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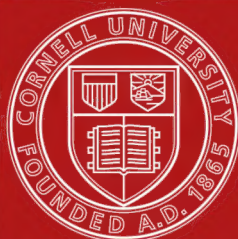
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A SUPPLEMENT
TO THE
COMMENTARIES
ON THE
LAW OF NEGLIGENCE

OF
SEYMOUR D. THOMPSON, LL. D.

BRINGING THE LAW OF EACH SECTION OF THE ORIGINAL
TEXT DOWN TO THE PRESENT TIME, AND ADDING
PHASES OF THE SUBJECT NOT INCLUDED
IN THE MAIN WORK

BY
EDWARD F. WHITE
OF THE PUBLISHERS' EDITORIAL STAFF

BEING
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OF THE SERIES

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PREFACE.

The purpose of this Supplement is to bring the law of the Commentaries down to the present time. In accomplishing this object it has been found entirely feasible to adapt the later law to Judge Thompson's masterly analysis of the subject, and this has been done. In this volume it is the office of the text to set forth new principles, modifications and variations of the older rules, and in special instances to apply the facts of the newer cases to illustrate the older principles. Repetition and restatement of the older principles in the text has not been entirely avoided, even if that were desirable. But in the main these principles and the supporting authorities are collected in notes dropped from the section titles. Phases of the law of Negligence not included in the main work—as, for example, the law of Automobiles, certain features of the law of Electricity, the tendency to a return to the doctrine of ~~Comparative~~ Negligence as shown in recent Federal enactments, etc.—are treated in new articles or sections and placed in the titles to which they pertain and are there classified with reference to the relation they bear to the other portions of the subject.

Under this method of treatment the user of the Commentaries, after having exhausted the subject of his investigation in the original work, has but to turn to like numbered and entitled sections in the Supplement to find the later law on his subject. In cases where the sections are omitted the law of the original volume is to be regarded as complete and no later authorities have been found by the editor.

A just and pleasant obligation is but partially discharged by an acknowledgment at this time of the assistance received by the author from Judge Joseph W. Thompson, a fellow member of the editorial staff and the author of law books of a high and authoritative character. This assistance has been rendered both in the preparation of matter for the book and in the advice and suggestions he has given at various times as to the treatment of the subject, and in all respects it has been timely and valuable.

EDWARD F. WHITE.

Indianapolis, March 14, 1907.

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Wiedman v. Erie R. Co., 66 App. 347	1642	v. Koehler, 41 App. Div. (N. Y.) 426	1294
Wiens v. Ebel, 69 Kan. 701	6267	v. Levert Lumber &c. Co., 114 La. 805	3873
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SUPPLEMENT

TO THE

LAW OF NEGLIGENCE.

TITLE ONE.

GENERAL PRINCIPLES AND THEORIES.

[§§ 1-39.]

§ 1. **What is Negligence?**—The courts employ a variety of forms of expression, without difference as to substance, in defining negligence. There is strong judicial sanction for a definition that negligence is a want of ordinary care and the failure to exercise that care which a man of ordinary prudence would have exercised under the circumstances. It is a failure to perform some duty imposed by the law.¹ Another court defines it as a failure to observe, for the protection of another's interest and safety, such care, precaution and vigilance, as the circumstances justly demanded and the want of which caused the injury.² With more brevity another court says it is the want or absence of ordinary care; that is, such care as a reasonably prudent and cautious man would exercise under similar circumstances.³ Another definition upheld, but criticised on the ground that it was not scientifically framed, defines negligence as "a failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, and the omission to use the means reasona-

¹ Jones v. American Warehouse Co., 138 N. C. 546; s. c. 51 S. E. Rep. 106. An instruction defining negligence as a failure to exercise that degree of care and diligence that an ordinarily prudent person would exercise in his own affairs, under like or similar circumstances, has been held not open to the objection that

it excluded acts of commission and covered only acts of omission: German Ins. Co. v. Chicago & C. R. Co., — Iowa —; s. c. 104 N. W. Rep. 361.

² Downey v. Gemini Min. Co., 24 Utah 431; s. c. 68 Pac. Rep. 414.

³ Boyd v. Blumenthal, 3 Penn. (Del.) 564; s. c. 52 Atl. Rep. 330.

bly necessary to avoid injury to others.”⁴ In any definition the words “carelessly” and “negligently” are regarded as synonymous.⁵

§ 2. The Failure to Exercise the Prescribed Degree of Care.—The essentials of a proper definition under this section seem to be covered by a statement that the person charged with the performance of a duty toward another, to be imputed with negligence, must have either done or neglected to do something which an ordinarily prudent man, acting under like circumstances, would not have done or omitted to do.⁶ Such a standard does not impose on the person charged with negligence a degree of care higher than ordinary care.⁷ In this connection it may be observed that ordinary negligence does not concern itself with the motives of the negligent party. It is not an excuse that the act complained of was in furtherance of a patriotic motive, as where the injury was caused by the fall of a pole from which the National flag floated.⁸

§ 3. Negligence Predicated Only on a Failure of Legal Duty.—It is another form of statement of the doctrine of the main section to say that an action for an injury to person or property arising from negligence can be maintained only where it is made to appear that some duty existed on the part of the person causing the injury toward the person injured, which duty was left unfulfilled.⁹

§ 8. Negligent Ignorance: Failure of the Duty of Finding Out and Knowing.—But where the negligence sued upon consists of the

⁴Bradley v. Ohio River &c. R. Co., 126 N. C. 735; s. c. 36 S. E. Rep. 181.

⁵Southern R. Co. v. Horine, 121 Ga. 386; s. c. 49 S. E. Rep. 285.

⁶Merrill v. Bassett, 97 Me. 447; s. c. 54 Atl. Rep. 1102; Missouri &c. R. Co. v. Wood (Tex. Civ. App.), 81 S. W. 1187; Hefferman v. Arnold, 48 App. Div. (N. Y.) 419; s. c. 63 N. Y. Supp. 261.

⁷San Antonio &c. R. Co. v. Hahl, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 27.

⁸Durfield v. New York, 101 App. Div. (N. Y.) 581; s. c. 92 N. Y. Supp. 204.

⁹Atlanta &c. R. Co. v. West, 121 Ga. 641; s. c. 67 L. R. A. 701; 49 S. E. Rep. 711; Cleveland &c. R. Co. v. Cline, 111 Ill. App. 416, 424; Wickenburg v. Minneapolis &c. R. Co., — Minn. —; s. c. 102 N. W. Rep. 713; Baltimore &c. R. Co. v. Cox, 66 Ohio St. 276; s. c. 64 N. E. Rep. 119 (plaintiff has burden of proof that defendant violated a le-

gal duty and that his negligence was the proximate cause of the injury). G. A. Duerler Man. Co. v. Dullnig (Tex. Civ. App.), 83 S. W. Rep. 889; s. c. aff'd, Dullnig v. G. A. Duerler Man. Co., — Tex. —; s. c. 87 S. W. Rep. 332. The relation between a gas consumer and a gas company in making alterations in the lighting arrangements of the consumer where the only compensation for the services is an indirect compensation consequent upon the increased use of gas after the alterations are made, is not that of a bailor and gratuitous bailee, under which the company would be liable only in case of gross negligence of the servant making the alterations, but the company is liable for the failure to use ordinary care under the circumstances: German-American Ins. Co. v. Standard Gaslight Co., 174 N. Y. 508; s. c. 66 N. E. Rep. 1109; aff'g s. c. 67 App. Div. (N. Y.) 539; 73 N. Y. Supp. 973.

breach of a duty suddenly and unexpectedly arising, the injured person must show that the defendant had an opportunity to become conscious of the facts from which the duty arose and a reasonable opportunity to perform such duty.¹⁰

§ 10. Negligence per se, or Statutory Negligence.¹¹—The doctrine that disobedience of a statute or ordinance is negligence *per se* is to be understood as qualified in all cases by the condition that such disobedience must have been the proximate cause of the injury complained of, or at least contributed thereto.¹² Where the duty imposed by an ordinance is clearly intended for the protection and benefit of individuals or their property, a violation of the ordinance tends to show negligence for which a recovery may be had; but where the duty is plainly for the benefit of the public at large, then the individual acquires no new rights by the enactment and the ordinance is of no evidential value on the question of negligence. It follows that the question whether liability arises under the one or the other of these rules will depend for its solution upon the nature of the duty enjoined and the benefits to be derived from its performance.¹³

§ 11. Doctrine that the Violation of a Statute is no More than Prima Facie Evidence of Negligence.¹⁴

¹⁰ South Chicago &c. R. Co. v. Kinare, 96 Ill. App. 210.

¹¹ That the violation of a statute or ordinance is *prima facie* evidence of negligence, see: Chicago City R. Co. v. O'Donnell, 114 Ill. App. 359 (operating street cars without fenders as required by ordinance); United States Brewing Co. v. Stoltzenberg, 211 Ill. 531; s. c. 71 N. E. Rep. 1081; aff'g s. c. 113 Ill. App. 435; Maxwell v. Durkin, 86 Ill. App. 257; s. c. aff'd, 185 Ill. 546; 57 N. E. Rep. 433 (horse allowed to run loose on street in violation of ordinance); True & True Co. v. Woda, 104 Ill. App. 15; Osborne v. Van Dyke, 113 Iowa 557; s. c. 85 N. W. Rep. 784; 54 L. R. A. 367 (bystander accidentally injured by person beating horse in violation of statute); Lincoln Traction Co. v. Heller, — Neb. —; s. c. 100 N. W. Rep. 197. Application of principle to failure of master to perform statutory duties for safety of employes, see: Diamond Block Coal Co. v. Cuthbertson (Ind. App.), 67 N. E. Rep. 558; Brower v. Locke, 31 Ind. App. 353; s. c. 67 N. E. 1015. Non-compliance with the provision of the building code of

the city of New York requiring buildings exceeding one hundred feet in height to be provided with stand pipes running from cellar to roof is *prima facie* negligence, and gives a cause of action to any one injured by its non-observance and entitled to have the statute complied with: Acton v. Reed, 104 App. Div. (N. Y.) 507; s. c. 93 N. Y. Supp. 911.

¹² Kuhnen v. White, 102 App. Div. (N. Y.) 36; s. c. 92 N. Y. Supp. 104; Browne v. Siegel, 90 Ill. App. 49; s. c. aff'd, 191 Ill. 226; 60 N. E. 815.

¹³ This distinction was made in a case where the law requiring the erection of fire-proof shutters on the windows of brick buildings was violated and property housed therein by the owner of the building as bailee was destroyed, with the conclusion that the ordinance was of a public character: Frontier Steam Laundry Co. v. Connolly, — Neb. —; s. c. 101 N. W. Rep. 995.

¹⁴ Oddie v. Mendenhall, 84 Minn. 58; s. c. 86 N. W. Rep. 881; Ubelmann v. American Ice Co., 209 Pa. 398; s. c. 58 Atl. Rep. 849 (ordinance regulating use of elevators not conclusive evidence of negligence in ac-

§ 14. **Casus: Inevitable Accident—Injuries Proceeding from Sources for which Neither Party is Responsible.**¹⁵—The accident which will relieve the defendant from liability within the doctrine of the main section is an accident which must have happened without his fault or negligence, and it is the duty of a court to make this distinction clear in its charge to the jury on this phase of a case.¹⁶ There is an example of inevitable accident in the case of an injury to the driver of a vehicle at a railroad crossing where the accident would not have occurred had not his horse become unmanageable and ran upon the track in front of a rapidly approaching train, which could not have been stopped by the engineer, who was running his engine without negligence, in time to avert the collision.¹⁷ But the slipping of a trolley pole from a wire which struck an overhanging electric light globe, the falling glass of which fell upon and injured a traveller passing along the street, was held not a "pure accident."¹⁸ Where the defendant is negligent it is no defense that the injuries resulting from this negligence were not intended by him. Thus where the injury was inflicted by the negligent discharge of a toy cannon pointed toward pedestrians using the street, the person guilty of this indiscretion was not allowed to urge that he did not intend to shoot the person injured.¹⁹ The term "act of God," used in the main section, is defined by one court to mean an inevitable accident, without the

tion for injuries by fall of elevator): *Rubin v. Miller*, 30 Pittsb. Leg. J. (N. S.) 351 (ordinance requiring a covering over pavements in front of buildings in course of erection not competent to prove negligence in case of one injured by falling piece of building material).

¹⁵ *Seaboard & C. R. Co. v. Spencer*, 111 Ga. 868; s. c. 36 S. E. Rep. 921; *Columbus v. Anglin*, 120 Ga. 785; s. c. 48 S. E. Rep. 318; *Illinois Cent. R. Co. v. Smiesni*, 104 Ill. App. 194; *Smith v. Kansas & C. R. Co.*, 61 Kan. 862; s. c. 60 Pac. Rep. 1059; *Fidelity & Casualty Co. v. Cutts*, 95 Me. 162; s. c. 49 Atl. Rep. 673; *Gibeline v. Smith*, 106 Mo. App. 545; s. c. 80 S. W. Rep. 961 (injury received in friendly scuffle); *Young v. Missouri Pac. R. Co.*, 93 Mo. App. 267; *Rea v. St. Louis Southwestern R. Co.* (Tex. Civ. App.), 73 S. W. Rep. 555. It is no objection to an instruction that there can be no recovery for the result of an accident that the court does not use the words "inevitable" or "unavoidable" as descriptive of the character of the accident: *Feary*

v. Metropolitan St. R. Co., 162 Mo. 75; s. c. 62 S. W. Rep. 452. Under the following circumstances the injuries were ascribed to accident: The purchaser of coal delivered by wagon, in order to save the trouble of shoveling the coal a second time, requested the driver to back his wagon into the shed and the purchaser stepped in behind the wagon to open the door of the wagon and was crushed between the wagon and a door post of the shed by reason of the wagon swerving. The post was visible to the injured person and not to the driver and the driver could not see him: *Neylon v. Phillips*, 179 Mass. 334; s. c. 60 N. E. Rep. 616.

¹⁶ *Nelson v. Richardson*, 108 Ill. App. 121.

¹⁷ *Reed v. Queen Anne's R. Co.*, — Del. —; s. c. 57 Atl. Rep. 529.

¹⁸ *Nelson v. Narragansett & C. Lighting Co.*, 26 R. I. 258; s. c. 58 Atl. Rep. 802.

¹⁹ *Combs v. Thompson*, 33 Wash. 92; s. c. 74 Pac. Rep. 1127.

intervention of man or public enemy.²⁰ Whether the evidence in a particular case shows that it was directly caused by an act of God is generally a question of fact for the jury.²¹

§ 15. Demonstrative Evidence of Negligence—*Res Ipsa Loquitur*.²²

—In a case where the evidence showed that both parties to a collision between a street car and a vehicle were in the exercise of ordinary care, and the injury was the result of an accident, it has been held error for the court to fail to charge that the defendant could relieve itself of the statutory presumption of negligence arising from proof of the collision by showing that neither party was to blame for the accident.²³

§ 20. Gross Negligence not Equivalent to "Willful" or "Wanton" Negligence.—In Kentucky, where gross negligence is recognized as a degree of negligence, it is held not improper to define this grade of negligence as a failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal danger.²⁴ Such negligence is more tersely characterized by some courts in that state as a failure to exercise slight care.²⁵ In Wisconsin, where the term gross negligence is used much in the sense of an equivalent for willful negligence, it is held that gross negligence does not include ordinary negligence, and that proof of gross negligence does not prove but rather disproves ordinary negligence.²⁶

²⁰ *Henry Sonneborn & Co. v. Southern R. Co.*, 65 S. C. 502; s. c. 44 S. E. Rep. 77. A good defense is stated by an answer alleging that the accident sued upon was the result of *vis major* in that a hurricane of unusual violence wrought the injury complained of: *Uggla v. Brokaw*, 77 App. Div. (N. Y.) 310; s. c. 79 N. Y. Supp. 244.

²¹ *Gulf & C. R. Co. v. Boyce*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 395.

²² For a further discussion of the doctrine of *res ipsa loquitur* and collection of authorities, see §§ 7634–7726. On the proposition that where the thing causing the injury is shown to have been under the management of defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who are charged with the management use proper care a presumption of negligence is raised, see generally: *Armour v. Golkowska*, 95 Ill. App. 492; *Cook v. Piper*, 79 Ill. App. 291; *Johnson v.*

Walsh, 83 Minn. 74; s. c. 85 N. W. Rep. 910; *Shuler v. Omaha & C. R. Co.*, 87 Mo. App. 618. The fact that a folding bed collapsed and caused the injury of plaintiff's wife when merely touched to take off the sheets, is sufficient evidence to go to the jury on the question of the seller's negligent performance of his duty to put the bed up in a safe condition for the use of plaintiff and his wife: *Cox v. Mason*, 89 App. Div. 219; s. c. 85 N. Y. Supp. 973.

²³ *Atlanta R. & C. Co. v. Gaston*, 118 Ga. 418; s. c. 45 S. E. Rep. 508.

²⁴ *Chesapeake & C. R. Co. v. Board* (Ky.), 77 S. W. Rep. 189; s. c. 25 Ky. L. Rep. 1118.

²⁵ *Chesapeake & C. R. Co. v. Dodge* (Ky.), 66 S. W. Rep. 606; s. c. 23 Ky. L. Rep. 1959; *Louisville & C. R. Co. v. Walden* (Ky.), 74 S. W. Rep. 694; s. c. 25 Ky. L. Rep. 1.

²⁶ *Rideout v. Winnebago Traction Co.*, 123 Wis. 297; s. c. 101 N. W. Rep. 672.

§ 21. Only Two Kinds of Negligence, Negligence and Willful Negligence.—The later American cases with practical unanimity reject the doctrine that negligence is capable of division into the different degrees of slight, ordinary and gross negligence. These cases recognize but two forms of negligence characterized as ordinary negligence and willful negligence. In this view the term “gross” is regarded as a word of description and not a definition.²⁷ The term “negligence” suggests only inadvertence, or want of ordinary care, and however great may be the degree of such want of care, so long as inadvertence remains, willfulness is excluded.²⁸ In these jurisdictions there is no impropriety in a holding that proof of ordinary negligence on the part of the defendant will support an allegation charging gross negligence.²⁹

§ 22. What is “Willful” or “Wanton” Negligence?—Wanton or willful negligence is defined as such a gross want of care and regard for the rights of others as to imply a disregard of consequences or a willingness to inflict injury.³⁰ The same idea is conveyed in an approved instruction to the effect that “before a party can be said to be guilty of willful or wanton conduct, it must be shown that the person charged therewith was conscious of his conduct, and conscious from his knowledge of existing conditions that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injury.”³¹ The purpose to inflict willful injury does not exist when the result of the wrongful conduct may be reasonably attributed to mere negligence or inattention to duty.³²

²⁷ *Kelly v. Malott*, 135 Fed. Rep. 74; s. c. 67 C. C. A. 548; *Magrane v. St. Louis & C. R. Co.*, 183 Mo. 119; s. c. 81 S. W. Rep. 1158; *Purple v. Union Pac. R. Co.*, 114 Fed. Rep. 123; s. c. 51 C. C. A. 564; 57 L. R. A. 700 (not error for the court to refuse an instruction that the defendant may be guilty of gross negligence as distinguished from ordinary negligence and willful negligence); *Denver & C. R. Co. v. Peterson*, 30 Colo. 77; s. c. 69 Pac. Rep. 578. There are degrees of negligence, as there are degrees of care; but the words “slight negligence,” “ordinary negligence,” and “gross negligence” are each descriptive of an omission of duty,—a neglect without intention to do harm: *Belt R. Co. v. Banicki*, 102 Ill. App. 642.

²⁸ *Rideout v. Winnebago Traction Co.*, 123 Wis. 297; s. c. 101 N. W. Rep. 672.

²⁹ *Atchison v. Wills*, 21 App. (D. C.) 548.

³⁰ *Cleveland & C. R. Co. v. Cline*, 111 Ill. App. 416, 424; *Chicago Terminal Transfer R. Co. v. Gruss*, 102 Ill. App. 439; s. c. aff'd, 200 Ill. 195; 65 N. E. Rep. 693. See also *Hancock v. Lake Erie & C. R. Co.*, 21 Ind. App. 10; s. c. 51 N. E. Rep. 369. The term “gross negligence” signifies willfulness, and involves intent, actual or constructive, which is a characteristic of criminal liability: *Rideout v. Winnebago Traction Co.*, 123 Wis. 297; s. c. 101 N. W. Rep. 672.

³¹ *Montgomery St. R. Co. v. Rice*, — Ala. —; s. c. 38 South. Rep. 857.

³² *Indianapolis St. R. Co. v. Dar-*

§ 23. Actionable Negligence is Usually the Failure to Exercise Reasonable or Ordinary Care.—Ordinary or reasonable care is that degree of care which an ordinarily prudent person would exercise under similar circumstances and charged with a like duty.³³ It is such care as ordinarily prudent persons exercise on any and all occasions, and not such care as such persons “usually” exercise.³⁴ It is to be observed that what is ordinary care depends upon the circumstances of each particular case, so that ordinary care under one set of circumstances might amount to positive negligence under another set of circumstances.³⁵ The expressions “due care” and “ordinary care” are generally used by the courts as convertible terms.³⁶

§ 24. Instructions as to Ordinary Care which have been Condemned.—The action of a court in substituting the phrase “under the facts and circumstances surrounding them at the time” in a definition of ordinary care, for the phrase “engaged in the same or similar business under the same or similar circumstances,” is held erroneous in a Wisconsin case.³⁷ Another instruction was held erroneous which declared that the degree of care required is higher when the life or limbs of persons are in danger. The degree of care required under all circumstances is ordinary or reasonable care, without regard to the character of the injury to be averted.³⁸

nell, 32 Ind. App. 687; s. c. 68 N. E. Rep. 609.

³³ Nesbit v. Crosby, 74 Conn. 554; s. c. 51 Atl. Rep. 550 (an instruction that ordinary care is the care which may be reasonably expected of a man in given circumstances, held not bad in substance); Western &c. R. Co. v. Vaughan, 113 Ga. 354; s. c. 38 S. E. Rep. 851; Chicago U. T. Co. v. Chugren, 209 Ill. 429; s. c. 70 N. E. Rep. 573; aff'g s. c. 110 Ill. App. 545; Louisville &c. R. Co. v. Logsdon, 114 Ky. 746; s. c. 71 S. W. Rep. 905; 24 Ky. Law Rep. 1566; Ford v. Kansas City, 181 Mo. 137; s. c. 79 S. W. Rep. 923; Anderson v. Union Terminal R. Co., 161 Mo. 411; s. c. 61 S. W. Rep. 874; Swanson v. Sedalia, 89 Mo. App. 121; Flinn v. World's Dis. Med. Assn., 54 App. Div. (N. Y.) 564; s. c. 67 N. Y. Supp. 1; Ramsbottom v. Atlantic Coast Line R. Co., 138 N. C. 38; s. c. 50 S. E. Rep. 448; Houston &c. R. Co. v. Brown, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 44 (the test is what an ordinarily prudent person would do or not do and not what an ordinarily “intelligent” and

prudent man would do or not do); Houston &c. R. Co. v. Buchanan, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 1073; Milligan v. Texas &c. R. Co., 27 Tex. Civ. App. 600; s. c. 66 S. W. Rep. 896; Missouri &c. R. Co. v. Webb, 20 Tex. Civ. App. 431; s. c. 49 S. W. Rep. 526; Waco Artesian Water Co. v. Cauble, 19 Tex. Civ. App. 417; s. c. 47 S. W. Rep. 538; Hanlon v. Milwaukee Elec. R. & Light Co., 117 Wis. 210; s. c. 95 N. W. Rep. 100.

³⁴ Chicago City R. Co. v. Schuler, 111 Ill. App. 470. See also, St. Louis R. Co. v. Brown, 30 Tex. Civ. App. 57; s. c. 69 S. W. Rep. 1010.

³⁵ Illinois Cent. R. Co. v. Keegan, 112 Ill. App. 28; s. c. aff'd, 210 Ill. 150; 71 N. E. Rep. 321.

³⁶ Baltimore &c. R. Co. v. Faith, 175 Ill. 58; s. c. 51 N. E. Rep. 807; aff'g s. c. 71 Ill. App. 59.

³⁷ Williams v. North Wisconsin Lumber Co., 124 Wis. 328; s. c. 102 N. W. Rep. 589.

³⁸ Louisiana W. E. R. Co. v. McDonald (Tex. Civ. App.), 52 S. W. Rep. 649.

§ 25. Actionable Negligence is the Failure to Exercise that Measure of Care which is Proportioned to the Danger to be Avoided.³⁹—

The principle indicated by this title finds some application in cases of injuries to children. Thus while the law undoubtedly requires the same degree of care to be exercised towards both adults and children, yet it is plain that conduct which is prudent in reference to an adult may be quite otherwise in respect to an infant under the same circumstances.⁴⁰

§ 28. The Law Regards only the Failure to Avoid Injuries such as should have been Foreseen or Anticipated.⁴¹—It is a doctrine finding numerous support in the late cases that negligence will not be imputed to acts resulting in damage to another, which result is not the reasonable and ordinary outcome of such acts, and which could not have been foreseen or anticipated by the exercise of ordinary prudence and foresight.⁴² Similarly, one will not be open to the charge of negligence

³⁹ That care to be exercised in a given case is proportioned to the danger to be avoided, see: *Indianapolis St. R. Co. v. Seerley*, 35 Ind. App. 467; s. c. 72 N. E. Rep. 169, 1034; *Lauritsen v. American Bridge Co.*, 87 Minn. 518; s. c. 92 N. W. Rep. 475; *Houston &c. R. Co. v. Milam* (Tex. Civ. App.), 58 S. W. Rep. 735; s. c. rev'd, 60 S. W. Rep. 591. Where the dangerous quality of a thing is not common to its species, persons offering it to another as a bailee should give warning of such dangerous qualities: *King v. National Oil Co.*, 81 Mo. App. 155.

⁴⁰ *Rohloff v. Fair Haven &c. R. Co.*, 76 Conn. 689; s. c. 58 Atl. Rep. 5.

⁴¹ *Cowett v. American Woolen Co.*, 100 Me. 65; s. c. 60 Atl. Rep. 703.

⁴² *Cleveland &c. R. Co. v. Lindsay*, 109 Ill. App. 533; *Cleghorn v. Thompson*, 62 Kan. 727; s. c. 64 Pac. Rep. 605; 54 L. R. A. 402; *Conway v. Vezzetti*, 69 N. J. L. 235; s. c. 54 Atl. Rep. 226 (fall of derrick); *McMullen v. New York*, 104 App. Div. (N. Y.) 337; s. c. 93 N. Y. Supp. 772 (city held to have exercised proper care and not liable for injury to the servant of a contractor engaged in delivering sand to a city caused by the break of a wire rope used in hoisting the sand, where it had employed competent engineers properly to secure the rope, and those engineers had constantly examined and inspected the appliance, and had

in fact done so on the morning of the accident); *Murphy v. New York*, 89 App. Div. (N. Y.) 93; s. c. 85 N. Y. Supp. 445 (city not liable for failure to anticipate the fact that a gas main would break through negligent filling of an excavation, whereby gas would escape along a conduit to a manhole two blocks away and cause injuries); *McKenzie v. Waddell Coal Co.*, 89 App. Div. (N. Y.) 415; s. c. 85 N. Y. Supp. 819 (fact that a wagon box in process of hoisting fell on an iron cog-wheel, causing it to break and cast off a part which struck a pedestrian on the street not a reasonable and probable result that should have been anticipated); *Russell v. Westmoreland Co.*, 26 Pa. Super. Ct. 425; *St. Louis Expanded Metal Fire-Proofing Co. v. Dawson* (Tex. Civ. App.), 59 S. W. Rep. 847 (injury to employé using concrete floor before it had hardened with the conclusion that the contractor had no reason to believe that the floor would be used before it had hardened); *Cole v. German Savings &c. Soc.*, 124 Fed. Rep. 113; s. c. 59 C. C. A. 593; 63 L. R. A. 416; *Consumers' Brewing Co. v. Doyle*, 102 Va. 399; s. c. 46 S. E. Rep. 390 (fact that ropes suspended from a staging and fallen to the ground would become entangled with the wheels of a wagon standing under the staging, held a result not to have been anticipated); *Meyer v. Milwaukee*

for the performance of a lawful act where the injury is caused by the unwarranted and unanticipated act of a third party intermeddling with the instrumentality causing the injury.⁴³ Where a person of ordinary prudence could have foreseen that some injury would likely result from a particular act of negligence, one charged with such an act will be liable for the consequences, though he could not have foreseen the particular injury that actually did result.⁴⁴ In like manner where the act is itself lawful, the liability will depend not upon the particular consequences which may flow from the act, but upon whether a prudent man in the exercise of ordinary care would have foreseen the injury or damage that would naturally or probably have resulted from the act.⁴⁵ In this connection it may be stated that there is no basis in the law for a doctrine that negligence does not exist where the person responsible for an accident uses his best judgment. As observed by the supreme court of the United States, "the standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned."⁴⁶

§ 30. Whether Evidence of Custom is Admissible on the Question of Negligence.⁴⁷

§ 39. Liability of Joint Owners, Joint Agents, etc.—There is general acceptance by the courts of the doctrine that where the injury complained of results from the concurring negligence of two different

Elec. R. & C. Co., 116 Wis. 336; s. c. 93 N. W. Rep. 6.

⁴³ Meeker v. Smith, 84 App. Div. (N. Y.) 111; s. c. 81 N. Y. Supp. 1067.

⁴⁴ Drum v. Miller, 135 N. C. 204; s. c. 47 S. E. Rep. 421; 65 L. R. A. 890; Atchison & C. R. Co. v. Parry, 67 Kan. 515; s. c. 73 Pac. Rep. 105; Currier v. McKee, 99 Me. 364; s. c. 59 Atl. Rep. 442; Texas & C. R. Co. v. Carlin, 111 Fed. Rep. 777; s. c. 49 C. C. A. 605 (the fact that the injury was produced in an unusual manner will not relieve the party responsible for the act when such act was one likely to cause injury in a way that might have been foreseen).

⁴⁵ Drum v. Miller, 135 N. C. 204; s. c. 65 L. R. A. 890; 47 S. E. Rep. 421 (corporal punishment of pupil by teacher).

⁴⁶ Oceanic Steam Nav. Co. v. Aitken, 196 U. S. 589; s. c. 49 L. Ed. 610; 25 Sup. Ct. Rep. 317; aff'g s. c. 124 Fed. Rep. 1; 59 C. C. A. 521.

⁴⁷ Waters-Pierce Oil Co. v. Davis, 24 Tex. Civ. App. 508; s. c. 60 S. W. Rep. 453 (custom of trade not to notify purchaser of dangerous article of its dangerous qualities held not available to relieve the seller of petroleum products from liability for failure to notify purchaser of eighty-seven-degree gasoline of its dangerous qualities). Where plaintiff, while receiving feed at defendant's mill, was injured by reason of the velocity with which the feed was delivered through the chute into his wagon, the action of the court in refusing to permit the manager of defendant to testify whether such a chute was in general use by mills, was not erroneous, under the rule that an employer is only bound to furnish the usual appliances, plaintiff not being defendant's servant: Salina Mill & C. Co. v. Hoyne, 10 Kan. App. 579; s. c. 63 Pac. Rep. 660.

parties each and both are liable and may be sued jointly or separately;⁴⁸ and hence where the action is brought for a joint and several act of negligence it does not follow that a nonsuit should be granted because of a failure of proof of negligence as to one of the defendants.⁴⁹ Thus in a case where a vehicle was struck by a street car and caused injury to a pedestrian it was held that the liability of the street railway in an action against it alone by the pedestrian for such injury was not affected by the fact of the contributory negligence of the driver of the vehicle.⁵⁰ The rule here referred to does not authorize a joint action, where the alleged negligence consists of separate and independent acts of both defendants, over which neither had entire control.⁵¹

⁴⁸ *Siegel &c. Co. v. Trcka*, 115 Ill. App. 56; s. c. aff'd, 218 Ill. 559; 75 N. E. 1053; *Muller v. Hale*, 138 Cal. 163; s. c. 71 Pac. Rep. 81; *Boyle v. Illinois Cent. R. Co.*, 88 Ill. App. 255; *Joseph v. Edison Elec. Co.*, 104 La. 634; s. c. 29 South. Rep. 223; *Duerr v. Consolidated Gas Co.*, 86 App. Div. (N. Y.) 14; s. c. 83 N. Y. Supp. 714; *Richard v. Detroit &c. R.*, 129 Mich. 458; s. c. 89 N. W. Rep. 52; 8 Det. Leg. N. 1029; *Harrill v. South Carolina &c. R. Co.*, 135 N. C. 601; s. c. 47 S. E. Rep. 730; *New York &c. R. Co. v. Kistler*, 66 Ohio St. 326; s. c. 64 N. E. Rep. 130; *Sternfels v. Metropolitan St. R. Co.*, 174 N. Y. 512; s. c. 66 N. E. Rep. 1117; aff'g s. c. 73 App. Div. (N. Y.) 494; 77 N. Y. Supp. 309 (joint liability for a collision between a street car and brewery wagon resulting in injury to passenger); *Schiverea v. Brooklyn Heights R. Co.*, 89 App. Div. (N. Y.) 340; s. c. 85 N. Y. Supp. 902 (street railroad and contractor doing work for it requiring street excavation, liable for injuries caused by stretching a cord across the highway); *Rahenkamp v. United Traction Co.*, 14 Pa. Super. Ct. 635 (injury result of concurrent negligence

of two street railway companies in allowing switch to remain in dangerous condition).

⁴⁹ *Southern R. Co. v. Carson*, 194 U. S. 136; s. c. 24 Sup. Ct. Rep. 609; 48 L. Ed. 907.

⁵⁰ *Demarest v. Forty-Second St. &c. R. Co.*, 104 App. Div. (N. Y.) 503; s. c. 93 N. Y. Supp. 663. See also, *Iaquinto v. Bauer*, 104 App. Div. (N. Y.) 56; s. c. 93 N. Y. Supp. 388.

⁵¹ *Howard v. Union Traction Co.*, 195 Pa. St. 391; s. c. 45 Atl. Rep. 1076 (passenger injured while alighting from car by being thrown by a block of wood placed across a trench by a gas company). There was a plain case of misjoinder where plaintiff sued the owner of a building, the supervising architect, and the contractors jointly, to recover damages for injuries and alleged in one count of the declaration that the owner's negligence consisted in causing the building to be erected on improper plans, and that of the architect in improper supervision, and that of the contractors in not using reasonable care in performing the work: *Cole v. Lipitt*, 23 R. I. 541; s. c. 46 Atl. Rep. 43.

TITLE TWO.

PROXIMATE AND REMOTE CAUSE.

[§§ 44-161.]

§ 44. No Recovery unless the Negligence was the Proximate Cause of the Injury.¹—There is authority for the proposition that though the defendant in an action for injuries admitted at the time of the accident that his negligence caused the injury complained of, yet there can be no recovery unless the evidence, including such admission, shows that the defendant was negligent and that such negligence was the proximate cause of the injury. The reason in support of this conclusion is that a person may acknowledge that he is morally responsible for an act when not legally so. Such a person, through sensitiveness, may feel that the accident might have been prevented by the exercise of more prudence than the law requires, and this may have been what he admitted.²

§ 45. Burden of Proving this Rests on Plaintiff.—Under this rule the evidence must show more than a probability of a negligent act. The cause must not be left to conjecture. There cannot be a recovery where it appears that the injury may have resulted from one of two causes, for one of which the defendant is liable but not for the other, and it is just as probable that the damage was caused by one as by the other.³

§ 48. Proximate Cause not Always the Nearest Agency in Time or Space.⁴—The doctrine under this head has been expressed by one

¹ The maxim is announced and illustrated in these cases: *Mills v. Wilmington City R. Co.*, 1 Marv. (Del.) 269; s. c. 40 Atl. Rep. 1114; *Alabama Midland R. Co. v. Guilford*, 114 Ga. 627; s. c. 40 S. E. Rep. 794; *Cleveland & C. R. Co. v. Lindsay*, 109 Ill. App. 533; *Sullivan v. Morrice*, 109 Ill. App. 650; *Sherman v. Vermilion*, 51 La. Ann. 880; s. c. 25 South. Rep. 538; *Crampton v. Ivie*, 126 N. C. 894; s. c. 36 S. E. Rep. 351; *Butts v. Atlantic & C. R. Co.*, 133 N. C. 82; s. c. 45 S. E. Rep. 472; *Warsawsky v. Dry Dock & C. R. Co.*, 86 N. Y. Supp. 748; *Murphy v. New York*, 89 App. Div. (N. Y.) 93; s. c.

85 N. Y. Supp. 445; *Marsh v. Giles*, 211 Pa. 17; s. c. 60 Atl. Rep. 315.

² *Schwartz v. Shull*, 45 W. Va. 405; s. c. 31 S. E. Rep. 914.

³ *Chesapeake & C. R. Co. v. Heath*, 103 Va. 64; s. c. 48 S. E. Rep. 508.

⁴ To the point that the negligence need not necessarily be the nearest cause in point of time, see: *Siegel & C. Co. v. Trcka*, 115 Ill. App. 56; s. c. aff'd, 218 Ill. 559; 75 N. E. Rep. 1053; *Ray v. Pecos & C. R. Co.*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 466; *Galveston & C. R. Co. v. Newport*, 26 Tex. Civ. App. 583; s. c. 65 S. W. Rep. 657; *Yess v. Chicago Brass Co.*, 124 Wis. 406; s. c. 102 N. W. Rep. 932.

court in these words: "The proximate cause is not necessarily the one nearest to the event, but the primary cause may be the one proximately responsible for the result, although it may operate through one or more successive instruments. If the primary cause was so linked and bound to the events succeeding it that all together they create and become one continuous whole—the one event so operating upon the others as to tie the result to the primary cause—the latter will be the proximate cause of the injury."⁵

§ 49. A Cause which is not Interrupted by an Intervening Cause.⁶

§ 50. Proximate Cause is Probable Cause: Remote Cause is Improbable Cause.⁷

§ 52. Especially where such Intervening Causes were put in Motion by the Original Wrongful Act.—It is another form of statement of the doctrine of the principal section to say that where the original act was wrongful and would naturally, according to the ordinary course of human events, prove injurious, and does actually result in injury through the intervention of other causes which are not wrongful, the injury will be referred to the wrongful cause, passing by those which are innocent.⁸

§ 53. Illustrations of the Interposition of Causes Deemed to have been set in Motion by the Original Wrong-Doer.—In the following

⁵ Shippers' Compress &c. Co. v. Davidson, 35 Tex. Civ. App. 558; s. c. 80 S. W. Rep. 1032.

⁶ In support of proposition, that proximate cause is cause which, not interrupted by an independent intervening cause, produced the injury, see generally: Decatur Car Wheel &c. Co. v. Mehaffey, 128 Ala. 242; s. c. 29 South. Rep. 646; Cleveland &c. R. Co. v. Lindsay, 109 Ill. App. 533; Davis v. Mercer Lumber Co., 164 Ind. 413; s. c. 73 N. E. Rep. 899; Claypool v. Wigmore, 34 Ind. App. 35; s. c. 71 N. E. Rep. 509; Cleveland &c. R. Co. v. Carey, 33 Ind. App. 275; s. c. 71 N. E. Rep. 244; Fishburn v. Burlington &c. R. Co., 127 Iowa 483; s. c. 103 N. W. Rep. 481; Strobeck v. Bren, 93 Minn. 428; s. c. 101 N. W. Rep. 795; Rider v. Syracuse Rapid Transit R. Co., 171 N. Y. 139; s. c. 63 N. E. Rep. 836; rev'g s. c. 72 N. Y. Supp. 1125; Anderson v. Southern R. Co., 70 S. C. 490; s. c. 50 S. E. Rep. 202; St. Louis Southwestern R. Co. v. Lowe, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 1059.

⁷ To the effect that the injury must have been the natural and probable consequence of the negligence complained of, see: Empire State Cattle Co. v. Atchison &c. R. Co., 135 Fed. Rep. 135; Hartman v. Clarke, 104 App. Div. (N. Y.) 62; s. c. 93 N. Y. Supp. 314; Ramsbottom v. Atlantic Coast Line R. Co., 138 N. C. 38; s. c. 50 S. E. Rep. 448; Cole v. German Savings &c. Soc., 124 Fed. Rep. 113; s. c. 59 C. C. A. 593; 63 L. R. A. 416; Texas &c. R. Co. v. McKenzie, 30 Tex. Civ. App. 293; s. c. 70 S. W. 237; Meyer v. Milwaukee &c. R. &c. Co., 116 Wis. 336; s. c. 93 N. W. Rep. 6; Henderson v. O'Halaran, 114 Ky. 186; s. c. 70 S. W. Rep. 662; 24 Ky. L. Rep. 995; 59 L. R. A. 718 (smallpox contracted during a visit with a family living in the neighborhood of a pesthouse established in violation of a law governing the proximity of pesthouses to other habitations was the natural and proximate result of the violation of the statute).

⁸ Currier v. McKee, 99 Me. 364; s. c. 59 Atl. Rep. 442.

cases the causes interposed were deemed to have been set in motion by the original wrong-doer: where a person with impaired eyesight, knowing himself to be a poor shot, unlawfully shot at and wounded a dog, which ran into his owner's house and knocked her down, injuring her;⁹ where the driver of a wagon so negligently drove his wagon that one sitting on a log would be run over unless he moved, and such person, in his effort to escape, was thrown under the team and suffered injuries;¹⁰ where the defendant's negligence set the plaintiff's team to running, thereby causing one of the lines to break—here the defendant was held liable, although the breaking of the line was the immediate cause of the injuries suffered by the plaintiff.¹¹

§ 54. Unless Some Independent, Responsible Cause Supervenes.—

It is a sound conclusion that where an intervening, distinct, independent and efficient cause breaks a causal relation between the original wrong and the injury, this intervening cause then becomes the proximate cause of the injury and the remoter cause cannot be made the basis of an action for the recovery of damages.¹²

§ 56. And Provided the First Cause was Such that but for it the Injury would not have Happened.—The principle here indicated was properly applied in a case where the defendant negligently discharged scalding water into a gutter and the injured person was pushed into the water by a companion. In this case it is clear that the injury could not have occurred had the defendant been free from negligence in the first instance.¹³

§ 57. And always Provided that the Result ought to have been Foreseen.—The principle of the main section is supported by numerous decisions to the effect that where the character of the intervening act was such that its probable or actual consequence could reasonably have been anticipated by the original wrong-doer, then the causal relation is not broken and the original wrong-doer is responsible for all the consequences resulting from the intervening act.¹⁴

⁹ *Isham v. Dow*, 70 Vt. 588; s. c. 41 Atl. Rep. 585.

¹⁰ *Chambers v. Carroll*, 199 Pa. 371; s. c. 49 Atl. Rep. 128.

¹¹ *Texas & C. R. Co. v. Moseley* (Tex. Civ. App.), 58 S. W. Rep. 48.

¹² *Andrews v. Kinsel*, 114 Ga. 390; s. c. 40 S. E. Rep. 300; *Terminal R. Assn. v. Larkins*, 112 Ill. App. 366; *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390; s. c. 69 Pac. Rep. 338; *Schwartz v. Shull*, 45 W. Va. 405; s. c. 31 S. E. Rep. 914.

¹³ *Whitman v. McNamara Tobacco*

Co. v. Wurm (Ky.), 66 S. W. Rep. 609; s. c. 23 Ky. Law Rep. 2120.

¹⁴ *Southern R. Co. v. Webb*, 116 Ga. 152; s. c. 42 S. E. Rep. 395; 59 L. R. A. 109; *Claypool v. Wigmore*, 34 Ind. App. 35; s. c. 71 N. E. Rep. 509; *Cole v. German Savings & C. Soc.*, 124 Fed. Rep. 113; s. c. 59 C. C. A. 593; 63 L. R. A. 416. Thus, wind, which the owner of a building should have anticipated would cause broken glass to fall from a window pane above a sidewalk, was not the proximate cause of an injury to a pedes-

§ 59. But not Necessary that the Injury in the Precise Form should have been Foreseen.¹⁵

§ 61. Illustrations of the Intervention of Independent Responsible Causes.—The reader is referred to the margin for a collection of recent cases illustrating what is meant by the intervention of independent responsible causes.¹⁶

§ 70. Combined Result of Negligent or Wrongful Act and Extraordinary or Unforeseen Cause.—On this subject it has been observed by the supreme court of Illinois: "Where an injury is the result of the negligence of the defendant, and an inevitable accident, or an inanimate thing has contributed with the negligence of the defendant to cause the injury, the plaintiff may recover, if the negligence of the defendant was an efficient cause of the injury, and the injured or deceased party was in the exercise of ordinary care for his own safety."¹⁷

§ 72. Combined Result of Act of Defendant and "Act of God."—Here it is the rule that where the injury was clearly caused by an act of God, the plaintiff will be denied a recovery without regard to

trian on whom it caused the glass to fall, and hence the owner is not relieved from liability under the doctrine of *vis major*: *Detzur v. B. Stroh Brewing Co.*, 119 Mich. 282; s. c. 77 N. W. Rep. 948.

¹⁵ See generally: *Chicago &c. R. Co. v. Willard*, 111 Ill. App. 225; *Osborne v. Van Dyke*, 113 Iowa 557; s. c. 85 N. W. Rep. 784; 54 L. R. A. 367 (negligence *per se* in cruelly beating a horse with a stick which in the course of the beating slipped from defendant's hand and struck a bystander is the proximate cause of the injury, though this result was not intended).

¹⁶ An electric company placed an improperly insulated lamp in the place of business of a customer, which fact was known to the customer. A third person, in the exercise of his duties, was injured by reason of its defective condition. It was held that there was such intervention of another agency between the company's neglect and the party's injury as to prevent a recovery from the electric company: *Griffin v. Jackson Light &c. Co.*, 128 Mich. 653; s. c. 87 N. W. 888; 8 Det. Leg. N. 822; 55 L. R. A. 318. An

elevator door was partially open and a companion of the injured person opened the door, and plaintiff stepped in and was injured by falling down the elevator shaft. It was held that even if the owner of the building was chargeable with negligence in leaving the door of the shaft partially open, he was not liable for the injuries sustained, as the negligent act of the plaintiff's companion was the proximate cause of the injury: *Claypool v. Wigmore*, 34 Ind. App. 35; s. c. 71 N. E. Rep. 509. A patron of a store, injured while entering through swinging double storm doors, by reason of some unknown person opening one of the doors while plaintiff was attempting to enter the other, so that the one on the other side of plaintiff flew back and struck plaintiff on the hand, crushing it between the doors, was denied a recovery on the ground that the efficient cause of the accident was the intervening act of the third person: *Pardington v. Abraham*, 93 App. Div. (N. Y.) 359; s. c. 87 N. Y. Supp. 670.

¹⁷ *Commonwealth Electric Co. v. Rose*, 214 Ill. 545; s. c. 73 N. E. Rep. 780; aff'g s. c. 114 Ill. App. 181.

whether the defendant used ordinary care at the time of the catastrophe.¹⁸

§ 73. Negligence of the Defendant Concurring with the Act of God.—Where, however, the negligence of the defendant concurs with the act of God in producing the injury, the defendant will be liable in case he might have foreseen the happening of the accident and provided against it.¹⁹ On the other hand, the person charged with this concurring negligence will not be liable where the act of God is so overwhelming in character that it would of itself have produced the injury complained of independently of his negligence.²⁰

§ 74. Prior Negligence of Defendant and Subsequent Act of God.—On the subject of this duty of anticipation it is held that a heavy rain working injury to the roadbed of a railroad will not be considered an act of God so as to relieve the railroad from liability for failure to furnish sufficient drainage properly to carry away the rain, unless this rain was so far outside the range of ordinary human experience that the duty of exercising reasonable care did not require the railroad to anticipate and provide against it.²¹

§ 75. Concurrent Negligence of Two Persons Injuring a Third.—In another connection²² we have found it necessary to advert to the principle, belonging here, that if the concurrent or successive acts of negligence of numerous persons combined together caused the plaintiff's injury, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury.²³ Thus, a person who

¹⁸ *Texas &c. R. Co. v. Anderson* (Tex. Civ. App.), 61 S. W. Rep. 424.

¹⁹ *Schwarz v. Adsit*, 91 Ill. App. 576 (fall of walls of a building destroyed by fire and left standing in a dangerous condition—proprietor liable on the theory that he had failed to do all that a reasonably prudent man ought to have done to make the walls reasonably secure); *Lockport v. Richards*, 81 Ill. App. 533; *Greeley v. State*, 94 App. Div. (N. Y.) 605; s. c. 88 N. Y. Supp. 468. Thus where a fence is insecurely built and it blows down and injures a traveller, the insecure condition of the fence is regarded as not less the proximate cause of the injury because a high wind concurred in producing the result: *Sutphen v. Hedden*, 67 N. J. L. 324; s. c. 51 Atl. Rep. 721. So, where walls of a building in course of construction

were blown down before they were secured by iron trusses, which the contractor had ample time to place in accordance with his agreement, and which would have secured the walls, the contractor's negligence, concurring with the storm, was properly held the proximate cause of the fall of the walls, rendering the contractor liable therefor: *Meyer v. Haven*, 37 App. Div. (N. Y.) 194; s. c. 55 N. Y. Supp. 864.

²⁰ *Siegfried v. South Bethlehem*, 27 Pa. Super. Ct. 456.

²¹ *Gulf &c. R. Co. v. Boyce*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 395.

²² *Ante*, § 39.

²³ *Cole v. German Savings &c. Soc.*, 124 Fed. Rep. 113; s. c. 59 C. C. A. 593; 63 L. R. A. 416; *Choctaw &c. R. Co. v. Holloway*, 114 Fed. Rep. 458; s. c. 52 C. C. A. 260; *St. Louis Nat. Stockyards v. God-*

negligently caused a telephone wire to fall across a trolley wire and hang down in the street, charged with electricity from the trolley, has been held liable for injuries to a person coming in contact with the wire, notwithstanding the negligence of the owner of the trolley in not providing fenders against the wire also concurred to cause the injury.²⁴ So, the negligence of the owner of premises, to which a railroad had access for switching purposes, in failing to have a watchman, was held a concurring proximate cause with the negligence of the railroad company in entering the premises without signal, whereby a person was thrown from the platform on which he was at work repairing a cable over the railroad tracks, so as to charge the employer with liability.²⁵ And so it was held that the negligence of a street railroad company in piling stones used in making repairs in close proximity to the track concurred with the negligence of the motorman in suddenly starting the car as the conductor was in the act of boarding it, whereby the conductor was thrown from the car against the stones and rolled under the car, sustaining injuries, and the company was held liable therefor.²⁶

frey, 101 Ill. App. 40; s. c. aff'd, 198 Ill. 288; 65 N. E. Rep. 90; Chicago Telephone Co. v. Hiller, 106 Ill. App. 306; s. c. aff'd, 203 Ill. 518; 68 N. E. Rep. 72; Chicago City R. Co. v. O'Donnell, 109 Ill. App. 616; s. c. aff'd, 207 Ill. 478; 69 N. E. Rep. 882; Illinois Cent. R. Co. v. Ferrell, 108 Ill. App. 659; McGregor v. Reid & Co., 178 Ill. 464; s. c. 53 N. E. Rep. 323; rev'g s. c. 76 Ill. App. 610; Flora v. Pruett, 81 Ill. App. 161; Siegel, Cooper & Co. v. Trcka, 115 Ill. App. 56; s. c. aff'd, 218 Ill. 559; 75 N. E. Rep. 1053; Springfield Consol. R. Co. v. Punttenney, 101 Ill. App. 95; s. c. aff'd, 200 Ill. 9; 65 N. E. Rep. 442; West Chicago St. R. Co. v. Dedloff, 92 Ill. App. 547; Logansport & Co. Gas Co. v. Coate, 29 Ind. App. 299; s. c. 64 N. E. Rep. 638; Burk v. Creamery Package Mfg. Co., 126 Iowa 730; s. c. 102 N. W. Rep. 793; Pratt v. Chicago & C. R. Co., 107 Iowa 287; s. c. 77 N. W. Rep. 1064; Bowden v. Derby, 99 Me. 208; s. c. 58 Atl. Rep. 993; Townsend v. Boston, 187 Mass. 283; s. c. 72 N. E. Rep. 991; King v. Chicago & C. R. Co., 77 Minn. 104; s. c. 79 N. W. Rep. 611; Boston & C. R. Co. v. Sargent, 72 N. H. 455; s. c. 57 Atl. Rep. 688; Gardner v. Friederich, 163 N. Y. 568; s. c. 57 N. E.

Rep. 1110; aff'g s. c. 25 App. Div. (N. Y.) 521; 49 N. Y. Supp. 1077; Ray v. Pecos & C. R. Co., —Tex. Civ. App. —; s. c. 88 S. W. Rep. 466 (concurring negligence of railroad company and plaintiff's employer). Where an injury proceeds from two causes operating together, the party putting in motion one of them is liable, the same as though his act were the sole cause: Donk Bros. Coal & Co. v. Leavitt, 109 Ill. App. 385. The negligence of a gas company in the construction of its lines may not be urged as a defense to an action by one of its customers against another company for damages from an explosion of its gas where, but for the negligence of an employé of the latter in opening a valve in the works of the former, the accident would not have occurred: McKenna v. Citizens' Natural Gas Co., 198 Pa. St. 31; s. c. 47 Atl. Rep. 990.

²⁴ Jones v. Finch, 128 Ala. 217; s. c. 29 South. Rep. 182.

²⁵ Merchants' & Co. Oil Co. v. Burns, 96 Tex. 573; s. c. 74 S. W. Rep. 753; rev'g s. c. 72 S. W. Rep. 626.

²⁶ North Chicago St. R. Co. v. Dudgeon, 184 Ill. 477; s. c. 56 N. E. Rep. 796; aff'g s. c. 83 Ill. App. 528.

§ 76. Rule where it is Impossible to Apportion the Damage Between the Wrong-Doers.—The doctrine of the previous section is not affected by the fact that it may be difficult to determine in what proportion each of the wrong-doers contributed to the injury.²⁷

§ 82. Collateral Unlawful Act Does not Bar a Recovery.—Thus in a case where a tree which a town had permitted to remain standing, notwithstanding its dangerous condition, was blown down and struck a passing street car, injuring a motorman, it was held that the motorman's right to recover damages from the town would not be defeated by the fact that at the time of the accident he was running his car at a higher rate of speed than permitted by an ordinance of the town. The fact that the car could not have reached the place in time to encounter the tree had the motorman been running at the lawful speed was regarded as a matter of mere chance. The possibility of such an accident as a result of the violation of the ordinance could not have been foreseen. The observation may be indulged that the accident would have been entirely avoided if the ordinance had been more flagrantly violated.²⁸

§ 85. Defendant's Negligence Proximate, Plaintiff's Negligence Remote.²⁹

§ 91. Rule Illustrated by Wrongful Acts Frightening Travellers' Horses.—The negligent blowing off of a gas well near a highway, causing the fright of a team and an injury to the driver, due to the break of the lines, whereby he lost control of the team, was held the proximate cause of the driver's injury and not the weakness of the lines.³⁰

§ 93. What Defects in Highways are the Proximate Causes of Injuries in Cases of Horses Taking Fright.—The act of the driver of a buggy, broken down by an accident in placing the vehicle at the side of the roadway, was not regarded as the proximate cause of the fright of a horse driven past the place before a reasonable time for the removal of the vehicle had elapsed where the fright of the animal was due to the act of other persons placing the vehicle in an unusual posi-

²⁷ *Gardner v. Friederich*, 163 N. Y. 568; s. c. 57 N. E. Rep. 1110; aff'g s. c. 25 App. Div. (N. Y.) 521; 49 N. Y. Supp. 1077.

²⁸ *Berry v. Sugar Notch Borough*, 191 Pa. St. 345; s. c. 43 Atl. Rep. 240.

²⁹ The plaintiff's negligence will not be considered as proximately contributing to an injury received

by him if it is independent of the negligence of the defendant and the defendant, by ordinary care, might have avoided the injury: *Coombs v. Mason*, 97 Me. 270; s. c. 54 Atl. Rep. 728.

³⁰ *Snyder v. Philadelphia Co.*, 54 W. Va. 149; s. c. 46 S. E. Rep. 366; 63 L. R. A. 896.

tion tending to cause the fright of quiet horses and the original position of the buggy had no tendency to produce that result.³¹

§ 99. In Case of Injuries from Defects and Obstructions in Highways.³²—The negligence, if any, of a street railway company in leaving a reel, which had held wire, lying on its side in the untravelled portion of the highway, was held the remote cause of an injury occasioned by boys rolling it down the street, and striking a carriage, injuring its occupant; in this case the wrongful act of the boys was the proximate cause of the injury.³³ In another case, where a horse, travelling on a highway in the night-time, shied into a barb-wire fence inside the highway line, but outside the travelled portion of the highway, the defendant's wrongful act in maintaining the fence in the highway was held not the proximate cause of the injury, as it did not appear that the driver of the horse knew where the true line of the highway was, but did know where the travelled track was, and was able to see posts upon which the wire was carried.³⁴

§ 116. In Case of Railway Injuries to Animals.—It has been held that a land-owner, whose premises adjoined the land of a person through whose premises a railroad company's right of way extended and a partition fence, substantially erected, was broken by a tree falling across it, cannot claim that an open gate in the railroad fence was the proximate cause of the injury to his cattle, which escaped through the opening made by the fallen tree and went thence onto the railroad track through the open gate.³⁵

§ 119. In Case of Collisions at Railway Crossings.—The act of negligence of a railroad company in striking a buggy at a crossing, which caused the horse to run away, was held the proximate cause of injury to the occupant by being thrown from the buggy when the wheels struck a curb stone while the horse was running away; the fact that the horse in its fright caused the buggy to strike the curb being merely incidental.³⁶

³¹ *Kumba v. Gilham*, 103 Wis. 312; s. c. 79 N. W. Rep. 325.

³² In a case where a bicycle rider ran into a stone and lost his balance, and while attempting to regain it, ran into a second stone that had dropped from a wagon belonging to the defendant, and was injured, it was held a question for the jury, in the action against the defendant, whether the accident would not have happened but for the second stone: *Overhouser v. American*

Cereal Co., 118 Iowa 417; s. c. 92 N. W. Rep. 74.

³³ *Glassey v. Worcester Consol. St. R. Co.*, 185 Mass. 315; s. c. 70 N. E. Rep. 199.

³⁴ *Anderson v. Schurke*, 121 Iowa 340; s. c. 96 N. W. Rep. 862.

³⁵ *Strobeck v. Bren*, 93 Minn. 428; s. c. 101 N. W. Rep. 795.

³⁶ *Wabash R. Co. v. Billings*, 212 Ill. 37; s. c. 72 N. E. Rep. 2; rev'g s. c. 105 Ill. App. 111.

§ 125. **In Case of the Spread of Fires.**—The proximate cause of the injury to the health of a person from overexertion in putting out a fire on his premises, negligently set by a railroad company, is held, by the supreme court of Iowa, to be the original act of the railroad company in setting out the fire.³⁷ The negligence of a motorman in running over and cutting hose stretched across street railroad tracks, thereby rendering ineffectual the efforts of the firemen to put out the fire, was held the proximate cause of the destruction of furniture in the house.³⁸

§ 129. **In Case of Injuries from Explosives.**—Negligence, if any, of a city in placing explosive caps in a tool chest was held not the proximate cause of a personal injury caused by the explosion of one of the caps, which had been taken from the box by an unknown person.³⁹ In another case, where a blast was exploded near the foot of a water-pipe without protecting the pipe as required by the rules of the water department of a city, it was decided that this act was the proximate cause of the injury, though the pipe was laid on rock and not on soft material, as required by another rule of the water department.⁴⁰

§ 131. **In Case of Injuries Caused by Assaulting or Frightening Persons, thereby Impelling them to do the Particular Injury.**—In accordance with the doctrine of this section it has been held that a woman, seeing a car which had been negligently derailed, coming across a public street at a high rate of speed in her direction, who attempted to escape what she conceived was a threatened injury, and received injuries, was entitled to recover from the street railroad company for the injuries suffered.⁴¹

§ 133. **In Case of Injuries to Children.**—Injuries received by a child while playing on a railroad turntable are referred to the negligence of the railroad company in keeping a dangerous machine in a place where children might reasonably be expected to gather and play thereon, and not to the act of the playmates of the child in unfastening and operating the turntable.⁴² The fact that an infant, taken from a burning house, returned thereto and suffered injuries, is held by the supreme court of Alabama not to break the chain of causation between the negligence of the person responsible for the fire and the injuries suffered by the child.⁴³

³⁷ *Glanz v. Chicago & C. R. Co.*, 119 Iowa 611; s. c. 93 N. W. Rep. 575.

³⁸ *Little Rock Traction & C. Co. v. McCaskill*, — Ark. —; s. c. 86 S. W. Rep. 997.

³⁹ *Affick v. Bates*, 21 R. I. 281; s. c. 43 Atl. Rep. 539.

⁴⁰ *Wheeler v. Norton*, 92 App. Div. (N. Y.) 368; s. c. 86 N. Y. Supp. 1095.

⁴¹ *Tuttle v. Atlantic City R. Co.*, 66 N. J. L. 397; s. c. 49 Atl. Rep. 450.

⁴² *Edgington v. Burlington & C. R. Co.*, 116 Iowa 410; s. c. 90 N. W. Rep. 95; 57 L. R. A. 561.

⁴³ *Birmingham R. & C. Co. v. Hinton*, 141 Ala. 606; s. c. 37 South. Rep. 635.

§ 135. In the Relation of Master and Servant.—In a case where a servant employed about machinery slipped, and in falling struck an unguarded lever, which started the machinery in motion, and caught his hand in a cog wheel thus set in motion by him, in endeavoring to save himself and was injured, it was held that if the act of the master in leaving the unguarded machinery ready to be set in motion was negligent, then this negligence would be the proximate cause of the injury.⁴⁴

§ 137. In Case of Mistakes and Delays in Delivering Telegraph Messages.—The failure to deliver a message of inquiry as to the condition of a sick person is not the proximate cause of anguish suffered by the sender of the message because of his absence from the funeral of the person inquired about, as an answer might not have been sent if the telegram had been delivered, or if sent, might, without the negligence of the telegraph company, never have reached the plaintiff.⁴⁵ In another case, it was held that delay in the delivery of a message announcing the death of a mother was not the proximate cause of the sender's failure to attend the funeral, where the message was delivered in time for the sender to have reached the place of the funeral by a train scheduled to arrive about the time the message was delivered, but was really two hours late, and the reason the belated train was not taken was that the station agent, in answer to an inquiry as to the time of the train, mistakenly stated that it was on time, as this presents a case of intervening negligence.⁴⁶

§ 141. In the Case of Accidents Arising from Electrical Appliances.—The proximate cause of injuries caused by the collision of an uncontrolled automobile with other vehicles was that of small boys, who mounted the automobile and turned on the lever at a time when the chauffeur was delivering goods in an adjoining building and had left the automobile standing on the street with the power off and the brake on.⁴⁷

§ 142. In Case of Injuries in Connection with Elevators in Buildings.—The mere fact that elevator cables are put in by an independent contractor will not relieve the master from liability for injury received by his servant from the fall of the elevator, where the elevator was equipped with safety devices which would have prevented the fall if the master had used reasonable care to keep them in good order.⁴⁸

⁴⁴ *Goe v. Northern Pac. R. Co.*, 30 Wash. 654; s. c. 71 Pac. Rep. 182.

⁴⁵ *Taliferro v. Western Union Tel. Co.*, 54 S. W. Rep. 825; s. c. 21 Ky. L. Rep. 1290.

⁴⁶ *Higdon v. Western Union Tel.*

Co., 132 N. C. 726; s. c. 44 S. E. Rep. 558.

⁴⁷ *Berman v. Schultz*, 40 Misc. (N. Y.) 212; s. c. 81 N. Y. Supp. 647.

⁴⁸ *McGregor v. Reid, Murdock & Co.*, 178 Ill. 464; s. c. 53 N. E. Rep. 323; rev'g s. c. 76 Ill. App. 610.

§ 143. **In Various Other Cases.**—The reader is referred to the margin for a collection of miscellaneous applications of the doctrine of proximate cause.⁴⁹

⁴⁹ Misapprehension of a signal to lookout for cars approaching a person from behind whereby he jumped in the path of the descending car, was the proximate cause of the injury and not negligence in allowing the rear car to descend by its own momentum without a brake: *Berlin Mills Co. v. Croteau*, 88 Fed. Rep. 860; s. c. 32 C. C. A. 126. Negligence causing an injury and not supervening blood poisoning was proximate cause of death: *Armstrong v. Montgomery St. R. Co.*, 123 Ala. 233; s. c. 26 South. Rep. 349. Break in fence enclosing race track and not runaway is proximate cause of injury to one outside the enclosure, injured by runaway escaping through opening: *Windeler v. Rush Co. Fair Ass'n*, 27 Ind. App. 92; s. c. 60 N. E. Rep. 954; 59 N. E. Rep. 209. The act of a boy striking horse hitched in front of store was proximate cause of injuries in runaway: *Stephenson v. Corder*, — Kan. —; s. c. 80 Pac. Rep. 938. Trespass of person in putting up stove on another's premises where goods were stored was not proximate cause of destruction of goods by fire from negligent use of gasoline in starting fire in stove: *Bellino v. Columbus Const. Co.*, 188 Mass. 430; s. c. 74 N. E. Rep. 684. Negligence of operatives of car colliding with a car on the same track, while the former was backing to obtain relief for a car derailed by reason of a defective rail, is the proximate cause of the injury of the motorman on the car collided with, and not the defective rail: *Seccombe v. Detroit Electric R. Co.*, 133 Mich. 170; s. c. 94 N. W. Rep. 747; 10 Det. Leg. N. 129. The act of a butcher in selling a retailer a putrid carcass is not the cause of blood poisoning to a clerk through cutting into the carcass, where he knew of its putrid condition at the time he cut into it: *Williams v. Wiedman*, 135 Mich. 444; s. c. 97 N. W. Rep. 966; 10 Det. Leg. N. 826. Gas escaping through negligence of a gas company into a greenhouse causing total destruction of part of plants is proximate cause of proprietor's loss on plants

that were not destroyed, as entire collection of plants was necessary to the conduct of the florist's business and not a portion: *Hansen v. St. Paul Gaslight Co.*, 82 Minn. 84; s. c. 84 N. W. Rep. 727. Negligence of the owner of a building in allowing a ladder against his house to remain over the sidewalk for several days, and of village authorities after knowledge of the fact, was the proximate cause of injuries caused by its fall, and not the unusual wind which induced the fall: *Moore v. Townsend*, 76 Minn. 64; s. c. 78 N. W. Rep. 880. A chimney to which a wire crossing a street was attached was thrown down when the wire was struck by the swinging arm of a derrick. Proximate cause of injuries to pedestrian struck by falling bricks was negligence of owner of derrick and not of persons anchoring wire: *Leeds v. New York Telephone Co.*, 178 N. Y. 118; s. c. 70 N. E. Rep. 219; rev'g s. c. 79 App. Div. (N. Y.) 121; 80 N. Y. Supp. 114. Negligence of employé working under tracks in putting his hand on a rail at the time one of the cars was passing overhead was the proximate cause of the injuries and not the fact that the car was propelled at an improper rate of speed: *Nolan v. Metropolitan St. R. Co.*, 65 App. Div. (N. Y.) 184; s. c. 72 N. Y. Supp. 501; s. c. aff'd, 173 N. Y. 604; 66 N. E. Rep. 1112. Mere permission of the owner of land to a third person to bury a horse therein not the proximate cause of injury to lessee occupying the land by being infected with the disease of the dead horse, the owner of the land having no knowledge that the horse was diseased: *Fitzwater v. Fassett*, 199 Pa. 442; s. c. 49 Atl. Rep. 310. Boy injured while playing with a slab leaned against an electric light pole—negligence of youthful companion in moving slab so as to crush finger was proximate cause of injury and not negligence of electric light company: *Marsh v. Giles*, 211 Pa. 17; s. c. 60 Atl. Rep. 315. Weakness of eaves trough and not the slipping of snow and ice from the roof into the trough was proximate cause of

§ 155. **Liability for Fright, Mental Distress or Nervous Shock.**—In one case a woman left her home to avoid annoyance from blasting in the neighborhood, leaving her mother at home. While away she suffered from fear for the safety of her mother, and on her return after the blasting, found her mother in a state of collapse, which the daughter took to be an indication of death. It was held that the plaintiff's fright was not caused directly by the blasting, but by her mother's condition, and hence she could not recover therefor.⁵⁰

§ 160. Questions of Pleading and Variance.⁵¹

§ 161. **Proximate Cause, Whether a Question for Court or Jury.**⁵²—Where several causes of injury are stated in a complaint, it is the

injuries caused by its falling upon and injuring a passerby: *Keeler v. Lederer Realty Corp.*, 26 R. I. 524; s. c. 59 Atl. Rep. 855. Proximate cause of injury to employé of railroad company by horse, while attempting to fasten door of stock car, is the kick, though the door would have been secured in time to have avoided the injury if the fastening had not been defective: *Smith v. Texas &c. R. Co.*, 24 Tex. Civ. App. 92; s. c. 58 S. W. Rep. 151.

⁵⁰ *Mahoney v. Dankwart*, 108 Iowa 321; s. c. 79 N. W. Rep. 134.

⁵¹ A complaint for injuries to a pedestrian on a sidewalk, caused by the violent opening of a gate outward on such sidewalk, alleged that defendant maintained around her land bordering on a street a close board fence and in the fence a gate opening outward of the same appearance as the rest of the fence so as not to be apparent to one passing along the sidewalk; that it was the duty of the owner of the premises to give notice of the existence of the gate, and that it could be opened, and that the injuries were caused by negligence in failing to give such notice. The complaint was held to state no cause of action since the violent opening of the gate without notice that it was about to be opened, and not the failure to give notice that it could be opened, was the proximate cause of the injury: *Edwards v. Brayton*, 25 R. I. 597; s. c. 57 Atl. Rep. 784.

⁵² What is proximate cause and what is the natural and reasonable result must be determined by the facts in each particular case, and

are questions of fact for the jury, particularly where the evidence is conflicting: *Missouri Malleable Iron Co. v. Dillon*, 106 Ill. App. 649; s. c. aff'd, 206 Ill. 145; 69 N. E. Rep. 12; *Schulte v. Schleep-er*, 210 Ill. 357; s. c. 71 N. E. Rep. 325; *Rock Island Sash &c. Works v. Pohlman*, 210 Ill. 133; s. c. 71 N. E. Rep. 428; aff'g s. c. 99 Ill. App. 670; *Junction Min. Co. v. Ench*, 111 Ill. App. 346; *Moore v. Grachowski*, 111 Ill. App. 216; *Southern R. Co. v. Drake*, 107 Ill. App. 12; *Chicago v. Bush*, 111 Ill. App. 638; *Flora v. Pruett*, 81 Ill. App. 161; *Indianapolis St. R. Co. v. Schmidt*, 35 Ind. App. 202; s. c. 71 N. E. Rep. 663; 72 N. E. Rep. 478; *Lincoln Traction Co. v. Heller*, — Neb. —; s. c. 100 N. W. Rep. 197; *Bowden v. Derby*, 99 Me. 208; s. c. 58 Atl. Rep. 993; *Omaha St. R. Co. v. Larson*, — Neb. —; s. c. 97 N. W. Rep. 824; *Venbuhr v. Lafayette Worsted Mills*, 27 R. I. 89; s. c. 60 Atl. Rep. 770; *Davis v. Mercer Lumber Co.*, 164 Ind. 413; s. c. 73 N. E. Rep. 899. The question is for the court where the facts are not disputed or there is no substantial conflict in the evidence. *Gilbert v. Chicago &c. R. Co.*, 123 Fed. Rep. 832; s. c. aff'd, 128 Fed. Rep. 529; 63 C. C. A. 27; *Trapp v. McClellan*, 68 App. Div. (N. Y.) 362; s. c. 74 N. Y. Supp. 130; *Lake Shore &c. R. Co. v. Liidtke*, 69 Ohio St. 384; s. c. 69 N. E. Rep. 653; *Douglass v. New York &c. R. Co.*, 209 Pa. 128; s. c. 58 Atl. Rep. 160; *Cole v. German Savings &c. Soc.*, 124 Fed. Rep. 113; s. c. 59 C. C. A. 593; 63 L. R. A. 416.

function of the jury to determine whether one or all of the acts viewed jointly or severally, was the proximate cause of the injury complained of;⁵³ and it is error to grant a nonsuit on failure to prove that any one of them was the proximate cause of the injury.⁵⁴ Again, where the negligence of two parties has contributed to an injury, it is for the jury to say whether it was the negligence of the one or the other that was the proximate cause of the injury.⁵⁵

⁵³ *Southern R. Co. v. Carson*, 194 U. S. 136; s. c. 24 Sup. Ct. Rep. 609; U. S. 136; s. c. 48 L. Ed. 907; 24 48 L. Ed. 907.

⁵⁴ *Chicago City R. Co. v. O'Donnell*, Sup. Ct. Rep. 609.

⁵⁵ *Southern R. Co. v. Carson*, 194 109 Ill. App. 616; s. c. aff'd, 207 Ill. 478; 69 N. E. Rep. 882.

TITLE THREE.

CONTRIBUTORY NEGLIGENCE.

[§§ 168-515.]

PART I.

GENERAL DOCTRINES.

[§§ 168-350.]

§ 168. General Rule that Contributory Negligence Bars Recovery.¹

—Contributory negligence, when proven, is an absolute defense;² and it is the plain duty of the court to direct a verdict for the defendant, where this defense is incontrovertibly established.³

§ 169. **Contributory Negligence Defined.**—Contributory negligence is defined by one court as the want of ordinary care on the part of the person injured by the actionable negligence of another combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, and without which such injury would not have occurred.⁴ In another case, no fault was found with a definition that “by contributory negligence is meant any negligence on the part of the person injured which proximately or naturally contributed to the injury.”⁵ In all cases there is implied a want of ordinary care on the part of the person injured and an approximate connection between this want of care and the injury.⁶ The case of contributory negligence is specially clear where the danger to the injured person was visible to him and was such that no warning was needed to call it to his attention and his act amounted to a violation of a plain law of nature learned in childhood.⁷

¹ The general principle is announced and illustrated in these cases: *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199; s. c. 40 Atl. Rep. 945; *Foult v. Wilmington City R. Co.*, — Del. —; s. c. 60 Atl. Rep. 973; *Barber v. East &c. R. Co.*, 111 Ga. 838; s. c. 36 S. E. Rep. 50; *Feitl v. Chicago City R. Co.*, 211 Ill. 279; s. c. 71 N. E. Rep. 991; aff'g s. c. 113 Ill. App. 381; *Indianapolis St. R. Co. v. Zaring*, 33 Ind. App. 297; s. c. 71 N. E. Rep. 270, 501; *Quinn v. Chicago &c. R. Co.*, 162 Ind. 442; s. c. 70 N. E. Rep. 526; *Moulton v. Sanford &c. R. Co.*, 99 Me. 508; s. c. 59 Atl. Rep. 1023; *Cox v. New York*

Cent. &c. R. Co., 69 App. Div. (N. Y.) 451; s. c. 74 N. Y. Supp. 1011.

² *Galveston &c. R. Co. v. Holyfield* (Tex. Civ. App.), 70 S. W. Rep. 221.

³ *Claus v. Northern Steamship Co.*, 89 Fed. Rep. 646; s. c. 32 C. C. A. 282.

⁴ *Kirby v. Southern R.*, 63 S. C. 494; s. c. 41 S. E. Rep. 765.

⁵ *McLeod v. Spokane*, 26 Wash. 346; s. c. 67 Pac. Rep. 74.

⁶ *Chicago &c. R. Co. v. Bailey*, 66 Kan. 115; s. c. 71 Pac. Rep. 246; *International &c. R. Co. v. Anchonda*, 33 Tex. Civ. App. 24; s. c. 75 S. W. Rep. 557.

⁷ *Culver Const. Co. v. McCormack*, 114 Ill. App. 655.

§ 170. Doctrine that Contributory Negligence "In any Degree" Bars Recovery.—The doctrine that contributory negligence in a degree, however slight, will bar a recovery, requires that this negligence should contribute proximately to produce the injury.⁸ In this view it was held error for a court to refuse to charge that, if the jury believe from the evidence that the plaintiff was guilty of negligence which, combined with the defendant's negligence, produced the accident so that both acts constituted the proximate cause of the injury, then the negligence of the plaintiff, however slight, would bar recovery.⁹

§ 171. There must have been a Want of Ordinary Care in the Person Injured.—The degree of care imposed upon the plaintiff under this branch of the law is termed ordinary or reasonable care;¹⁰ that is, the degree of care that a person of ordinary prudence would have used under like circumstances,¹¹ and it does not depend upon the extent of the threatened danger. In all cases the care required is only ordinary care to avoid dangers commensurate with the peril.¹² Under this rule a pedestrian using a sidewalk is bound to exercise ordinary care not only to avoid dangerous places known or seen, but also those the existence of which he is ignorant.¹³ Strictly speaking "due care" is not the equivalent of ordinary care and hence an instruction that persons travelling on the streets must use "due care" to avoid accidents is open to criticism.¹⁴

§ 173. Tests by which to Determine whether there has been a Want of Ordinary Care.—The proper standard to measure the conduct of the plaintiff in a given situation to determine whether he was guilty of contributory negligence is, would a person of ordinary intelligence and prudence, under the same or similar circumstances, so conduct himself?¹⁵ Under a rule peculiar to West Virginia the plaintiff

⁸ *United States Exp. Co. v. McCluskey*, 77 Ill. App. 56; *Birmingham R. & Co. v. Bynum*, 139 Ala. 389; s. c. 36 South. Rep. 736.

⁹ *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712; s. c. 81 S. W. Rep. 374.

¹⁰ *Atlanta & C. R. Co. v. Gardner*, 122 Ga. 82; s. c. 49 S. E. Rep. 818; *Potter v. Sjorgren*, 91 Ill. App. 530; *Elwood v. Chicago City R. Co.*, 90 Ill. App. 397; *United States Exp. Co. v. McCluskey*, 77 Ill. App. 56; *Tricity R. Co. v. Killeen*, 92 Ill. App. 57; *Chicago Title & Co. v. Standard Fashion Co.*, 106 Ill. App. 135; *Illinois Cent. R. Co. v. Jones*, 97 Ill. App. 131; *Fitzgerald v. Hedstrom*, 98 Ill. App. 109.

¹¹ *Accousi v. G. A. Stowers Furni-*

ture Co., — Tex. Civ. App. —; s. c. 87 S. W. Rep. 861.

¹² *Spring Valley v. Gavin*, 81 Ill. App. 456.

¹³ *Quimby v. Filter*, 62 N. J. L. 766; s. c. 42 Atl. Rep. 1051.

¹⁴ *San Antonio v. Talerico* (Tex. Civ. App.), 78 S. W. Rep. 28.

¹⁵ *West Chicago St. R. Co. v. Schenker*, 78 Ill. App. 592; *Meyers v. Chicago & C. R. Co.*, 103 Mo. App. 268; s. c. 77 S. W. Rep. 149; *Pecos & C. R. Co. v. Reveley*, 24 Tex. Civ. App. 293; s. c. 58 S. W. Rep. 845; *San Antonio & C. R. Co. v. Lester*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 401; *Schrunk v. St. Joseph*, 120 Wis. 223; s. c. 97 N. W. Rep. 946. The idea as expressed by the supreme court of Utah is that there

is not required to exercise more care than is usual under similar circumstances among careful persons of the class to which he belongs.¹⁶ In reaching a conclusion on this matter, it is the duty of the jury in any event, to keep in mind the respective duties of the parties, the plaintiff and the defendant.¹⁷ But a person is not to be charged with contributory negligence merely by the fact that he has engaged in a dangerous occupation.¹⁸

§ 176. In Case of Strictly Mutual or Concurring Negligence, No Recovery.¹⁹

§ 178. Where the Injury would not have Happened Except for the Negligence of the Person Injured, no Recovery.—Subject to the qualification noted in the principal section, an injured person cannot recover damages for the consequences of the defendant's negligence, which, by the exercise of ordinary care, he could have avoided.²⁰

§ 184. Implied Waiver of Right of Action by Voluntarily Accepting Risk.—In further illustration of a doctrine which finds its most frequent application in the law of master and servant, a recovery was denied where an employé of one contractor, objected to working in a certain place because there was no covering to protect him from bricks which the bricklayers employed by another contractor were laying on a wall above him, and on being told either to go to work or quit the job, he went to work and was injured by the fall of a brick; he was held to have assumed the risk and could not recover against either contractor.²¹ Where, however, the servant, employed in the construction of a building, is promised protection from falling objects by the owner of the premises, and, relying on his promise, proceeds with the

is a want of ordinary care constituting negligence only where, under all the circumstances of the case, something was done or omitted which an ordinarily careful and prudent person in like circumstances as the person injured would not have done or omitted and which was the efficient and proximate cause of the injury: *Hone v. Mammoth Min. Co.*, 27 Utah 168; s. c. 75 Pac. Rep. 381.

¹⁶ *Normile v. Wheeling Traction Co.*, — W. Va. —; s. c. 49 S. E. Rep. 1030.

¹⁷ *Illinois Terminal R. Co. v. Thompson*, 112 Ill. App. 463; s. c. aff'd, 210 Ill. 226; 71 N. E. Rep. 328.

¹⁸ *Potts v. Shreveport Belt R. Co.*, 110 La. 1; s. c. 34 South. Rep. 103.

¹⁹ That concurring negligence of plaintiff and defendant will prevent

a recovery where negligence of defendant without concurring negligence of plaintiff would not have caused the injuries, see: *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199; s. c. 40 Atl. Rep. 945; *Butler v. Rockland &c. R.*, 99 Me. 149; s. c. 58 Atl. Rep. 775; *Hanheide v. St. Louis Transit Co.*, 104 Mo. App. 323; s. c. 78 S. W. Rep. 820; *Pim v. St. Louis Transit Co.*, 108 Mo. App. 713; s. c. 84 S. W. Rep. 155; *Cleveland &c. R. Co. v. Gahan*, 24 Ohio Cir. Ct. R. 277.

²⁰ *Nicholas v. Tanner*, 117 Ga. 223; s. c. 43 S. E. Rep. 489; *Neal v. Southern R. Co.*, 113 Ga. 341; s. c. 38 S. E. Rep. 825.

²¹ *Harff v. Green*, 168 Mo. 308; s. c. 67 S. W. Rep. 576.

work and is injured, he may recover, although in the absence of such a promise, the owner would not be liable, if the injured person knew that the work was going on above him, and took no precaution to acquaint himself with the risk and protect himself from the dangers.²² In another case, the relation of master and servant not being involved, where it was not intended by the proprietors of a grain elevator that customers should operate the dump in connection with the elevator, it was held that a person who voluntarily attempted to do so, assumed the risk, and could not recover damages for injuries caused by his intermeddling.²³

§ 186. Recklessly Encountering Known Dangers.²⁴—One who recklessly encounters a known danger, and thereby directly contributes to his injury, cannot escape the effect of this negligence because the unknown negligence of the defendant, which concurred to produce the injury, made the danger greater than he supposed it to be.²⁵ So, one who recklessly encounters a known danger cannot escape the effect of this rule on the ground that his action was the result of an error of judgment.²⁶

§ 187. Illustrations of Recklessly Encountering Known Dangers.—The reader is referred to the margin for cases illustrating the doctrine that one recklessly encountering a known danger is chargeable with contributory negligence defeating a recovery for injuries received as a result of his act of imprudence.²⁷

²² *Sesler v. Rolfe Coal & Co.*, 51 W. Va. 318; s. c. 41 S. E. Rep. 216.

²³ *Brownback v. Thomas*, 101 Ill. App. 81.

²⁴ In support of general proposition that such negligence bars a recovery, see: *Simmons v. Seaboard Air Line R.*, 120 Ga. 225; s. c. 47 S. E. Rep. 570; *Atherton v. Kansas City Coal & Co.*, 106 Mo. App. 591; s. c. 81 S. W. Rep. 223; *Barrett v. Lake Ontario Beach Imp. Co.*, 68 App. Div. (N. Y.) 601; s. c. 74 N. Y. Supp. 301 (boy injured on toboggan slide by reason of insufficient railing, which defect was open and visible); *Chicago & C. R. Co. v. Weeks*, 99 Ill. App. 518; s. c. aff'd, *Weeks v. Chicago & C. R. Co.*, 198 Ill. 551; s. c. 64 N. E. Rep. 1039.

²⁵ *Gilbert v. Burlington & C. R. Co.*, 128 Fed. Rep. 529; s. c. 63 C. C. A. 27; aff'g s. c. 123 Fed. Rep. 832.

²⁶ *Atkins v. Lakawanna Transportation Co.*, 79 Ill. App. 19 (person injured in jumping from a boat after the gangplank had been taken in,

he believing at the time that the intervening space could be easily covered).

²⁷ *Claus v. Northern Steamship Co.*, 89 Fed. Rep. 646; s. c. 32 C. C. A. 282 (recovery denied to a person engaged in making repairs on a vessel and injured by falling into an open hatchway, that he knew that open hatchways were maintained and it was shown that there was a clear space of ten feet by the side of hatchway); *Curran v. New York Cent. & C. R. Co.*, 30 Misc. (N. Y.) 787; s. c. 63 N. Y. Supp. 209 (one injured by handling wet soda belonging to another who knew that it would burn the flesh if touched, cannot recover for injuries resulting, on the ground of negligence of the owner in allowing the soda to get damp); *Downes v. Elmira Bridge Co.*, 41 App. Div. (N. Y.) 339; s. c. 58 N. Y. Supp. 628 (person crushed between a stone pile and a girder being raised by workmen, charged with having assumed

§ 188. **Qualifications of the Rule as to Recklessly Encountering Known Dangers.**²⁸—The principle discussed in this section finds application in the case of a person injured by a piece of metal flying from a pipe, which workmen are cutting, while watching the operation from the sidewalk, and it is held that such a person is not to be charged with contributory negligence merely because he failed to move when warned that he was in a dangerous place if this fact was not apparent to him, and the reason why it was dangerous was not explained.²⁹

§ 189. **What if the Danger Might have been Seen, and Avoided if Seen.**—The statute of Georgia which requires a person in danger of injury to avoid the same, is construed by the supreme court of that State to require the plaintiff to exercise ordinary care to avoid the defendant's negligence by remaining away, going away, or getting out of the way of all probable or known danger.³⁰

the risk where the party was familiar with the surroundings and the course taken by him was unnecessary, there being ample space outside); *Bass v. Reitdorf*, 25 Ind. App. 650; s. c. 58 N. E. Rep. 95 (bather in public park violating a posted notice against bathing outside pool limits and suffering injuries therefrom, cannot recover where it is shown that he was old enough to know the consequences and was able to read the notice); *Nolan v. Metropolitan St. R. Co.*, 65 App. Div. (N. Y.) 184; s. c. 72 N. Y. Supp. 501; s. c. aff'd, 173 N. Y. 604; 66 N. E. Rep. 1112 (employé engaged in laying brick in a trench that ran under the track of a street railway, knowing the use of such track, who put his hand on a rail while one of the cars was passing, whereby the hand was crushed, cannot recover for the injury, as the danger was obvious to any person of ordinary intelligence); *Magar v. Hammond*, 171 N. Y. 377; s. c. 64 N. E. Rep. 150; rev'g s. c. 54 App. Div. (N. Y.) 532; 67 N. Y. Supp. 63 (trespasser on grounds of one who maintained a fish pond and employed a watchman to protect grounds from poachers, cannot recover from the owner of the premises on being shot by the watchman, it appearing that plaintiff knew the habit of the watchman to shoot in the direction of noises made by supposed poachers); *Greis v. Hazard Mfg. Co.*, 209 Pa. 276; s. c. 58 Atl. Rep. 474

(driver, directed to deliver a load of lumber to a purchaser, who did not go into the building by the ordinary entrance, but went in through the door at which goods were unloaded from cars, on which was posted a notice forbidding persons to enter, and fell through an unguarded space in the floor, was charged with contributory negligence preventing a recovery from the owner of the building); *Klutt v. Philadelphia & C. R. Co.*, 133 Fed. Rep. 1003 (a recovery was denied for the death of a person resulting from his attempt to cross a river in a small rowboat in front of two car floats in tow on either side of a tug, which was passing in the daytime, and the deceased had an unobstructed view of the vessels and their course for a long distance).

²⁸ The mere fact of knowledge of a defect in a sidewalk will not, as a matter of law, prevent a recovery by an injured person, but the question should be submitted to the jury to determine whether the defect was so obvious that a prudent person would not have taken the chances of using the walk: *Stevens v. Walpole*, 76 Mo. App. 213.

²⁹ *Shilagi v. Degnon-McLean Contracting Co.*, 71 App. Div. (N. Y.) 152; s. c. 75 N. Y. Supp. 540; s. c. aff'd, 173 N. Y. 625; 66 N. E. Rep. 1116.

³⁰ *Mansfield v. Richardson*, 118 Ga. 250; s. c. 45 S. E. Rep. 269.

§ 190. **Whether Negligence not to Anticipate the Negligence or Misconduct of Another.**³¹—The general rule does not impute negligence to a person for failing to look for danger when, under the surrounding circumstances, there was no occasion to apprehend any danger.³² Where, however, the circumstances are such that danger may be apprehended, the plaintiff may be imputed with contributory negligence in failing to anticipate the danger and act accordingly.³³

§ 195. **Acting Erroneously in Presence of Imminent Peril not Produced by his Own Fault.**³⁴—The familiar rule of the original text is thus phrased by one court: "Where the person is placed by the negligence of another in such a position that he is compelled to choose

³¹ *Kansas City-Leavenworth R. Co. v. Langley*, — Kan. —; s. c. 78 Pac. Rep. 858 (pedestrian may presume that employes of street railway company will take all necessary means to avoid inflicting injury); *Iola Portland Cement Co. v. Moore*, 65 Kan. 762; s. c. 70 Pac. Rep. 864 (brakeman not bound to anticipate that a guy rope would be stretched across the track so low as to throw him off the top of the car where he was engaged in the discharge of his duty); *Salina Mill & Elevator Co. v. Hoyne*, 10 Kan. App. 579; s. c. 63 Pac. Rep. 660 (plaintiff injured by bags of feed precipitated from a chute into his wagon with such force as to knock him out of the wagon not charged with contributory negligence where the danger was not apparent and he was not warned by the proprietor of the mill); *Burkhardt v. Schott*, 101 Mo. App. 465; s. c. 74 S. W. Rep. 430 (plowman injured by a tree felled by defendant, who knew that plowman would come within range of the tree and failed to give him any warning that the tree was about to fall).

³² *Missouri Pac. R. Co. v. Johnson*, 69 Kan. 721; s. c. 77 Pac. Rep. 576.

³³ *Erie R. Co. v. Kane*, 118 Fed. Rep. 223; s. c. 55 C. C. A. 129.

³⁴ That contributory negligence will not be attributed to imprudent action in the presence of immediate peril not produced by the fault of the injured person, see: *Ward v. District of Columbia*, 24 App. (D. C.) 524; *Momence Stone Co. v. Groves*, 100 Ill. App. 98; s. c. aff'd, 197 Ill. 88; 64 N. E. Rep. 335; *Cleveland &c. R. Co. v. Baker*, 106 Ill. App.

500; *Galesburg Electric Motor &c. Co. v. Barlow*, 108 Ill. App. 509; *Illinois Cent. R. Co. v. Haecker*, 110 Ill. App. 102; *Kansas City-Leavenworth R. Co. v. Langley*, — Kan. —; s. c. 78 Pac. Rep. 858; *Chesapeake &c. R. Co. v. Ogles*, 73 S. W. Rep. 751; s. c. 24 Ky. L. Rep. 2160 (horse drawing a buggy was frightened at train on overhead crossing, and plaintiff, fearing injury, jumped from buggy and injured herself); *Ellick v. Wilson*, 58 Neb. 584; s. c. 79 N. W. Rep. 152; *Riley v. Missouri Pac. R. Co.*, — Neb. —; s. c. 95 N. W. Rep. 20; *Nebraska Tel. Co. v. Jones*, 60 Neb. 396; s. c. 83 N. W. Rep. 197 (driver of buggy was injured by collision with stump of telephone pole, the existence of which he knew, but lost sight of it by reason of his attention being wholly taken up with the driving of a pair of spirited horses down the hill); *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531; s. c. 83 N. W. Rep. 744; *Hefferman v. Alfred Barber's Son*, 36 App. Div. (N. Y.) 163; s. c. 55 N. Y. Supp. 418; *Wheeling &c. R. Co. v. Suhrwiar*, 22 Ohio Cir. Ct. R. 560; *Russell v. Westmoreland County*, 26 Pa. Super. Ct. 425; *Chattanooga Electric R. Co. v. Cooper*, 109 Tenn. 308; s. c. 70 S. W. Rep. 72; *Saunders v. Missouri &c. R. Co.*, 35 Tex. Civ. App. 383; s. c. 80 S. W. 387; *Houston &c. R. Co. v. Byrd* (Tex. Civ. App.), 61 S. W. Rep. 147; *Richmond Ry. &c. Co. v. Hudgins*, 100 Va. 409; s. c. 41 S. E. Rep. 736 (by reason of fright of horse caused by unusual noise and smoke from street car, plaintiff failing to exercise presence of mind, was thrown from his wagon and injured).

instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that, if he had chosen the other hazard he would have escaped injury is of no importance. Even if, in bewilderment he rushes directly into the very danger which he fears, he is not in fault."³⁵ The rule applies only where there is a real danger, or the surroundings as they appear to the party at the time are such as to create in his mind a reasonable apprehension of danger.³⁶ The question whether the person acted as a reasonably prudent and cautious person would have acted under the circumstances of immediate peril is generally regarded as one for the determination of the jury.³⁷

§ 196. Voluntarily Placing One's Self in a Position where one Loses Self-Control.—The rule in the foregoing section is to be considered with the qualification that the plaintiff must have been without fault in putting himself in the position of peril or danger.³⁸

§ 197. Acting Erroneously under Impulse of Fear Produced by Defendant's Negligence.—Generally speaking where one without his own fault is, through the negligence of another, put in such apparent danger as to cause him terror, loss of self-possession, and bewilderment, he will not, as a matter of law, be imputed with contributory negligence for an error of judgment in attempting to extricate himself.³⁹

§ 198. Acting Erroneously in Attempting to Rescue Another from Imminent Peril.—Under the humane view of enlightened courts a person who seeks to rescue another from imminent danger, and in the effort imperils his own life, is not as a matter of law imputable with contributory negligence, unless his action is so rash and reckless that it would not be performed by a person of ordinary prudence,⁴⁰ and

³⁵ Chicago & C. R. Co. v. Corson, 101 Ill. App. 115; s. c. aff'd, 198 Ill. 98; 64 N. E. Rep. 739.

³⁶ Texas Midland R. Co. v. Booth, 35 Tex. Civ. App. 322; s. c. 80 S. W. Rep. 121.

³⁷ Chicago & C. R. Co. v. Kinnare, 76 Ill. App. 394; Louisville & C. R. Co. v. Stewart, 128 Ala. 313; s. c. 29 South. Rep. 562.

³⁸ Chattanooga Electric R. Co. v. Cooper, 109 Tenn. 308; s. c. 70 S. W. Rep. 72; Dummer v. Milwaukee Electric R. & C. Co., 108 Wis. 589; s. c. 84 N. W. Rep. 853.

³⁹ Junction Min. Co. v. Ench, 111 Ill. App. 346; St. Louis & C. R. Co. v. Brock, 69 Kan. 448; s. c. 77 Pac.

Rep. 86; Thies v. Thomas, 77 N. Y. Supp. 276; Tuttle v. Atlantic City R. Co., 66 N. J. L. 327; s. c. 49 Atl. Rep. 450 (a frightened woman injured while attempting to escape from a derailed car crossing a public street in her direction at a high rate of speed).

⁴⁰ Louisville & C. R. Co. v. Orr, 121 Ala. 489; s. c. 26 South. Rep. 35; Walters v. Denver Consol. Electric Light Co., 12 Colo. App. 145; s. c. 54 Pac. Rep. 960 (a mother not imputed with negligence for taking hold of her child in an endeavor to move him from contact with a live electric wire and thereby injured, without regard to whether she was

the question whether the act was of this character is for the jury.⁴¹ In cases of this kind it is not required that the rescuer should hesitate until it is too late to accomplish the rescue but it is sufficient if he acts with such care as a reasonably prudent person would exercise in such an emergency and under similar circumstances.⁴²

§ 199. Injuries Incurred in Attempting to Save Persons or Property Imperiled by the Negligence of Another.⁴³

aware of the danger or not); *Chicago &c. R. Co. v. Eganolf*, 112 Ill. App. 323; *West Chicago St. R. Co. v. Liderman*, 187 Ill. 463; s. c. 58 N. E. Rep. 367; aff'g s. c. 67 Ill. App. 638 (contributory negligence not imputed to a mother engaged in conversation with another, who unconsciously loosened her child's hand and allowed her to stray away from her onto a street car track; *Saylor v. Parsons*, 122 Iowa 679; s. c. 98 N. W. Rep. 500; *Bitzer v. Caver*, 74 S. W. Rep. 735; s. c. 25 Ky. L. Rep. 92 (contributory negligence not imputed to an employé who placed himself between his employer and another who had just engaged in a fight, and was accidentally shot by his employer, who held a cocked pistol in his hand); *Healy v. Vorndrain*, 65 App. Div. (N. Y.) 353; 72 N. Y. Supp. 877 (person injured by falling into a hole in his effort to reach a child whose position on a lumber crate appeared to him to be dangerous; evidence held sufficient to take case as to negligence of defendant and plaintiff to the jury); *Manthey v. Rauenbuehler*, 71 App. Div. (N. Y.) 173; s. c. 75 N. Y. Supp. 714; *Manzella v. Rochester R. Co.*, 105 App. Div. (N. Y.) 12; s. c. 93 N. Y. Supp. 457 (person making the attempt not a trespasser).

⁴¹ *Manthey v. Rauenbuehler*, 71 App. Div. (N. Y.) 173; s. c. 75 N. Y. Supp. 714. So, it has been held a question purely of fact whether a mother was justified in believing that she could rescue her child from an approaching car eighty or ninety feet distant without danger to herself. *West Chicago St. R. Co. v. Liderman*, 87 Ill. App. 638; s. c. aff'd, 187 Ill. 463; 58 N. E. Rep. 367.

⁴² *Ridley v. Mobile &c. R. Co.*, 114 Tenn. 727; s. c. 86 S. W. Rep. 606.

⁴³ Contributory negligence was imputed to the owner of a team which

ran away while he was in a depot and the injuries were inflicted by a fast train as he was crossing the track to head off the team, the train being plainly visible from the place where the injured person started across the track and signals of its approach were duly given: *Collins v. Illinois Cent. R. Co.*, 77 Miss. 855; s. c. 27 South. Rep. 837. A person acting recklessly in an attempt to extricate a team cannot recover if his action was the result of excitement due wholly or in part to his being intoxicated: *Balser v. Chicago &c. R. Co.*, 9 Ohio S. & C. P. Dec. 523; s. c. 7 Ohio N. P. 482. In a case where a railroad employé, on observing a boy standing on the track with his back to a rapidly approaching train, which had failed to give the statutory signals, rushed on the track and got the boy out of danger, but stumbled himself, and in consequence of the stumble was struck by the train and killed, it was held that a finding that the employé acted with due care under the circumstances was justified: *Ridley v. Mobile &c. R. Co.*, 114 Tenn. 727; s. c. 86 S. W. Rep. 606. A son who went on an awning, on which defendant had a license to run its electric wires, to help his father, who had been shocked by contact with the same, was not a trespasser, so as to preclude the father from recovering for his death, caused by the company's failure to properly insulate the wires: *Brush Electric Light &c. Co. v. Lefevre* (Tex. Civ. App.), 55 S. W. Rep. 396. Driver of a team used about a thrasher was not charged with contributory negligence in attaching the horses to a separator for the purpose of removing it from a stack of grain set on fire through the negligence of those in charge of the thrasher: *Thorn v. James*, 14 Man. R. 373.

§ 202. **Subsequent Negligence of the Person Injured in Treating his Wound.**—Matter under this head finds its proper treatment in connection with that branch of the law of damages which has to do with the mitigation of damages. It is the rule that the aggravation of the injury by the plaintiff's own negligence will affect only the amount of the damages he is entitled to recover and not his right of action.⁴⁴ In the matter of the care of an injury the law only demands that the course of the plaintiff shall be reasonable in view of the circumstances and the nature of the injury.⁴⁵

§ 206. **Contributory Negligence no Defense to an Action for a Willful or Wanton Injury.**⁴⁶—Nor is it in all cases required that the defendant should have an actual intent to injure. If a person displays a reckless indifference and disregard of the probable consequence of the doing or omitting to do an act, conscious from his knowledge of existing circumstances that his conduct will likely result in injury, such a person may be imputed with wanton negligence under the rules.⁴⁷

⁴⁴ *Texas &c. R. Co. v. McKenzie*, 30 Tex. Civ. App. 293; s. c. 70 S. W. Rep. 237.

⁴⁵ *Atkinson v. Fisher*, — Neb. —; s. c. 93 N. W. Rep. 211. A person injured by a defective sidewalk will be held to have exercised reasonable care in the employment of a physician where he procures the services of a graduate physician of long standing, and he will not be prevented from recovering for the injuries which resulted from the accident, though such injuries might have been lessened by a more skillful treatment: *Elliott v. Kansas City*, 174 Mo. 554; s. c. 74 S. W. Rep. 617.

⁴⁶ The principle that contributory negligence is not a defense to an action for willful or wanton injury is supported by these cases: *Southern R. Co. v. Yancy*, 141 Ala. 246; s. c. 37 South. Rep. 341; *Frank v. St. Louis Transit Co.*, 112 Mo. App. 496; s. c. 87 S. W. Rep. 88; *McGee v. Campbell*, 101 Fed. Rep. 936; s. c. 42 C. C. A. 94; *Spring Valley Coal Co. v. Rowatt*, 96 Ill. App. 248; s. c. aff'd, 196 Ill. 156; 63 N. E. Rep. 649; *Chicago Union Traction Co. v. McGinnis*, 112 Ill. App. 177; *De Lon v. Kokomo City St. R. Co.*, 22 Ind. App. 377; s. c. 53 N. E. Rep. 847; *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269; s. c. 68 N. E. Rep. 238; *Holwerson v. St. Louis &c.*

R. Co., 157 Mo. 216; s. c. 57 S. W. Rep. 770; *Magar v. Hammond*, — N. Y. —; s. c. 76 N. E. Rep. 474; rev'g s. c. 95 App. Div. (N. Y.) 249; 88 N. Y. Supp. 796; *Barker v. Ohio River R. Co.*, 51 W. Va. 423; s. c. 41 S. E. Rep. 148; *Bolin v. Chicago &c. R. Co.*, 108 Wis. 333; s. c. 84 N. W. Rep. 446. But see a holding of the Federal courts that there is no degree of "willful" negligence in Kentucky, and the rule that contributory negligence is not available as a defense to any degree of negligence is no longer in force: *Singleton v. Felton*, 101 Fed. Rep. 526; s. c. 42 C. C. A. 57. In a case where a motorman, approaching a crossing with his car running at its customary speed, and on seeing the driver of a wagon attempt to cross in front of the car when it was within 130 feet thereof, immediately applied the brakes and so nearly stopped the car that it ran only a few feet after a collision with the wagon, it was held that he was not guilty of such gross negligence as would authorize a recovery without regard to the contributory negligence of the driver of the vehicle: *Watermolen v. Fox River &c. R. Co.*, 110 Wis. 153; s. c. 85 N. W. Rep. 663.

⁴⁷ *Harrington v. Los Angeles R. Co.*, 140 Cal. 514; s. c. 74 Pac. Rep. 15; 63 L. R. A. 238.

§ 208. **What is Willful or Wanton Negligence which Renders the Defendant Liable notwithstanding Plaintiff's Contributory Negligence.**—Willful or wanton negligence whereby liability is incurred without regard to the contributory negligence of the party injured is defined as a reckless disregard of the safety of the person or property of another, by failing, after discovering the peril, to exercise ordinary care to prevent the injury.⁴⁸ There is an example of willful negligence within the rule in a case where a motorman allowed his car to run down a sharp grade, past a number of persons picking up packages on the edge of the track at the place of a recent accident, with no control of the car, and without sounding an alarm, and struck one of these persons, and this though such person may have been guilty of contributory negligence.⁴⁹ In Michigan where the doctrine of gross negligence obtains, it is held that the gross negligence of the defendant will not warrant a recovery, notwithstanding the contributory negligence of the plaintiff, where the plaintiff's negligence is, in the order of causation, either subsequent to, or concurrent with, that of the defendant.⁵⁰

§ 212. **Defense Available to all Joint Defendants.**—It is the rule that where the plaintiff sets up but one injury, by whomsoever caused, but declares against two defendants as jointly and severally liable, his contributory negligence which prevents recovery against one defendant will also prevent recovery against the other.⁵¹

§ 216. **This Want of Ordinary Care must have been a Proximate Cause of the Injury.**⁵²—Here as in the case of the negligence of the de-

⁴⁸ *Alger & Co. v. Duluth-Superior Traction Co.*, 93 Minn. 314; s. c. 101 N. W. Rep. 298.

⁴⁹ *Rhymes v. Jackson & Co. R. Co.*, 85 Miss. 140; s. c. 37 South. Rep. 708.

⁵⁰ *Labarge v. Pere Marquette R. Co.*, 134 Mich. 139; s. c. 95 N. W. Rep. 1073; 10 Det. Leg. N. 430.

⁵¹ *Fletcher v. Boston & M. R. R.*, 187 Mass. 463; s. c. 73 N. E. Rep. 552.

⁵² On the proposition that a want of ordinary care of plaintiff must have been the proximate cause of the injury to defeat a recovery, see: *Kansas City & Co. R. Co. v. Prunty*, 133 Fed. Rep. 13; s. c. 66 C. C. A. 163; *Georgia Southern & Co. R. Co. v. Cartledge*, 116 Ga. 164; s. c. 42 S. E. Rep. 405; 59 L. R. A. 118; *Indianapolis St. R. Co. v. Schmidt*, 35 Ind. App. 202; s. c. 71 N. E. Rep. 663; 72 N. E. Rep. 478; *Cosgrove v.*

Kennebec Light & Co., 98 Me. 473; s. c. 57 Atl. Rep. 841; *Ward v. Maine Cent. R. Co.*, 96 Me. 136; s. c. 51 Atl. Rep. 947; *Oates v. Metropolitan St. R. Co.*, 168 Mo. 535; s. c. 68 S. W. Rep. 906; *Kube v. St. Louis Transit Co.*, 102 Mo. App. 582; s. c. 78 S. W. Rep. 55; *Frank v. St. Louis Transit Co.*, 99 Mo. App. 323; s. c. 73 S. W. Rep. 239; *Ericius v. Brooklyn Heights R. Co.*, 63 App. Div. (N. Y.) 353; s. c. 71 N. Y. Supp. 596; *Brewster v. Elizabeth City*, 137 N. C. 392; s. c. 49 S. E. Rep. 835; *Mathews v. Toledo*, 11 Ohio C. D. 375; s. c. 21 Ohio Cir. Ct. R. 69; *Schweinfurth v. Cleveland & Co. R. Co.*, 60 Ohio St. 215; s. c. 54 N. E. Rep. 89; *Bowen v. Southern R. Co.*, 58 S. C. 222; s. c. 36 S. E. Rep. 590; *Norfolk & Co. R. Co. v. Perrow*, 101 Va. 345; s. c. 43 S. E. Rep. 614; *Mauch v. Hartford*, 112 Wis. 40; s. c. 87 N. W. Rep. 816. The negligence

fendant it is not required that the plaintiff's act should necessarily be the cause nearest to the accident.⁵³ The test is whether or not the plaintiff's want of care directly contributed to the injury.⁵⁴ If, however, his negligence precedes the injury, which is caused by the defendant's subsequent independent negligence, still the plaintiff may recover, and this though the plaintiff's negligence may have afforded the opportunity for the injury.⁵⁵ The rule as applied to evidence where the plaintiff has the burden of showing his freedom from contributory negligence is that he is required to show only that his negligence, if any, did not contribute proximately to the result.⁵⁶

§ 218. **Theory that it is Enough if it "Contributed" to it.**—In some jurisdictions a want of ordinary care on the part of the injured person, however slight, will preclude a recovery of compensation for the injury from another, who contributed thereto by his negligence, however great, if short of willful and wanton misconduct.⁵⁷

§ 219. **Defendant's Negligence Proximate, Plaintiff's Negligence Remote.**⁵⁸

§ 221. **Does not Bar Recovery Unless, but for such Negligence, the Accident would not have Happened.**—Under this principle it is not enough to constitute contributory negligence that the negligence of the one injured may have contributed to his injury, but it must be such that the injury would not otherwise have occurred.⁵⁹

§ 227. **No Recovery where, by Exercising Ordinary Care, Consequences of Defendant's Negligence could have been Avoided.**⁶⁰—But this duty to avert the consequences of the defendant's negligence does not arise until the negligence of the defendant is existing and ap-

of a farmer in improperly replacing a panel of a snow fence built by a railroad company, which had blown down through negligent construction or maintenance, was the proximate cause of an injury thereafter caused by a second fall of the panel and not its original negligent construction: *Fishburn v. Burlington & N. W. Ry. Co.*, 127 Iowa 483; s. c. 98 N. W. Rep. 380.

⁵³ *Central Texas & C. R. Co. v. Hoard* (Tex. Civ. App.), 49 S. W. Rep. 142.

⁵⁴ *Gilbert v. Burlington & C. R. Co.*, 128 Fed. Rep. 529; s. c. 63 C. C. A. 27; aff'g s. c. 123 Fed. Rep. 832.

⁵⁵ *Ward v. Maine Cent. R. Co.*, 96 Me. 136; s. c. 51 Atl. Rep. 947.

⁵⁶ *Brick v. Metropolitan St. Ry. Co.*, 35 Misc. (N. Y.) 135; s. c. 71 N. Y. Supp. 314.

⁵⁷ *Galveston & C. R. Co. v. Hubbard* (Tex. Civ. App.), 70 S. W. Rep. 112; *Bolin v. Chicago & C. R. Co.*, 108 Wis. 333; s. c. 84 N. W. Rep. 446; *Lyon v. Grand Rapids*, 121 Wis. 609; s. c. 99 N. W. Rep. 311; *Boyce v. Wilbur Lumber Co.*, 119 Wis. 642; s. c. 97 N. W. Rep. 563.

⁵⁸ To the effect that plaintiff may recover where his negligence is remote and that of defendant is proximate, see: *Rice v. Crescent City R. Co.*, 51 La. An. 108; s. c. 24 South. Rep. 791; *Ward v. Maine Cent. R. Co.*, 96 Me. 136; s. c. 51 Atl. Rep. 947.

⁵⁹ *Harper v. Kopp*, 73 S. W. Rep. 1127; 24 Ky. L. Rep. 2342.

⁶⁰ See generally, *Fulcher v. Central of Georgia R. Co.*, 110 Ga. 327; s. c. 35 S. E. Rep. 280.

parent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence.⁶¹

§ 230. Doctrine that Plaintiff, though Negligent, may Recover if Defendant could have Avoided Injury by Exercise of Ordinary Care.—The doctrine that the plaintiff may recover notwithstanding his contributory negligence if the defendant, by the exercise of ordinary care, could have avoided the accident, has not, everywhere, met with acceptance by the courts.⁶² One court has rejected the principle on ground that it in effect abolishes contributory negligence as a defense.⁶³

§ 238. Defendant Liable if, after Discovering the Exposed Situation of the Plaintiff he could have Avoided Injuring him by the Exercise of Ordinary Care.—Most American courts subject the rule that there can be no recovery by an injured person where his own negligence contributes in any degree to the immediate cause of the injury to the qualification that the person causing the injury was without knowledge of the perilous position of the injured person in time to avoid the injury by the exercise of ordinary care. In case the defendant has this knowledge and the means to prevent the injury the contributory negligence of the injured person is no defense.⁶⁴ The

⁶¹ *Western &c. R. Co. v. Ferguson*, 113 Ga. 708; s. c. 39 S. E. Rep. 306.

⁶² *West Chicago St. R. Co. v. Liderman*, 187 Ill. 463; s. c. 58 N. E. Rep. 367; aff'g s. c. 87 Ill. App. 638.

⁶³ *Jones v. Charleston &c. R. Co.*, 61 S. C. 556; s. c. 39 S. E. Rep. 758.

⁶⁴ *Memphis &c. R. Co. v. Martin*, 131 Ala. 269; s. c. 30 South. Rep. 827; *Green v. Los Angeles Terminal R. Co.*, 143 Cal. 31; s. c. 76 Pac. Rep. 719; rev'g s. c. 69 Pac. Rep. 694; *Tully v. Philadelphia &c. R. Co.*, 2 Pen. (Del.) 537; s. c. 47 Atl. Rep. 1019; *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199; s. c. 40 Atl. Rep. 945; *Tully v. Philadelphia &c. R. Co.*, 3 Pen. (Del.) 455; s. c. 50 Atl. Rep. 95; *Baltimore &c. R. Co. v. Hellenenthal*, 88 Fed. Rep. 116; s. c. 31 C. C. A. 414; *Turnbull v. New Orleans &c. R. Co.*, 120 Fed. Rep. 783; s. c. 57 C. C. A. 151; *Krenzer v. Pittsburgh &c. R. Co.*, 151 Ind. 587; s. c. 52 N. E. Rep. 220; 43 N. E. Rep. 649; *Indianapolis St. Ry. Co. v. Schmidt*, 35 Ind. App. 202; s. c. 71 N. E. Rep. 663; 72 N. E. Rep. 478; *Baltimore Consol. R. Co. v. Rifcowitz*, 89 Md. 338; s. c. 43 Atl. Rep. 762; *Rawitzer v. St. Paul City R.*

Co., 93 Minn. 84; s. c. 100 N. W. Rep. 664; *Ross v. Metropolitan St. R. Co.*, 113 Mo. App. 600; s. c. 88 S. W. Rep. 144; *Cardwell v. Gulf &c. R. Co.*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 422; *Northern Texas Traction Co. v. Yates*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 283; *Dailey v. Burlington &c. R. Co.*, 58 Neb. 396; s. c. 78 N. W. Rep. 722; *Mapes v. Union R. Co.*, 56 App. Div. (N. Y.) 508; s. c. 67 N. Y. Supp. 358; *Denison &c. R. Co. v. Craig*, 35 Tex. Civ. App. 548; s. c. 80 S. W. Rep. 865; *St. Louis &c. R. Co. v. Jacobson*, 28 Tex. Civ. App. 150; s. c. 66 S. W. Rep. 1111; *El Paso Electric R. Co. v. Kendall*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 61. Negligence in failing to discover one's peril is not the equivalent of discovered peril; *Hawkins v. Missouri &c. R. Co.*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 52. The rule was applied to allow a recovery where a person standing in the window of a building adjacent to a railroad track attempting to adjust the sling of a beam being hoisted in the building, and which projected across the track, and did all that he could

doctrine is without application where the negligence of the plaintiff is concurrent with that of the defendant.⁶⁵

§ 239. Or When he Ought to have Discovered Plaintiff's Negligence, etc.—The doctrine of the foregoing section that the plaintiff may recover, though guilty of contributory negligence, if the defendant failed to use ordinary care to avert the injury after discovering the plaintiff's peril, is held in many jurisdictions to apply not only to cases where the defendant actually discovered the peril, but also where, by the exercise of ordinary care, he could have done so.⁶⁶

§ 240. The "Last Clear Chance" Doctrine.⁶⁷—Under the doctrine of last clear chance, as applied in North Carolina, a recovery was sustained where a person run over by a railroad train was down on the track in such a position that he could have been seen by the engineer if the latter had been looking, at a distance of over one hundred fifty yards, and in time to have stopped the train and prevented the injury.⁶⁸

§ 249. Collateral Violations of Law.⁶⁹—In a case where the plaintiff poured kerosene oil from a can on wood and kindling in a stove, which contained live coals to her knowledge, and there was an explosion of the can causing the injuries complained of, it was held that the contributory negligence of the plaintiff was so obvious and reprehensible as to preclude her from recovering for the injury from the manufacturer of the oil though the oil was below the legal standard of safety.⁷⁰

§ 259. Doctrine of "Comparative Negligence" Generally Denied.⁷¹

reasonably be expected to do to escape injury from an approaching train, the engineer of which had notice of his exposed condition and could have stopped the train and saved him from injury: *Fitzgibbons v. Manhattan R. Co.*, 88 N. Y. Supp. 341.

⁶⁵ *Green v. Los Angeles Terminal R. Co.*, 143 Cal. 31; s. c. 76 Pac. Rep. 719; rev'g s. c. 69 Pac. Rep. 694; *Lake Shore & C. R. Co. v. Callahan*, 25 Ohio Cir. Ct. R. 115.

⁶⁶ *Denver & C. R. Co. v. Buffehr*, 30 Colo. 27; s. c. 69 Pac. Rep. 582; *Buxton v. Ainsworth*, — Mich. —; s. c. 101 N. W. Rep. 817; 11 Det. Leg. N. 682; *Klockenbrink v. St. Louis & C. R. Co.*, 81 Mo. App. 351, 409; *Dieter v. Zbaren*, 81 Mo. App. 612; *Richmond Traction Co. v. Martin*, 102 Va. 209; s. c. 45 S. E. Rep. 886.

⁶⁷ The party who has the last opportunity of avoiding accident is

not excused by the negligence of any one else. His negligence, and not that of the one first in fault, is the sole proximate cause of the injury: *Klockenbrink v. St. Louis & C. R. Co.*, 81 Mo. App. 351, 409.

⁶⁸ *Carter v. Southern R. Co.*, 135 N. C. 498; s. c. 47 S. E. Rep. 614.

⁶⁹ The fact that the plaintiff was doing an act forbidden by statute at the time of receiving the injuries will not bar a recovery for the injuries unless the illegal act was a proximate cause contributing to the injury: *Monroe v. Hartford St. R. Co.*, 76 Conn. 201; s. c. 56 Atl. Rep. 498.

⁷⁰ *Riggs v. Standard Oil Co.*, 130 Fed. Rep. 199.

⁷¹ The doctrine of comparative negligence is rejected in the jurisdictions indicated by the following recent cases: *Denver & C. R. Co. v. Maydole*, 33 Colo. 150; s. c. 79 Pac.

§ 268. **Doctrine in Georgia as to Comparative Negligence.**—The authority for the doctrine of comparative negligence recognized in Georgia is found in the civil code of that State. One section of this code provides, "if the plaintiff, by ordinary care, could have avoided the consequences to himself, caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained."⁷² Another section provides that "no person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him."⁷³ These provisions as construed by the supreme court of that State allow the plaintiff to recover unless his negligence was equal to, or greater than that of the defendant, or unless he could by ordinary care have avoided the consequences of the defendant's negligence.⁷⁴ If the plaintiff knows of the defendant's negligence and fails to exercise that degree of care and caution which an ordinarily prudent man would exercise under similar circumstances to prevent the impending injury, he will not be entitled to a recovery of damages for the injury suffered.⁷⁵

Rep. 1023; *Brown v. Wilmington City R. Co.*, 1 Pen. (Del.) 332; s. c. 40 Atl. Rep. 936; *Colbourn v. Wilmington*, — Del. —; s. c. 56 Atl. Rep. 605; *Macon v. Holcomb*, 205 Ill. 643; s. c. 69 N. E. Rep. 79; *Birmingham R. & Co. v. Bynum*, 139 Ala. 389; s. c. 36 South. Rep. 736; *Missouri & C. R. Co. v. Kellerman*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 401; *Chicago & C. R. Co. v. Kelly*, 75 Ill. App. 490; *Chicago & C. Coal Co. v. Moran*, 210 Ill. 9; s. c. 71 N. E. Rep. 38; aff'g s. c. 110 Ill. App. 664; *Sandy River Cannel Coal Co. v. Caudill* (Ky.), 60 S. W. Rep. 180; s. c. 22 Ky. L. Rep. 1175; *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746; s. c. 77 N. W. Rep. 130; *Riley v. Missouri Pac. R. Co.*, — Neb. —; s. c. 95 N. W. Rep. 20; *Texas Midland R. Co. v. Tidwell* (Tex. Civ. App.), 49 S. W. Rep. 641; *Woolf v. Washington R. & C. Co.*, 37 Wash. 491; s. c. 79 Pac. Rep. 997; *Franklin v. Engel*, 34 Wash. 480; s. c. 76 Pac. Rep. 84; *Tesch v. Milwaukee & C. R. Co.*, 108

Wis. 593; s. c. 84 N. W. Rep. 823; *Richmond Traction Co. v. Martin*, 102 Va. 201; s. c. 45 S. E. Rep. 886.

⁷² Georgia Civil Code, § 2972.

⁷³ These provisions change the common law in respect to liability for negligence only in the particular that when there is negligence by both parties, which is concurrent and contributes to the injury, plaintiff is not barred entirely, but may recover damages reduced below full compensation by an amount proportioned to the amount of the fault attributable to him: *Alabama & C. R. Co. v. Coggins*, 88 Fed. Rep. 455; s. c. 32 C. C. A. 1.

⁷⁴ *Christian v. Macon R. & C. Co.*, 120 Ga. 314; s. c. 47 S. E. Rep. 923; *Willingham v. Macon & C. R. Co.*, 113 Ga. 374; s. c. 38 S. E. Rep. 843; *Southern R. Co. v. Watson*, 104 Ga. 243; s. c. 30 S. E. Rep. 818; *Brunswick & C. R. Co. v. Wiggins*, 113 Ga. 842; s. c. 39 S. E. Rep. 551.

⁷⁵ *Western & C. R. Co. v. Ferguson*, 113 Ga. 708; s. c. 39 S. E. Rep. 306.

§ 269a. **Doctrine of Comparative Negligence Revived by Federal Statute.**—The thoroughly discarded doctrine of comparative negligence, as recognized and applied especially in the earlier Illinois cases, is revived by a statute recently enacted by Congress and made a rule of procedure in actions for personal injuries to the employés of carriers. The statute provides: "That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé. All questions of negligence and contributory negligence shall be for the jury."⁷⁶ The statute limits its operation to common carriers in the District of Columbia and territories and common carriers engaged in commerce between the States and between the States and foreign nations. The doctrine of comparative negligence when accepted in Illinois received general application in all cases where the defense of contributory negligence was interposed. The federal act—without any readily discerned reason therefor—makes the principle available only to a limited portion of a class of persons sustaining the servant relation, which suggests the reflection that the statute may be found to violate the rule against class legislation—a subject not within the scope of this work.

§ 282. **Instructions under the Rule.**—In Kentucky where the doctrine of gross negligence finds acceptance, it has been held that a charge to find for the plaintiff unless the jury believe that the plaintiff, by his negligence, so far contributed to his injury that but for such negligence, he would not have been injured, is not open to the objection that it injects into the case the doctrine of comparative negligence.⁷⁷

§ 292. **The Rule as Declared in *Hartfield v. Roper* Adopted in What States.**—The doctrine of *Hartfield v. Roper*,⁷⁸ which imputes negligence of parents or custodians to children, still obtains in full force in New York,⁷⁹ the State of its adoption, and is followed in

⁷⁶ Act Cong. of June 11, 1906.

⁷⁷ *Kentucky Bridge &c. Co. v. Sydor*, — Ky. —; s. c. 82 S. W. Rep. 989; 26 Ky. L. Rep. 951; 68 L. R. A. 183.

⁷⁸ 21 Wend. (N. Y.) 615; s. c. 2 Thomp. Neg. (1st ed.) 1121.

⁷⁹ *Levine v. Metropolitan St. R. Co.*, 78 App. Div. (N. Y.) 426; s. c.

80 N. Y. Supp. 48; s. c. aff'd, 177 N. Y. 523; 69 N. E. Rep. 1125 (child six and a half years old killed by street car while in charge of brother twelve years old—negligence of older brother charged to injured child); *Lewin v. Lehigh Valley R. Co.*, 52 App. Div. (N. Y.) 69; s. c. 65 N. Y. Supp. 49 (negligence of

North Carolina.⁸⁰ This doctrine originally accepted in Indiana, is now rejected by the courts of that State.⁸¹

§ 293. **Denied in what States.**—The doctrine of imputed negligence in this connection is denied in recent decisions in Connecticut,⁸² Illinois,⁸³ Indiana,⁸⁴ Iowa,⁸⁵ Kentucky,⁸⁶ Minnesota,⁸⁷ New Hampshire,⁸⁸ New Jersey,⁸⁹ Ohio,⁹⁰ Oregon,⁹¹ Tennessee,⁹²

father acting as driver of vehicle will not be imputed to eighteen months old child, riding on its mother's lap in the carriage, and injured. In this case the mother was custodian and the father's negligence was not different from that of a driver not related to the injured child); *Lifschitz v. Dry Dock & C. R. Co.*, 67 App. Div. (N. Y.) 602; s. c. 73 N. Y. Supp. 888; *Lowery v. New York Ice Co.*, 26 Misc. (N. Y.) 163; s. c. 55 N. Y. Supp. 707 (unattended child five years old run over by an ice wagon). Negligence of the father, as well as of the mother, in not discovering a train, is imputable to a child, held in the arms of his mother, who was sitting by the side of the father, who was driving, as the father is not acting as a driver merely: *Delaware & C. R. Co. v. Devore*, 114 Fed. Rep. 155; s. c. 52 C. C. A. 77. If, however, the infant is of sufficient age and intelligence to render it prudent for his parents to permit him to go on the street unattended, he is *sui juris*, and it is only his contributory negligence which will defeat a recovery for injuries the result of the negligence of another: *Lafferty v. Third Ave. R. Co.*, 85 App. Div. (N. Y.) 592; s. c. 83 N. Y. Supp. 405; s. c. aff'd, 176 N. Y. 594; 68 N. E. Rep. 1118.

⁸⁰ *Davis v. Seaboard Air Line R.*, 136 N. C. 115; s. c. 48 S. E. Rep. 591.

⁸¹ *Evansville v. Senhenn*, 151 Ind. 42; s. c. 47 N. E. Rep. 634; 51 N. E. Rep. 88.

⁸² *Murphy v. Derby St. R. Co.*, 73 Conn. 249; s. c. 47 Atl. Rep. 120.

⁸³ *Heldmaier v. Taman*, 88 Ill. App. 209; s. c. aff'd, 188 Ill. 283; 58 N. E. Rep. 960; *Chicago City R. Co. v. Tuohy*, 196 Ill. 410; s. c. 63 N. E. Rep. 997; aff'g s. c. 95 Ill. App. 314.

⁸⁴ *Evansville v. Senhenn*, 151 Ind. 42; s. c. 47 N. E. Rep. 634; 51 N. E. Rep. 88; *McNamara v. Beck*, 21 Ind.

App. 483; s. c. 52 N. E. Rep. 707; *Jeffersonville v. McHenry*, 22 Ind. App. 10; s. c. 53 N. E. Rep. 183; *Indianapolis St. R. Co. v. Bordenchecker*, 34 Ind. App. 138; s. c. 70 N. E. Rep. 995.

⁸⁵ *Chicago & C. R. Co. v. Kowalski*, 92 Fed. Rep. 310; s. c. 34 C. C. A. 1; aff'g s. c. 84 Fed. Rep. 586; *Ives v. Weiden*, 114 Iowa 476; s. c. 87 N. W. Rep. 408; 54 L. R. A. 854 (knowledge of father that gasoline was received in place of coal oil he ordered is not imputed to a child ignorant of the mistake, who used gasoline to start a fire); *Fink v. Des Moines*, 115 Iowa 641; s. c. 89 N. W. Rep. 28 (fact that parents have been warned of the danger to a child in playing at a certain place cannot be imputed to the child injured while playing at such place).

⁸⁶ *South Covington & C. R. Co. v. Herrklotz*, 104 Ky. 400; s. c. 47 S. W. Rep. 265. But see, *Toner v. South Covington & C. R. Co.*, 58 S. W. Rep. 439; s. c. 22 Ky. L. Rep. 564.

⁸⁷ *Mattson v. Minnesota & C. R. Co.*, — Minn. —; s. c. 104 N. W. Rep. 443.

⁸⁸ *Warren v. Manchester St. R.*, 70 N. H. 352; s. c. 47 Atl. Rep. 735; *Carney v. Concord St. R.*, 72 N. H. 364; s. c. 57 Atl. Rep. 218.

⁸⁹ *Markey v. Consolidated Traction Co.*, 65 N. J. L. 682; s. c. 48 Atl. Rep. 1117; *Markey v. Consolidated Traction Co.*, 65 N. J. L. 82; s. c. 46 Atl. Rep. 573.

⁹⁰ *Ludden v. Columbus & C. R. Co.*, 7 Ohio N. P. 106; s. c. 9 Ohio S. & C. P. Dec. 793.

⁹¹ *Macdonald v. O'Reilly*, 45 Or. 589; s. c. 78 Pac. Rep. 753.

⁹² *Nashville R. Co. v. Howard*, 112 Tenn. 107; s. c. 78 S. W. Rep. 1098. The act of a mother in leaving medicine containing poison where her child could reach it is not contributory negligence, where the bottle was not labeled, and she was not aware that it contained poison:

Texas,⁹³ and Vermont.⁹⁴ In Connecticut it is held that the question of the negligence of the parents of a child in allowing it to play on the streets is immaterial, where it does not appear that the parents are in a position to be benefited by a participation in the distribution of the amount sought to be recovered in an action by the administrator for the wrongful death of a child.⁹⁵

§ 308. **Degree of Care Required of Children.**—Generally speaking a child of immature years is held only to the exercise of that degree of care which is to be reasonably expected of one of his age; he is not required to exercise the degree of care and prudence that would be expected of an adult under the same circumstances.⁹⁶ It is the view of one court, at least, that there is no arbitrary rule as to the time when an infant is capable of understanding and avoiding dangers to be encountered on railroad tracks.⁹⁷

§ 309. **Age Considered with Reference to Intelligence, Experience and Surrounding Circumstances.**—Here it may be stated as a rule, sanctioned by many cases, that the measure of responsibility of a person of immature years for contributory negligence is regarded as the average capacity of others of the same age, intelligence and experience, and this is to be considered with reference to the character of the danger to which he is exposed.⁹⁸

Wise v. Morgan, 101 Tenn. 273; s. c. 48 S. W. Rep. 971.

⁹³ Gulf & C. R. Co. v. Johnson (Tex. Civ. App.), 51 S. W. Rep. 531; Northern Texas Traction Co. v. Royce, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 621; Over v. Missouri & C. R. Co. (Tex. Civ. App.), 73 S. W. Rep. 535; Texas & C. R. Co. v. Kingston, 30 Tex. Civ. App. 24; s. c. 68 S. W. Rep. 518.

⁹⁴ Ploof v. Burlington Traction Co., 70 Vt. 509; s. c. 41 Atl. Rep. 1017; 43 L. R. A. 108.

⁹⁵ Murphy v. Derby St. R. Co., 73 Conn. 249; s. c. 47 Atl. Rep. 120.

⁹⁶ Rohloff v. Fair Haven & W. R. Co., 76 Conn. 689; s. c. 58 Atl. Rep. 5; Welden v. Philadelphia & C. R. Co., 2 Pen. (Del.) 537; s. c. 43 Atl. Rep. 156; Tully v. Philadelphia & C. R. Co., 3 Pen. (Del.) 455; s. c. 50 Atl. Rep. 95; Baltimore & C. R. Co. v. Cumberland, 12 App. (D. C.) 598; Illinois Cent. R. Co. v. Bandy, 88 Ill. App. 629; Harper v. Kopp, 73 S. W. Rep. 1127; 24 Ky. L. Rep. 2342; Anderson v. Union Terminal R. Co., 81 Mo. App. 116; Thies v. Thomas, 77 N. Y. Supp. 276; Lud-

den v. Columbus & C. R. Co., 7 Ohio N. P. 106; s. c. 9 Ohio S. & C. P. Dec. 793; Dubiver v. City & S. Ry. Co., 44 Or. 227; s. c. 75 Pac. Rep. 693; 74 Pac. Rep. 915; St. Louis Southwestern R. Co. v. Bolton, 36 Tex. Civ. App. 87; s. c. 81 S. W. Rep. 123.

⁹⁷ Chicago & C. R. Co. v. Russell, — Neb. —; s. c. 100 N. W. Rep. 156.

⁹⁸ See generally, Goldstein v. People's R. Co., — Del. —; s. c. 60 Atl. Rep. 975; Smith v. Pittsburgh & C. R. Co., 90 Fed. Rep. 783; Tully v. Philadelphia & C. R. Co., 2 Pen. (Del.) 537; s. c. 47 Atl. Rep. 1019; Western & C. R. Co. v. Rogers, 104 Ga. 224; s. c. 30 S. E. Rep. 804; Chicago & C. Coal Co. v. Moran, 110 Ill. App. 664; s. c. aff'd, 210 Ill. 9; 71 N. E. Rep. 38; Fitzgerald v. Chicago & C. R. Co., 114 Ill. App. 118; Kinnare v. Chicago & C. R. Co., 114 Ill. App. 230; Cleveland & C. R. Co. v. Miles, 162 Ind. 646; s. c. 70 N. E. Rep. 985; Fishburn v. Burlington & C. R. Co., 127 Iowa 483; s. c. 103 N. W. Rep. 481; Mitchell v. Illinois Cent. R. Co., 110 La. 630; s. c. 34 South. Rep. 714; Young v. Small, 188 Mass. 4;

§ 310. **Age at which Children Deemed Incapable of Negligence, as Matter of Law.**—Cases where children were deemed incapable of contributory negligence as a matter of law are collected in the margin.⁹⁹

s. c. 73 N. E. Rep. 1019; Grenell v. Michigan Cent. R. Co., 124 Mich. 141; s. c. 82 N. W. Rep. 843; Campbell v. St. Louis & C. R. Co., 175 Mo. 161; s. c. 75 S. W. Rep. 86 (boy of sixteen years killed by street car); Heinze v. Metropolitan St. R. Co., 182 Mo. 528; s. c. 81 S. W. Rep. 848; Edwards v. Metropolitan St. R. Co., 112 Mo. App. 656; s. c. 87 S. W. Rep. 587; Fry v. St. Louis Transit Co., 111 Mo. App. 324; s. c. 85 S. W. Rep. 960; Lafferty v. Third Ave. R. Co., 85 App. Div. (N. Y.) 592; s. c. 83 N. Y. Supp. 405; s. c. aff'd, 176 N. Y. 594; 68 N. E. Rep. 1118; Atchason v. United Traction Co., 90 App. Div. (N. Y.) 571; s. c. 86 N. Y. Supp. 176; Citizens' Electric R. & Co. v. Bell, 26 Ohio Cir. Ct. R. 691; s. c. aff'd, 70 Ohio St. 482; 72 N. E. Rep. 1155; Dubiver v. City & C. R. Co., 44 Or. 227; s. c. 74 Pac. Rep. 915; 75 Pac. Rep. 693; Parker v. Washington & C. R. Co., 207 Pa. 438; s. c. 56 Atl. Rep. 1001; Denison & C. R. Co. v. Carter (Tex. Civ. App.), 79 S. W. Rep. 320; s. c. rev'd, 98 Tex. 196; 82 S. W. Rep. 782; Houston & C. R. Co. v. Bulger, 35 Tex. Civ. App. 478; s. c. 80 S. W. Rep. 557; Missouri & C. R. Co. v. Scarborough, 29 Tex. Civ. App. 194; s. c. 68 S. W. Rep. 196; Christensen v. Oregon Short Line R. Co., — Utah —; s. c. 80 Pac. Rep. 746. In an action for an injury to an eight-year-old child it was held that the law was properly stated in an instruction that the conduct of a child of tender years is not to be judged by the same rule that governs adults who, to be entitled to recover for injury from another, must be free from negligence or fault. This rule, when applied to a child of tender years, will not prevent a recovery by it unless it is possessed of that degree of intelligence, prudence and caution which will cause it to know and appreciate and understand the dangers incident to itself from its wrongful acts and omissions: North Texas Const. Co. v. Bostick (Tex. Civ. App.), 80 S. W. Rep. 109; s. c. rev'd on other grounds in 98 Tex. 239; 83 S. W. Rep. 12.

⁹⁹ *Infant sixteen months old:* Ma-

son v. Southern R. Co., 58 S. C. 70; s. c. 36 S. E. Rep. 440. *Seventeen months old:* Galveston & C. R. Co. v. Clark, 21 Tex. Civ. App. 167; s. c. 51 S. W. Rep. 276. *Twenty-one months old:* Carney v. Concord St. Ry., 72 N. H. 364; s. c. 57 Atl. Rep. 218. *Two years old:* Carr v. Merchants' Ice Co., 91 App. Div. (N. Y.) 162; s. c. 86 N. Y. Supp. 368. *Twenty-five months old:* O'Brien v. Wisconsin Cent. Ry. Co., 119 Wis. 7; s. c. 96 N. W. Rep. 424. *Two and a half years old:* Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138; s. c. 70 N. E. Rep. 995. *Between two and three years old:* Toledo Real Estate & Co. v. Putney, 10 Ohio C. D. 698; s. c. 44 Ohio Cir. Ct. R. 486. *Under three years of age:* Indianapolis St. R. Co. v. Schomberg, 164 Ind. 111; s. c. 72 N. E. Rep. 1041; aff'g s. c. 71 N. E. Rep. 237. *Three years old:* Wise v. Morgan, 101 Tenn. 656; s. c. 48 S. W. Rep. 971. *Between three and four years old:* North Kankakee St. R. Co. v. Blatchford, 81 Ill. App. 609; Fink v. Des Moines, 115 Iowa 641; s. c. 89 N. W. Rep. 28; South Covington & C. R. Co. v. Herrklotz, 104 Ky. 400; s. c. 47 S. W. Rep. 265; Rice v. Crescent City R. Co., 51 La. Ann. 108; s. c. 24 South. Rep. 791; True & C. Co. v. Woda, 201 Ill. 315; s. c. 66 N. E. Rep. 369. *Four years old:* Reliance Textile & C. Works v. Mitchell, 71 S. W. Rep. 425; 24 Ky. L. Rep. 1286; United States Brewing Co. v. Stoltenberg, 113 Ill. App. 435; s. c. aff'd, 211 Ill. 531; 71 N. E. Rep. 1081; Potter v. Leviton, 101 Ill. App. 544; s. c. aff'd, 199 Ill. 93; 64 N. E. Rep. 1029. *Between four and five years old:* Kansas City & C. R. Co. v. Herman, 64 Kan. 546; s. c. 68 Pac. Rep. 46; aff'g s. c. 62 Pac. Rep. 543; Macdonald v. O'Reilly, 45 Or. 589; s. c. 78 Pac. Rep. 753; Eskildsen v. Seattle, 29 Wash. 583; s. c. 70 Pac. Rep. 64; Crawford v. Southern R. Co., 106 Ga. 870; s. c. 33 S. E. Rep. 826. *Five and a half years old:* Hebard v. Mabie, 98 Ill. App. 543. *Six years old:* Chicago City R. Co. v. Biederman, 102 Ill. App. 617; Kaplan v. Metropolitan St. R. Co., 98 App. Div. (N. Y.) 133; s. c. 90

§ 311. **Age and Circumstances at which Contributory Negligence Imputable as Matter of Law.**—Generally a child twelve years of age or above, is charged with the care demanded of an adult, unless he is shown to be without mental capacity sufficient to exercise that degree of care.¹⁰⁰ In the following cases it was held that there could be no recovery of damages on the ground that contributory negligence was shown as a matter of law:—Where a child eight years old deliberately ran in front of an approaching car and was run over;¹⁰¹ where a boy sixteen years of age travelling alone, extended his person beyond the line of the car and was struck by an object at the side of the track;¹⁰² where a girl twelve years of age, of ordinary intelligence, while crossing a city street, was injured by being run over by a team of horses;¹⁰³ where a child twelve years of age, and of ordinary intelligence, had her hand crushed by the coming together of a pair of swinging storm doors;¹⁰⁴ where a boy fifteen years old, unable to swim, had knowledge of the existence of holes in the bottom of the river, and notwithstand-

N. Y. Supp. 585; *Ollis v. Houston & Co.*, 31 Tex. Civ. App. 601; s. c. 73 S. W. Rep. 30; *Chicago & C. R. Co. v. Eganolf*, 112 Ill. App. 323. *Six years and ten months old*: *Chicago & C. R. Co. v. Jamieson*, 112 Ill. App. 69. *Under seven years of age*: *Illinois Cent. R. Co. v. Jernigan*, 198 Ill. 297; s. c. 65 N. E. Rep. 88; aff'g s. c. 101 Ill. App. 1; *Ricketts v. Markdale* (Div. Ct.) 31 Ont. 610; *Chicago City R. Co. v. Tuohy*, 95 Ill. App. 314; s. c. aff'd, 196 Ill. 410; 63 N. E. Rep. 997.

¹⁰⁰ *Killelea v. California Horseshoe Co.*, 140 Cal. 602; s. c. 74 Pac. Rep. 157; *Evans v. Josephine Mills*, 119 Ga. 448; s. c. 46 S. E. Rep. 674; *Fitzgerald v. Chicago & C. R. Co.*, 114 Ill. App. 118; *Lowry v. Anderson Co.*, 96 App. Div. (N. Y.) 465; s. c. 89 N. Y. Supp. 107; *Charlton v. Forty-second & C. R. Co.*, 79 App. Div. (N. Y.) 546; s. c. 80 N. Y. Supp. 174; *Murphy v. Perlstein*, 73 App. Div. (N. Y.) 256; s. c. 76 N. Y. Supp. 657; *Wills v. Ashland Light, Power & C. Co.*, 108 Wis. 255; s. c. 84 N. W. Rep. 998 (boy fourteen years old run over by street car). A school girl twelve years of age, while she is not to be presumed to have the judgment of an adult on many things, must know as well as an adult the dangers of walking on a railroad track: *Smith v. Chicago & C. R. Co.*, 99 Ill. App. 296. In a case

where a boy twelve years of age was run over by a train while asleep on the track, it was held improper to allow witnesses to testify that the boy did not have sufficient intelligence to appreciate that if he sat down on the railroad track while weary and tired at night, he might fall asleep: *St. Louis Southwestern R. Co. v. Shiftet*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 247. In a case where a twelve-year-old boy playing in the street with other boys, collided with a team which was being driven slowly, and took no precaution to ascertain the approach of vehicles, he was held not to have exercised the care of an ordinary boy of his own age and intelligence, and was imputed with contributory negligence defeating a recovery for the injuries suffered: *Gleason v. Smith*, 180 Mass. 6; s. c. 61 N. E. Rep. 220; 55 L. R. A. 622.

¹⁰¹ *Rohloff v. Fair Haven & C. R. Co.*, 76 Conn. 689; s. c. 58 Atl. Rep. 5; *Poland v. Union R. Co.*, 26 R. I. 215; s. c. 58 Atl. Rep. 653.

¹⁰² *Benedict v. Minneapolis & C. R. Co.*, 86 Minn. 224; s. c. 90 N. W. Rep. 360; 57 L. R. A. 639.

¹⁰³ *Noonan v. Obermeyer & C. Brewing Co.*, 50 App. Div. (N. Y.) 377; s. c. 63 N. Y. Supp. 1066.

¹⁰⁴ *Dolan v. Callender & C. Co.*, 26 R. I. 198; s. c. 58 Atl. Rep. 655.

ing this knowledge, waded in and fell into one of the holes and was drowned.¹⁰⁵

§ 313. **Age and Circumstances under which Contributory Negligence not Matter of Law, but Question for Jury.**—Children beyond seven years of age are generally regarded as capable of contributory negligence, but whether in any particular case they have displayed such negligence is a question of fact for the jury.¹⁰⁶ Where the child is under twelve years of age this capacity must be shown by evidence as the law indulges the presumption that children at this period of their lives are *non sui juris*.¹⁰⁷ In a case where there was no evidence as to the age of the child, and she was spoken of as a "little girl" and was carried on the occasion she was taken to and from the hospital after being injured, it was held the duty of the court to assume that she may have been of such tender years as to require the question of her status under the law of negligence to be submitted to the jury.¹⁰⁸

§ 315. **Age at which Infants Charged with Ordinary Care of Adults.**—It is but a restatement of a familiar principle to say that a minor who is not a child of tender years is bound to use that care that persons of his own age, capacity and intelligence are capable of using.¹⁰⁹ Under this rule it has been properly held error for a court to instruct as a matter of law, that a boy eighteen years old is not required to use the same care as an adult.¹¹⁰

¹⁰⁵ Hunt v. Graham, 15 Pa. Super. Ct. 42.

¹⁰⁶ Walters v. Denver &c. Light Co., 12 Colo. App. 145; s. c. 54 Pac. Rep. 960 (question for the jury whether a boy twelve years old was negligent in endeavoring to replace an insulator attached to a naked electric wire, to its support, which was attached to his father's house, and was directly beneath and within reach of the window); Quincy Gas &c. Co. v. Bauman, 104 Ill. App. 600; s. c. aff'd, 203 Ill. 295; s. c. 67 N. E. Rep. 807; Chicago Union Traction Co. v. McGinnis, 112 Ill. App. 177 (child ten years old); Chicago &c. R. Co. v. Hoffman, 82 Ill. App. 453 (boy eleven years old); Cleveland &c. R. Co. v. Scott, 111 Ill. App. 234; Biggs v. Consolidated Barb-Wire Co., 60 Kan. 24; s. c. 56 Pac. Rep. 4 (whether fourteen-year-old boy was of sufficient intelligence to be imputed with contributory negligence in climbing upon exposed machinery); Fritsch v. New York &c.

R. Co., 93 App. Div. 554; s. c. 87 N. Y. Supp. 942; Dynes v. Bromley, 208 Pa. 633; s. c. 57 Atl. Rep. 1123; Lynchburg Cotton Mills v. Stanley, 102 Va. 590; s. c. 46 S. E. Rep. 908.

¹⁰⁷ Dempsey v. Brooklyn Heights R. Co., 98 App. Div. (N. Y.) 182; s. c. 90 N. Y. Supp. 639; Hill v. Baltimore & N. Y. R. Co., 75 App. Div. (N. Y.) 325; s. c. 78 N. Y. Supp. 134; 11 N. Y. Ann. Cas. 418.

¹⁰⁸ Morrissey v. Smith, 67 App. Div. (N. Y.) 189; s. c. 73 N. Y. Supp. 673 (this holding was rendered on a motion for a non-suit and was based on the rule that on such motion plaintiff was entitled to the most favorable inferences deducible from the evidence).

¹⁰⁹ Coleman v. Himmelberger-Harrison Land &c. Co., 105 Mo. App. 254; s. c. 79 S. W. Rep. 981.

¹¹⁰ See *ante*, § 309: Coleman v. Himmelberger-Harrison Land &c. Co., 105 Mo. App. 254; s. c. 79 S. W. Rep. 981.

§ 316. Injuries Ascribed to Accident or Misfortune due to Childish Inexperience; No Evidence of Negligence on Part of Defendant.—The law regards an injury to a child of tender years as a misfortune without a remedy, where it occurs without any negligence on the part of the party charged therewith.¹¹¹

§ 318. Examples of Injuries to Children where the Defendant was Exonerated.—The plaintiff was denied a recovery on the ground of contributory negligence where the injuries were received under these circumstances:—Where a boy between thirteen and fourteen years old, went with a companion to see if the ice on a pond was strong enough to skate on, knowing that the water was over his head, and notwithstanding this knowledge, ran ahead of his companion, jumped over a strip of water surrounding the ice and slid to the middle of the pond, where the ice broke under his weight, and he was drowned.¹¹²

§ 321. Degree of Care to be Exercised by Parents or Guardians.—A parent is only required to exercise ordinary or reasonable care to prevent an injury to his child,¹¹³ and whether this care has been exercised in a particular case is usually a question for the jury.¹¹⁴

§ 322. Age of Custodian with Whom Child may be sent out.—Courts have refused to declare it negligence as a matter of law, to send out a child six and a half years old with a brother twelve years old, well acquainted with the city;¹¹⁵ a child of tender years in company with brothers and sisters eight¹¹⁶ and nine years old;¹¹⁷ a child seven years and five months old to attend school in the vicinity of railroad crossings attended by a sister eleven years old.¹¹⁸

¹¹¹ Lee v. Jones, 181 Mo. 291; s. c. 79 S. W. Rep. 927; Brown v. Schellenberg, 19 Pa. Super. Ct. 286. A child pushed into an excavation on a portion of premises which the law did not require to be fenced, cannot recover for the injuries from the owner of the premises where the child was seven years old and testified that she knew it would hurt her if she jumped in: Loftus v. Dehail, 133 Cal. 214; s. c. 65 Pac. Rep. 379.

¹¹² Heimann v. Kinnare, 190 Ill. 156; s. c. 60 N. E. Rep. 215; 52 L. R. A. 652; rev'g s. c. 92 Ill. App. 232.

¹¹³ Corbett v. Oregon Short Line R. Co., 25 Utah 449; s. c. 71 Pac. Rep. 1065. An instruction in an action for injuries to a child of four years, that to render the defendant railroad company liable for the injuries, the parent must have used reasonable care to restrain and keep

his child at home, and prevent him from going on defendant's tracks was held not open to objection, as it did not require the parent to keep his child in doors, but merely at home: Thomas v. Chicago & C. R. Co., 114 Iowa 169; s. c. 86 N. W. Rep. 259.

¹¹⁴ Phillips v. Duquesne Traction Co., 8 Pa. Super. Ct. 210; s. c. 29 Pittsb. Leg. J. (N. S.) 60.

¹¹⁵ Levine v. Metropolitan St. R. Co., 78 App. Div. (N. Y.) 426; s. c. 80 N. Y. Supp. 48; s. c. aff'd, 177 N. Y. 523; 69 N. E. Rep. 1125.

¹¹⁶ Kennedy v. Hills Bros. Co., 54 App. Div. (N. Y.) 29; s. c. 66 N. Y. Supp. 280.

¹¹⁷ Adams v. Metropolitan St. R. Co., 60 App. Div. (N. Y.) 188; s. c. 69 N. Y. Supp. 1117.

¹¹⁸ Illinois Cent. R. Co. v. Bandy, 88 Ill. App. 629.

§ 323. **Facts Imputing Negligence to Custodians as Matter of Law.**—In a jurisdiction where the negligence of a parent is imputed to the child, it is held negligence for the parents of a five-year-old child to permit him to go on the streets unattended at night.¹¹⁹ So where a father took his son nine years old to a locality where freight cars were being shifted and there left him unattended and unprotected, and the boy was injured while trespassing upon the cars, the father was held guilty of such contributory negligence as to bar a recovery for loss of the child's services and the expenses attendant on the injury.¹²⁰ In all cases it is essential to this defense that the negligence of the custodian should have been the proximate cause of the injury. Damages may be recovered, notwithstanding the negligence of the custodian, if the act of the child was not dangerous or different from what it would have been if directed by a reasonably prudent adult.¹²¹

§ 324. **Not Negligence per se to Permit Child to Escape or to go Unattended upon the Street.**¹²²

§ 329. **Whether Poverty of Parent Considered.**—In one jurisdiction it was held proper on the question of contributory negligence of

¹¹⁹ Lowery v. New York Ice Co., 26 Misc. (N. Y.) 163; s. c. 55 N. Y. Supp. 707.

¹²⁰ Pollack v. Pennsylvania R. Co., 210 Pa. 634; s. c. 60 Atl. Rep. 312.

¹²¹ McNeil v. Boston Ice Co., 173 Mass. 570; s. c. 54 N. E. Rep. 257.

¹²² The general proposition that it is not negligence *per se* to permit a child to escape and go unattended on the street finds support in these cases under the circumstances indicated: Garner v. Trumbull, 94 Fed. Rep. 321; s. c. 36 C. C. A. 361 (child left at play with older children in a yard escaping unobserved, and injured on railroad track two hundred fifty feet away; Elwood Electric St. R. Co. v. Ross, 26 Ind. App. 258; s. c. 58 N. E. Rep. 535 (recovery not prevented by fact that child four years old is permitted to go on a street in which street cars are operated); Elwood v. Addison, 26 Ind. App. 28; s. c. 59 N. E. Rep. 47 (parent not charged with negligence in permitting seven-year-old child to go alone on a street which the parent does not know is in a dangerous condition); O'Brien v. Hudner, 182 Mass. 381; s. c. 65 N. E. Rep. 788 (mother not charged with negligence in permitting an eight-year-old child to go into a yard to

play with an elder sister whence she escapes into the street and is struck by a team); Dehmann v. Beck, 61 App. Div. (N. Y.) 505; s. c. 70 N. Y. Supp. 29 (mere negligence of parents in permitting child to play on sidewalk from which it escaped to the street and was killed by a passing team not imputed to child); Koersen v. Newcastle Electric St. R. Co., 198 Pa. 30; s. c. 47 Atl. Rep. 851 (child nearly four years old on sidewalk in care of nurse, escaped unobserved into street where injured by electric car); Daubert v. Delaware & C. R. Co., 199 Pa. 345; s. c. 49 Atl. Rep. 72 (boy nine years old sent on an errand by his mother which required him to cross tracks with which he was familiar); Ploof v. Burlington Traction Co., 70 Vt. 509; s. c. 41 Atl. Rep. 1017; 43 L. R. A. 108 (not negligence to allow boy ten years old to go unattended on street on which cars ran); Trow v. Thomas, 70 Vt. 580; s. c. 41 Atl. Rep. 652; Decker v. McSorley, 111 Wis. 91; s. c. 86 N. W. Rep. 554 (parents of child four and a half years old not imputed with negligence in allowing child to go unattended on residence street at nine o'clock in the morning).

the parent in allowing the child on the street, to show that the child was without a father and the mother was in poor health.¹²³ In another case where a child was injured while in the custody of a sister nine years of age, the plaintiff was allowed to show that the parents were working people and at the time of the injury the father was at his work and the mother engaged in her household duties.¹²⁴

§ 330. Effect of Contributory Negligence of Parents upon Parents' Right of Action for Death or Injury of Child.—There is authority that a father is not the real plaintiff to an action by the administrator of a child killed by the negligence of another, so as to impute the negligence of the parent to the child, though he will be indirectly benefited as an heir to whom the damages recovered will be distributed in accordance with the law of the State.¹²⁵

§ 332. Illustrations of Negligence of Parents Barring their Right of Action.¹²⁶

§ 336. Greater Care Required of Persons who are Blind, Deaf, Aged, or Otherwise Infirm.—In conformity with the doctrine of the main section it is declared by one court that a person with impaired eyesight is required to exercise a degree of care beyond the ordinary, and if there is a failure to exercise this degree of care, contributory negligence may be imputed.¹²⁷

§ 338. Application of the Rule to Persons Non Compos Mentis.—In a recent case it is held that the fact that the mentally infirm husband of the plaintiff was at large and unattended during her temporary and necessary absence from home, and while so at large was run over by a train, did not, as a matter of law, necessarily charge her with contributory negligence defeating her action for his death.¹²⁸

§ 340. Voluntary Intoxication of Person Injured.¹²⁹

¹²³ Fullerton v. Metropolitan St. R. Co., 63 App. Div. (N. Y.) 1; s. c. 71 N. Y. Supp. 326.

¹²⁴ True & Co. v. Woda, 104 Ill. App. 15.

¹²⁵ Warren v. Manchester St. R. Co., 70 N. H. 352; s. c. 47 Atl. Rep. 735.

¹²⁶ A mother was imputed with negligence where she allowed a child four years of age to go unattended and unwarned into and across a street crowded with people and vehicles: Finkelstein v. American Ice Co., 88 N. Y. Supp. 942. The mother of child four years of age was charged with negligence imputable to child run over by a street car,

where the parents lived on a street on which street railway tracks were laid and about an hour before the accident the mother saw the child in the yard unattended with the gate leading to the street open: Cotter v. Lynn & Co. R. Co., 180 Mass. 145; s. c. 61 N. E. Rep. 818.

¹²⁷ Karl v. Juniata Co., 206 Pa. 633; s. c. 56 Atl. Rep. 78.

¹²⁸ Jackson v. Kansas City & Co. R., 157 Mo. 621; s. c. 58 S. W. Rep. 32; Simpson v. Rhode Island Co., 26 R. I. 200; s. c. 58 Atl. Rep. 658.

¹²⁹ The voluntary intoxication of the person killed or injured is not a bar to a recovery but is a circumstance to be considered in determin-

§ 345. **Care Required to Avoid Injuring Children.**—The law recognizes the fact that children act upon childish instincts and impulses and requires those charged with the duty of care and caution toward them to calculate upon this and take precaution accordingly. The degree of care in this situation, as elsewhere, is that known as "reasonable care."¹³⁰ It is the holding of one court that responsibility in an action for negligence for injuries to children is broader when the result is from acts of commission than when the injuries are the result of acts of omission leading up to unexpected consequences.¹³¹

§ 347. **What Facts Amount to Prima Facie Evidence of Negligence in Cases of Injuries to Children.**—In one case it was well reasoned that the mere fact that a boy twelve years of age was riding on the part of a loaded wagon which projected beyond the tailboard, did not, as a matter of law, show such contributory negligence as to prevent a recovery in an action against the owner of a following wagon so negligently driven that its tongue struck the boy and inflicted the injuries for which damages were sought.¹³²

§ 350. **Various Facts Amounting to Contributory Negligence as Matter of Law.**—Contributory negligence to an extent fatal to the plaintiff's recovery was held to exist in these cases:—Where a person engaged in work about the yard of an electric railway company was killed by electricity communicated from a trolley wire through a metal hoe with which he was working and which he carelessly placed over the wire;¹³³ where a person, unacquainted with the interior arrange-

ing whether such person was at the time of the accident taking that care of his own safety which ought to have been expected of a reasonably prudent man under the circumstances: *Wabash R. Co. v. Monegan*, 94 Ill. App. 82; *Clay v. Macon & C. R. Co.*, 111 Ga. 839; s. c. 36 S. E. Rep. 233; *Louisville & C. R. Co. v. Cummins*, 111 Ky. 333; s. c. 63 S. W. Rep. 594; 23 Ky. L. Rep. 681; *Clarke v. Philadelphia & C. R. & C. Co.*, 92 Minn. 418; s. c. 100 N. W. Rep. 231; *Lyons v. Dee*, 88 Minn. 490; s. c. 93 N. W. Rep. 899; *Kenney v. Rhineland*, 28 App. Div. (N. Y.) 246; s. c. 50 N. Y. Supp. 1088; s. c. aff'd, 163 N. Y. 576; 57 N. E. Rep. 1114; *Rhyner v. Menasha*, 107 Wis. 201; s. c. 83 N. W. Rep. 303. The intoxication of the injured person to defeat a recovery must have contributed to or proximately caused his injuries: *Missouri & C. R. Co. v. Jones*, 35 Tex. Civ. App. 584; s. c. 80 S. W. Rep. 852. The intoxicated person is held

to the exercise of the degree of care required of a sober man under the same circumstances: *Burke v. Chicago & C. R. Co.*, 108 Ill. App. 565; *Union Pac. R. Co. v. Smith*, — Neb. —; s. c. 99 N. W. Rep. 813; *Cogdell v. Wilmington & C. R. Co.*, 130 N. C. 313; s. c. 41 S. E. Rep. 541; *Balser v. Chicago & C. R. Co.*, 9 Ohio S. & C. P. Dec. 523; s. c. 7 Ohio N. P. 482; *Mooney v. Pennsylvania R. Co.*, 203 Pa. 222; s. c. 52 Atl. Rep. 191; *Vizachero v. Rhode Island Co.*, 26 R. I. 392; s. c. 59 Atl. Rep. 105.

¹³⁰ *Ficker v. Cleveland & C. R. Co.*, 9 Ohio S. & C. P. Dec. 804; s. c. 7 Ohio N. P. 600; *Bucci v. Waterman*, 25 R. I. 125; s. c. 54 Atl. Rep. 1059.

¹³¹ *Lopes v. Sahuque*, 114 La. 1004; s. c. 38 South. Rep. 810.

¹³² *Illinois Iron & C. Co. v. Weber*, 89 Ill. App. 368.

¹³³ *Proctor v. San Antonio St. R. Co.*, 26 Tex. Civ. App. 148; s. c. 62 S. W. Rep. 939.

ment of an apartment house, entered and passed along a dark hallway without being able to see where she was going, and fell down a flight of stairs at the end of the hallway;¹³⁴ where a person working on a swinging stage over a place used for loading wagons, allowed a rope to trail on the ground, and he was thrown by reason of the rope becoming entangled in one of the wheels of a wagon driven thereunder;¹³⁵ where a person employed to paint an elevator shaft, got on the cage and undertook to operate it himself and was injured by reason of his inability to stop the elevator, it appearing that the defendants provided a conductor to operate the elevator while the plaintiff was painting, and he knew this fact;¹³⁶ where the goods of a janitor of a building were injured from water overflowing by reason of waste pipes becoming choked with refuse matter, it being the duty of the janitor himself to keep the waste pipes clear.¹³⁷

¹³⁴ *Brugher v. Buchtenkirch*, 167 N. Y. 153; s. c. 60 N. E. Rep. 420; ¹³⁵ *Arzt v. Lit*, 198 Pa. 519; s. c. 48 Atl. Rep. 297.

rev'g s. c. 57 N. Y. Supp. 314.

¹³⁶ *Consumers' Brewing Co. v. Doyle*, 102 Va. 399; s. c. 46 S. E. Rep. 390. ¹³⁷ *Stanton v. Ashley*, 36 Misc. (N. Y.) 781; s. c. 74 N. Y. Supp. 886.

PART TWO.

RULES OF PROCEDURE WITH REFERENCE TO CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE.

[§§ 365-515.]

§ 365. **Jurisdictions in which Burden of Proving Freedom from Contributory Negligence is on Plaintiff.**¹—The courts in these jurisdictions do not generally extend the rule to negligence of the plaintiff subsequent to the injury which it is claimed has accentuated or aggravated the injury; the burden of proving this form of contributory negligence belongs to the defendant.²

§ 366. **Jurisdictions in which Contributory Negligence is an Affirmative Defense to be Averred and Proved.**³

¹ See generally: *Haner v. Northern Pac. Ry. Co.*, 7 Idaho 305; s. c. 62 Pac. Rep. 1028 (animal run over by cars); *Wilson v. Illinois Cent. R. Co.*, 109 Ill. App. 542; s. c. aff'd, 210 Ill. 603; 71 N. E. Rep. 398; *Jones v. Illinois Cent. R. Co.*, 106 Ill. App. 597; *Mutual Wheel Co. v. Mosher*, 85 Ill. App. 240; *Decatur v. Simpson*, 115 Iowa 348; s. c. 88 N. W. Rep. 839; *Brown v. Illinois Cent. R. Co.*, 123 Iowa 239; s. c. 98 N. W. Rep. 625; *Brennan v. Standard Oil Co.*, 187 Mass. 376; s. c. 73 N. E. Rep. 472; *Hunter v. Durand*, 137 Mich. 53; s. c. 100 N. W. Rep. 191; 11 Det. Leg. N. 138; *Scialo v. Steffens*, 105 App. Div. (N. Y.) 592; s. c. 94 N. Y. Supp. 305; *Bruce v. Brooklyn Heights R. Co.*, 68 App. Div. (N. Y.) 242; s. c. 74 N. Y. Supp. 324; *Larsen v. United States Mortgage & Co.*, 104 App. Div. (N. Y.) 76; s. c. 93 N. Y. Supp. 610; *Byrnes v. Interurban St. R. Co.*, 84 N. Y. Supp. 193; *Hoffman v. Syracuse Rapid Transit Ry. Co.*, 50 App. Div. (N. Y.) 83; s. c. 63 N. Y. Supp. 442.

² *Wissler v. Atlantic*, 123 Iowa 11; s. c. 98 N. W. Rep. 131.

³ The following cases support the doctrine that contributory negligence is an affirmative defense to be averred and proved by defendant: *Elliott v. Canadian Pac. R. Co.*, 129 Fed. Rep. 163; *Jefferson Hotel Co. v. Warren*, 128 Fed. Rep. 565; s. c. 63

C. C. A. 193; *Northern Pac. R. Co. v. Tynan*, 119 Fed. Rep. 288; *Ward v. Dampskibsselskabet Kjoebenhaven*, 136 Fed. Rep. 502; *Watertown v. Greaves*, 112 Fed. Rep. 183; s. c. 50 C. C. A. 172; *Atchison v. Wills*, 21 App. (D. C.) 548; *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 414; s. c. 61 N. E. Rep. 936; *Pittsburgh & R. Co. v. Lightheiser*, 163 Ind. 247; s. c. 71 N. E. Rep. 218, 660; *Nichols v. Baltimore & C. R. Co.*, 33 Ind. App. 229; s. c. 70 N. E. Rep. 183; 71 N. E. Rep. 170; *Chicago & C. R. Co. v. Lain*, — Ind. App. —; s. c. 72 N. E. Rep. 539; *Southern R. Co. v. Davis*, 34 Ind. App. 377; s. c. 72 N. E. Rep. 1053; *Harris v. Pittsburg & C. R. Co.*, 32 Ind. App. 600; s. c. 70 N. E. Rep. 407; *Chicago & C. R. Co. v. Vandenberg*, 164 Ind. 470; s. c. 73 N. E. Rep. 990; *Diamond Block Coal Co. v. Cuthbertson*, — Ind. —; s. c. 73 N. E. Rep. 818; aff'g s. c. 67 N. E. Rep. 558; 73 N. E. Rep. 132; *Wortman v. Minich*, 28 Ind. App. 31; s. c. 62 N. E. Rep. 85 (provable under general denial); *Coe v. Louisville & C. R. Co.*, 78 S. W. Rep. 439; s. c. 25 Ky. L. Rep. 1679; *Lancaster v. Walter*, — Ky. —; s. c. 80 S. W. Rep. 189; 25 Ky. L. Rep. 2189; *Buechner v. New Orleans*, 112 La. 599; s. c. 36 South. Rep. 603; 66 L. R. A. 334 (must be specially pleaded); *Pryor v. Walkerville*, 31 Mont. 618; s. c. 79 Pac. Rep. 240; *Simms*

§ 369. **Plaintiff Nonsuited if his Evidence Shows Contributory Negligence although not Pleased.**⁴—A court having in mind this doctrine has held erroneous an instruction having a tendency to leave the impression with the jury that unless the defendant by his evidence established contributory negligence, the defense must fail, the proper rule being that the plaintiff's recovery would be defeated if his own evidence showed him to have been negligent and the defendant introduced no evidence.⁵ So, where the plaintiff's evidence shows circumstances of contributory negligence which would defeat his right of recovery, the defendant may take advantage thereof, though his plea of contributory negligence has been stricken.⁶

§ 371. **Freedom from Contributory Negligence need not be Alleged by the Plaintiff in those Jurisdictions where the Negligence is an Affirmative Defense.**⁷

§ 374. **Particularity of Averment in Pleading Contributory Negligence.**—Contributory negligence was held to have been sufficiently

v. Forbes, 86 Miss. 412; s. c. 38 South. Rep. 546; Smith v. Southern R. Co., 129 N. C. 374; s. c. 40 S. E. Rep. 86 (defense not raised by demurrer); Dubiver v. City & C. R. Co., 44 Or. 227; s. c. 75 Pac. Rep. 693; 74 Pac. Rep. 915; Illinois Cent. R. Co. v. Davis, 104 Tenn. 442; s. c. 58 S. W. Rep. 296; Chicago & C. R. Co. v. Long, 32 Tex. Civ. App. 40; s. c. 74 S. W. 59; writ of error denied, 97 Tex. 69; 75 S. W. 483; Gulf & C. R. Co. v. Melville, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 863; Houston & C. R. Co. v. Byrd (Tex. Civ. App.), 61 S. W. Rep. 147; Texas & C. R. Co. v. Mayfield, 23 Tex. Civ. App. 415; s. c. 56 S. W. Rep. 942; Galveston & C. R. Co. v. Dehnisch (Tex. Civ. App.), 57 S. W. Rep. 64; Gulf & C. R. Co. v. Hall, 34 Tex. Civ. App. 535; s. c. 80 S. W. Rep. 133; Winchester v. Carroll, 99 Va. 727; s. c. 40 S. E. Rep. 37; 3 Va. Sup. Ct. Rep. 555; Gallagher v. Buckley, 31 Wash. 380; s. c. 72 Pac. Rep. 79; Currans v. Seattle & C. R. & C. Co., 34 Wash. 512; s. c. 76 Pac. Rep. 87.

⁴That burden is on defendant unless contributory negligence is shown by plaintiff's evidence, see: Hot Springs St. R. Co. v. Hildreth, 72 Ark. 572; s. c. 82 S. W. Rep. 245; Chaney v. Louisiana & C. R. Co., 176 Mo. 598; s. c. 75 S. W. Rep. 595; Taillon v. Mears, 29 Mont. 161; s. c.

74 Pac. Rep. 421; New Omaha & C. Light Co. v. Dent, — Neb. —; s. c. 94 N. W. Rep. 819; Coolbroth v. Pennsylvania R. Co., 209 Pa. 433; s. c. 58 Atl. Rep. 808. On the proposition that plaintiff is not required to disprove contributory negligence, but only make out a case clear of it, see: Raulston v. Philadelphia Traction Co., 13 Pa. Super. Ct. 412.

⁵Missouri & C. R. Co. v. Merrill, 61 Kan. 671; s. c. 60 Pac. Rep. 819.

⁶Engelking v. Kansas City & C. R. Co., 187 Mo. 158; s. c. 86 S. W. Rep. 89.

⁷See generally: Birmingham R., Light & Power Co. v. Hinton, 141 Ala. 606; s. c. 37 South. Rep. 635; Southern R. Co. v. Crenshaw, 136 Ala. 573; s. c. 34 South. Rep. 913; Baltimore & C. R. Co. v. Ryan, 31 Ind. App. 597; s. c. 68 N. E. Rep. 923; Chicago & C. R. Co. v. Stephenson, 33 Ind. App. 95; s. c. 69 N. E. Rep. 270; Cleveland & C. R. Co. v. Goddard, 33 Ind. App. 321; s. c. 71 N. E. Rep. 514; Nichols v. Baltimore & C. R. Co., 33 Ind. App. 229; s. c. 70 N. E. Rep. 183; 71 N. E. Rep. 170; Parkhurst v. Swift, 31 Ind. App. 521; s. c. 68 N. E. Rep. 620; Pittsburgh & C. R. Co. v. Browning, 34 Ind. App. 90; s. c. 71 N. E. Rep. 227; Rich v. Evansville & C. R. Co., 31 Ind. App. 10; s. c. 66 N. E. Rep. 1028; Ball v. Gussenhoven, 29 Mont. 321; s. c. 74 Pac. Rep. 871.

pleaded in an action for negligent death caused by falling into an open waterway, where the plea alleged that the deceased knew the location of the waterway, that it contained hot water and that it was at times uncovered; that he attempted to cross it when it was uncovered, and when steam arising therefrom obstructed his view; and that he did not use due care to ascertain whether it was covered.⁸ In an action for the death of a fireman in a collision, it was held that contributory negligence was sufficiently charged in a plea which averred that the deceased was guilty of contributory negligence in failing to give the engineer on his engine the proper signal, and that such failure caused the collision.⁹ The plea will generally be regarded as sufficient where it sets out the negligent acts or omissions of the plaintiff, and alleges the manner in which these contributed to his injury.¹⁰

§ 378. Allegations which Sufficiently Negative Contributory Negligence.—In Iowa it was held in an action by a married woman for personal injuries received while riding in a wagon driven by her husband, that an allegation of freedom from contributory negligence on the plaintiff's part was a sufficient denial of negligence of the husband imputable to the wife.¹¹ In Connecticut a declaration was sustained as sufficiently negating contributory negligence which alleged that the defendants so negligently operated their cars that they collided at the point where the two roads crossed each other, and the plaintiff seeing that the collision was inevitable became frightened, and jumped from the car to protect herself and was violently thrown to the ground and injured.¹² In Illinois an allegation negating the fact of contributory negligence set forth at the conclusion of a declaration containing several counts, is, in the absence of demurrer, deemed to refer to each count in the declaration and is sufficient.¹³ In Minnesota it is held that a plain allegation that an employé was injured while engaged in doing certain acts in the proper performance of his duty, and was without fault, sufficiently repels the inference that he was guilty of contributory negligence.^{13a}

§ 379. Examples of Complaints which do not Negative Contributory Negligence.—An allegation in a declaration by a servant against his employer for injuries from a kicking horse, that the plaintiff, act-

⁸ *Osborne v. Alabama Steel & C. Co.*, 135 Ala. 571; s. c. 33 South. Rep. 687.

⁹ *Texas & C. R. Co. v. Reagan*, 118 Fed. Rep. 815; s. c. 55 C. C. A. 427.

¹⁰ *Charping v. Toxaway Mills*, 70 S. C. 470; s. c. 50 S. E. Rep. 186.

¹¹ *Elenz v. Conrad*, 115 Iowa 183; s. c. 88 N. W. Rep. 337.

¹² *Brockett v. Fair Haven & C. R. Co.*, 73 Conn. 428; s. c. 47 Atl. Rep. 763.

¹³ *United States Brewing Co. v. Stoltenberg*, 113 Ill. App. 435; s. c. aff'd, 211 Ill. 531; 71 N. E. Rep. 1081.

^{13a} *Pope v. Great Northern R. Co.*, 94 Minn. 429; s. c. 103 N. W. Rep. 331.

ing with due care and caution for his own safety, hitched the horse furnished by his employer to a wagon, and while driving him in the discharge of his duties, was kicked, was construed to allege due care and caution for his own safety only at the time of hitching the horse and not subsequent thereto.¹⁴

§ 382. **When not Necessary, Under either Rule, to Negative Contributory Negligence.**—Where the negligence relied upon is of the character known as statutory negligence, it would seem unnecessary for the plaintiff to aver and prove that he was in the exercise of ordinary care.¹⁵

§ 383. **Not Necessary to Negative Contributory Negligence in Actions for Willful or Wanton Injuries.**¹⁶

§ 384. **Negating Contributory Negligence in an Action by a Child.**—An allegation of freedom from contributory negligence is not necessary where the complaint shows that the child was clearly *non sui juris* at the time of receiving his injuries.¹⁷

§ 385. **What Complaints are Demurrable as Showing Contributory Negligence on their Face.**—Where the declaration or complaint shows such contributory negligence on its face as would bar a recovery if pleaded as a defense, it is clear that a demurrer thereto should be sustained.¹⁸ Under this rule a declaration against a manufacturer of soap for negligence in its manufacture, which alleged that the soap when used by the plaintiff in his business as barber, and applied to the faces of a large number of his customers, poisoned them and caused a loss of trade, was held open to the objection that it showed the plaintiff negligent in continuing to use the soap on “a large number of customers” after knowledge of its effects.¹⁹ In an action for injuries received at a railroad crossing a complaint was held to disclose contributory negligence as a matter of law, which alleged that the plaintiff was aged and infirm, with impaired sight and hearing; that, as he approached the railroad crossing he observed a long freight train approaching on the south track and while waiting very near the north track for this train to pass, he was struck by an engine and cars backing toward him on such

¹⁴ Ward v. Danzeizen, 111 Ill. App. 163.

¹⁵ Junction Min. Co. v. Ench, 111 Ill. App. 346.

¹⁶ Continental Ins. Co. v. Clark, 126 Iowa 274; s. c. 100 N. W. Rep. 524.

¹⁷ Elwood Electric St. R. Co. v. Ross, 26 Ind. App. 258; s. c. 58 N. E. Rep. 535; Elwood v. Addison, 26 Ind. App. 28; s. c. 59 N. E. Rep. 47.

¹⁸ Stillwell v. South Louisville Land Co., 58 S. W. Rep. 696; s. c. 22 Ky. L. Rep. 785; 52 L. R. A. 325; Abrams v. Waycross, 114 Ga. 712; s. c. 40 S. E. Rep. 699; Lafayette v. Fitch, 32 Ind. App. 134; s. c. 69 N. E. Rep. 414.

¹⁹ Slattery v. Colgate, 25 R. I. 220; s. c. 55 Atl. Rep. 639.

track which, when he approached the crossing, were standing still; that he was engrossed in watching the freight train, which made considerable noise; and though he could easily have been seen by the servants of the train which struck him, it approached without warning.²⁰

§ 386. What Complaints not Demurrable as Showing Contributory Negligence on their Face.²¹

§ 387. Whether Defense of Contributory Negligence Admissible under General Issue.—Unless excepted to, the general plea of contributory negligence is sufficient in some jurisdictions to warrant the submission of the issue raised thereby, either generally, or in any and all forms which the evidence warrants.²² In a State where contributory negligence is regarded as an affirmative defense, a denial in an answer or allegations of the complaint that the plaintiff was without fault in bringing about his injury will raise the question and it is unnecessary specially to plead it as a defense.²³

§ 388. Doctrine that Defense not Admissible unless Specially Plead.²⁴—Where the rule requiring contributory negligence spe-

²⁰ Van Winkle v. New York & C. R. Co., 34 Ind. App. 476; s. c. 73 N. E. Rep. 157.

²¹ A complaint for the death of a railroad brakeman by the alleged negligence of another in failing to give the deceased notice of the turning of a switch, was held not demurrable as showing contributory negligence, which alleged that the deceased was without fault, but had no notice, knowledge or warning of the change of the switch, and that he could not have known thereof by the exercise of ordinary care and diligence: Cleveland & C. R. Co. v. Goddard, 33 Ind. App. 321; s. c. 71 N. E. Rep. 514. So, a declaration by a servant for injuries which averred that they were due to the defective manner in which the machinery causing the injuries had been set up, and that he had no knowledge of this condition, and could not by due care have ascertained the dangerous condition, was held not demurrable as showing contributory negligence in undertaking the service, when he knew nothing of the machinery, as the declaration did not disclose that plaintiff was not an infant or that he had not just been employed in the particular service without any knowledge or means of knowledge of the attendant risks; East Brook-

lyn Box Co. v. Nudling, 96 Md. 390; s. c. 54 Atl. Rep. 132. For other examples of complaints not demurrable on this ground, see: Wheeler v. Oak Harbor Head Lining & C. Co., 126 Fed. Rep. 348 (woman employé injured by skirts becoming caught on revolving shaft under a window in which she had seated herself); Kansas City & C. R. Co. v. Thornhill, 141 Ala. 215; s. c. 37 South. Rep. 412 (section hand injured by collision while attempting to remove hand car from track in presence of approaching locomotive, the plaintiff acting under orders of his foreman without time to appreciate danger); Shepherd v. Morton-Edgar Lumber Co., 115 Wis. 522; s. c. 92 N. W. Rep. 260 (injury to plaintiff by revolving knives under table of a planing machine).

²² Stewart v. Galveston & C. R. Co., 34 Tex. Civ. App. 370; s. c. 78 S. W. Rep. 979.

²³ Hutchings v. Mills Mfg. Co., 68 S. C. 512; s. c. 47 S. E. Rep. 710; Mitchiner v. Western Union Tel. Co., 70 S. C. 522; s. c. 50 S. E. Rep. 190.

²⁴ The doctrine that the defense will not be admitted unless specially pleaded is supported by these cases: Western Union Tel. Co. v. Morris, 10 Kan. App. 61; s. c. 61 Pac. Rep. 972; Buechner v. New Orleans, 112 La.

cially to be pleaded is strictly construed, a recovery will be refused, where the defense is not so pleaded, though the evidence shows plaintiff's negligence.²⁵

§ 389. **Whether the Intoxication of the Plaintiff or of the Person Killed or Injured must be Specially Plead.**²⁶

§ 391. **Whether a Reply Necessary to a Special Pleading of Contributory Negligence.**—Where contributory negligence is a matter of affirmative defense to be specially pleaded, as in Kentucky, a reply is necessary to an allegation of contributory negligence in the answer;²⁷ and the fact that an amended petition filed after an answer, alleged that the injured person exercised ordinary care, has been held not to operate as a denial of the allegation or take the place of a reply.²⁸

§ 401. **Presumption of Right-Acting and Freedom from Contributory Negligence under the Rule which Puts the Burden of Proving Contributory Negligence upon the Defendant.**²⁹—It is plain that this presumption cannot be invoked where there is direct evidence as to the conduct of the injured person during the entire time that he was in the zone of danger.³⁰ Similarly where there is direct testimony on

599; s. c. 36 South. Rep. 603; 66 L. R. A. 334; Meisner v. Dillon, 29 Mont. 116; s. c. 74 Pac. Rep. 130. The defenses that whatever damages were sustained by plaintiff were due to his contributory negligence, and that such injuries were sustained because of the negligence of a third person, unknown to defendant, need not be specially pleaded: Levy v. Metropolitan St. R. Co., 34 Misc. (N. Y.) 220; s. c. 68 N. Y. Supp. 944; appeal dismissed, 34 Misc. (N. Y.) 518; 69 N. Y. Supp. 973.

²⁵ Strickland v. Capital City Mills, 70 S. C. 211; s. c. 49 S. E. Rep. 478.

²⁶ In South Carolina the fact of plaintiff's intoxication may be shown under general denial: Sharpton v. Augusta &c. R. Co., 72 S. C. 162; s. c. 51 S. E. Rep. 553.

²⁷ Louisville &c. R. Co. v. Paynter, 82 S. W. Rep. 412; s. c. 26 Ky. L. Rep. 761.

²⁸ Louisville &c. R. Co. v. Paynter, 82 S. W. Rep. 412; s. c. 26 Ky. L. Rep. 761.

²⁹ That the surrounding circumstances and natural instinct of self-preservation may be considered by the jury in cases where there is no

direct evidence, see: Atchison v. Wills, 21 App. (D. C.) 548; Indiana &c. R. Co. v. Otstot, 113 Ill. App. 37; s. c. aff'd, 212 Ill. 429; 72 N. E. Rep. 387; Phinney v. Illinois Cent. R. Co., 122 Iowa 488; s. c. 98 N. W. Rep. 358; Kansas City &c. R. Co. v. Gallagher, 68 Kan. 424; s. c. 75 Pac. Rep. 469; Riska v. Union Depot R. Co., 180 Mo. 168; s. c. 79 S. W. Rep. 445; Priesmeyer v. St. Louis Transit Co., 102 Mo. App. 518; s. c. 77 S. W. Rep. 313 (presumption that person struck by car looked and listened before attempting to cross the track); Miller v. Boston &c. R. Co., 73 N. H. 330; s. c. 61 Atl. Rep. 360 (brakeman struck by low bridge); Dubiver v. City &c. R. Co., 44 Or. 227; s. c. 74 Pac. Rep. 915; 75 Pac. Rep. 693 (presumption applies to minor); Texas &c. R. Co. v. Shoemaker, 98 Tex. 451; s. c. 84 S. W. Rep. 1049; rev'g s. c. 81 S. W. Rep. 1019.

³⁰ Golinvaux v. Burlington &c. R. Co., 125 Iowa 625; s. c. 101 N. W. Rep. 465; Newport News Pub. Co. v. Beaumeister, 102 Va. 677; s. c. 47 S. E. Rep. 821.

this issue the jury cannot be enlightened by evidence that the injured person was cautious and careful, and such evidence should be refused.³¹

§ 406. Theories as to Shifting of Burden of Proof on the Issue of Contributory Negligence.—In a State where the burden of proof as to contributory negligence is placed on the defendant, this burden is not shifted to the plaintiff by the mere fact of allegations in his complaint negating contributory negligence.³² And there is authority that the burden will not be shifted from the defendant in these jurisdictions by the fact that the testimony of the plaintiff tends to show his own carelessness, and this carelessness might have caused the injury complained of.³³ An instruction in an action for death by wrongful act, that to hold the defendant liable it must appear that the deceased was without fault, was held not erroneous as shifting the burden of proof and telling the jury that the plaintiff must affirmatively show lack of contributory negligence.³⁴

§ 414. Due Care may be Shown by Circumstantial as well as Direct Evidence.—It is not necessary that freedom from contributory negligence be shown by direct testimony; the evidence will be sufficient where the inference of due care may be drawn from the general tendency of the evidence in favor of the plaintiff.³⁵

§ 417. What Proof Sustains the Burden when on Defendant.—In determining whether the injured person was guilty of negligence contributing to the accident, the jury are to consider all the evidence in the case and are not restricted solely to a consideration of the evidence adduced by the party charged with the burden of proof of that issue.³⁶ An instruction in an action for injuries that if the jury find

³¹ *Quincy Gas &c. Co. v. Clark*, 109 Ill. App. 20.

³² *Pennsylvania Co. v. Fertig*, 34 Ind. App. 459; s. c. 70 N. E. Rep. 834. The burden on defendant of showing contributory negligence does not shift throughout the trial: *Harris v. Pittsburg &c. R. Co.*, 32 Ind. App. 600; s. c. 70 N. E. Rep. 407.

³³ *Rupp v. Sarpy Co.*, — Neb. —; s. c. 98 N. W. Rep. 1042.

³⁴ *Quill v. Southern Pac. Co.*, 140 Cal. 268; s. c. 73 Pac. Rep. 991.

³⁵ *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531; s. c. 71 N. E. Rep. 1081; aff'g s. c. 113 Ill. App. 435; *Pittsburgh &c. R. Co. v. Parish*, 28 Ind. App. 189; s. c. 62 N. E. Rep. 514; *Newell v. Stony Point*, 59 App. Div. (N. Y.) 237; s. c. 69 N. Y.

Supp. 583; *Hancock v. New York Cent. &c. R. Co.*, 100 App. Div. (N. Y.) 161; s. c. 91 N. Y. Supp. 601; *Upper Alton v. Green*, 112 Ill. App. 439; *Wolpers v. New York &c. Electric &c. Co.*, 91 App. Div. (N. Y.) 424; s. c. 86 N. Y. Supp. 845.

³⁶ *Van Winkle v. New York &c. R. Co.*, 34 Ind. App. 476; s. c. 73 N. E. Rep. 157; *Chicago &c. R. Co. v. Stephenson*, 33 Ind. App. 95; s. c. 69 N. E. Rep. 270; *Indianapolis &c. Rapid Transit Co. v. Haines*, 33 Ind. App. 63; s. c. 69 N. E. Rep. 187; *Gillum v. New York &c. S. Co.* (Tex. Civ. App.), 76 S. W. Rep. 232; *Missouri &c. R. Co. v. Jolley*, 31 Tex. Civ. App. 512; s. c. 72 S. W. Rep. 871; *Silcock v. Rio Grande &c. R. Co.*, 22 Utah 179; s. c. 61 Pac. Rep. 565.

that the plaintiff is entitled to recover but for her own contributory negligence, then the burden of showing her contributory negligence is on the defendant, has been held not misleading, on the ground that it conveys the impression that all the evidence to be considered must be offered by the defendant, or that the plaintiff's testimony is to be disregarded in this respect.³⁷

§ 419. Burden on Plaintiff to Remove Presumption of Contributory Negligence Raised by his own Testimony.³⁸

§ 420. Relevancy of Evidence on Questions of Contributory Negligence.—Evidence of previous acts of carelessness on the plaintiff's part is generally admissible.³⁹ Evidence of a custom on the part of persons in the same line of employment to do what the plaintiff did,—as for example, that it was customary for railroad yardmasters and switchmen to ride on the ladders of freight cars while setting in and taking out cars from switch tracks in yards—is admissible.⁴⁰

§ 422. Burden of Proof as to Discovered Peril.—The plaintiff has the burden of proof to show that, notwithstanding his negligence, the defendant could have avoided injuring him by the exercise of ordinary care.⁴¹

§ 425. Contributory Negligence Generally a Question of Fact for the Jury.—It is a restatement of a familiar principle to say that if there is any doubt as to whether the plaintiff was guilty of contributory negligence, the question is not one of law for the court, but one of fact for the jury. It is the province of the jury to determine the question whenever there may be reasonably a difference of opinion as to the inferences and conclusions from the facts.⁴²

³⁷ *Topeka v. Myers*, 10 Kan. App. 576; s. c. 63 Pac. Rep. 273.

³⁸ In support of the general proposition that plaintiff, having raised the implication that his own negligence contributed to bring about his injuries, has the burden of overthrowing this presumption, see: *Texas Portland Cement & Co. v. Ross*, 35 Tex. Civ. App. 597; s. c. 81 S. W. Rep. 94; *Bier v. Hosford*, 35 Wash. 544; s. c. 77 Pac. Rep. 867.

³⁹ *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269; s. c. 68 N. E. Rep. 238.

⁴⁰ *Boyce v. Wilbur Lumber Co.*, 119 Wis. 642; s. c. 97 N. W. Rep. 563.

⁴¹ *Smith v. Atlanta & C. R. Co.*, 132 N. C. 819; s. c. 44 S. E. Rep. 663.

⁴² *Cary Bros. & Hannon v. Morrison*, 129 Fed. Rep. 177; s. c. 63 C. C. A. 267; 65 L. R. A. 659; *Chicago &*

R. Co. v. Bell, 111 Ill. App. 280; *Chicago & C. R. Co. v. Burrige*, 107 Ill. App. 23; *Chicago & C. R. Co. v. Condon*, 108 Ill. App. 639; *Elgin & C. R. Co. v. Duffy*, 93 Ill. App. 463; s. c. aff'd 191 Ill. 489; s. c. 61 N. E. Rep. 432; *McLeansboro v. Trammel*, 109 Ill. App. 524; *Shickle-Harrison & Iron Co. v. Beck*, 112 Ill. App. 444; *Toledo & C. R. Co. v. Christy*, 111 Ill. App. 247; *Toledo & C. R. Co. v. Deliplane*, 106 Ill. App. 634; *Ft. Wayne v. Mellinger*, 22 Ind. App. 191; s. c. 53 N. E. Rep. 426; *Cummings v. Wichita R. & C. Co.*, 68 Kan. 218; s. c. 74 Pac. Rep. 1104; *Smith v. Pere Marquette R. Co.*, 136 Mich. 224; s. c. 98 N. W. Rep. 1022; 10 Det. Leg. N. 1033; *Harriman v. Kansas City Star Co.*, 81 Mo. App. 124; *Chicago & C. R. Co. v. Winfrey*, 67 Neb. 13; s. c.

§ 426. Unless no Recovery could be had upon any View which could be Properly Taken of the Facts.—Where the evidence raises a clear presumption of negligence on the part of the plaintiff contributing to his injury, and no evidence is offered by him to rebut that presumption, the court should direct a verdict for the defendant.⁴³

§ 427. Always for the Jury where the Evidence is Conflicting.⁴⁴

§ 428. Is a Question of Law upon Undisputed Facts which do not Admit of Different Inferences.—Where the evidence is uncontradicted, and of such a character that reasonable minds would not disagree in the conclusion that the injury was caused by the plaintiff's contributory negligence, the question is no longer a question of fact for the jury, but a question for the court.⁴⁵

§ 429. Is a Question of Fact where Fair-Minded Men Might Draw Different Conclusions from Undisputed Facts.—The question should not be withdrawn from the jury where the evidence is such that reasonable persons may differ as to its effect as proof of contributory

93 N. W. Rep. 526; Mathiesen v. Omaha St. R. Co., — Neb. —; s. c. 97 N. W. Rep. 243; Healey v. Ehret, 42 App. Div. (N. Y.) 27; s. c. 58 N. Y. Supp. 917; Cromley v. Pennsylvania R. Co., 208 Pa. 445; s. c. 57 Atl. Rep. 832; Coolbroth v. Pennsylvania R. Co., 209 Pa. 433; s. c. 58 Atl. Rep. 808; Hone v. Mammoth Min. Co., 27 Utah 168; s. c. 75 Pac. Rep. 381.

⁴³ Baltimore &c. R. Co. v. McClellan, 69 Ohio St. 142; s. c. 68 N. E. Rep. 816.

⁴⁴ Price v. St. Louis &c. R. Co., — Ark. —; s. c. 88 S. W. Rep. 575; Earl v. Cedar Rapids, 126 Iowa 361; s. c. 102 N. W. Rep. 140; Strauss v. United Railroads &c. Co., 61 Atl. Rep. 137; McIntyre v. Detroit Safe Co., 129 Mich. 385; s. c. 89 N. W. Rep. 39; 8 Det. Leg. N. 1019; Wacker v. St. Louis Transit Co., 108 Mo. App. 645; s. c. 84 S. W. Rep. 138; Omaha v. Houlihan, — Neb. —; s. c. 100 N. W. Rep. 415; Coolbroth v. Pennsylvania R. Co., 209 Pa. 433; s. c. 58 Atl. Rep. 808 (whether person injured at crossing stopped to look and listen); Morrow v. Gaffney Mfg. Co., 70 S. C. 242; s. c. 49 S. E. Rep. 573 (evidence conflicting as to whether plaintiff was of sufficient mental capacity to be charged with contributory negligence); Charlottesville v. Stratton, 102 Va. 95; s. c. 45 S. E. Rep. 737.

⁴⁵ McGhee v. Campbell, 101 Fed. Rep. 936; s. c. 42 C. C. A. 94; Riggs v. Standard Oil Co., 130 Fed. Rep. 199; Louisville &c. R. Co. v. Pearce, 142 Ala. 680; s. c. 39 South. Rep. 72; Wilson v. Illinois Cent. R. Co., 109 Ill. App. 542; s. c. aff'd, 210 Ill. 603; 71 N. E. Rep. 398; Central R. Co. v. Sehnert, 115 Ill. App. 560; Lake St. &c. R. Co. v. Gormley, 108 Ill. App. 59; O'Donnell v. Chicago &c. R. Co., 106 Ill. App. 287; Bush v. Grant, 61 S. W. Rep. 363; s. c. 22 Ky. L. Rep. 1766; Standard Oil Co. v. Eiler, 110 Ky. 209; s. c. 61 S. W. Rep. 8; 22 Ky. L. Rep. 1641; Topp v. United Railways &c. Co., 99 Md. 630; s. c. 59 Atl. Rep. 52; Bridges v. Jackson &c. R. &c. Co., 86 Miss. 584; s. c. 38 South. Rep. 788; Hecker v. Chicago &c. R. Co., 110 Mo. App. 162; s. c. 84 S. W. Rep. 126; Gress v. Missouri Pac. R. Co., 109 Mo. App. 716; s. c. 84 S. W. Rep. 122; Campbell v. Stanberry, 85 Mo. App. 159; Meyers v. Chicago &c. R. Co., 103 Mo. App. 268; s. c. 77 S. W. Rep. 149; Benjamin v. Metropolitan St. Ry. Co., 84 N. Y. Supp. 458; Haltom v. Southern R. Co., 127 N. C. 255; s. c. 37 S. E. Rep. 262; Pennsylvania Co. v. Alburn, 23 Ohio Cir. Ct. R. 130; Lebeau v. Dyerville Mfg. Co., 26 R. I. 34; s. c. 57 Atl. Rep. 1092; Burian v. Seattle Electric Co., 26 Wash. 606; s. c. 67 Pac. Rep. 214.

negligence.⁴⁶ Stated in another way, the question of contributory negligence is for the jury where equally reasonable persons might conscientiously differ in the conclusions to be drawn from the evidence.⁴⁷

§ 430. Is a Question for the Jury where Facts in Dispute and Fair-Minded Men Might Draw Different Inferences from them.⁴⁸

§ 431. Where the Evidence so Clearly Shows Contributory Negligence that a Verdict for the Plaintiff would be set Aside.—The case may properly be withdrawn from the jury where the evidence is of such a conclusive character that the court would be compelled to set aside a verdict in opposition to it.⁴⁹

§ 432. Where an Unavoidable Inference of Contributory Negligence Arises Out of Plaintiff's Own Case.—Where the plaintiff's own testimony conclusively shows negligence on his part contributing to the injury, the question of negligence then becomes one of law for the court, and a verdict may properly be directed for the defendant,⁵⁰ and this though the defendant has introduced no evidence in support of his plea of contributory negligence.⁵¹

§ 443. In Cases of Injuries to Children.—Various cases where the question of contributory negligence of a child was deemed a question for the jury are collected in the margin.⁵²

⁴⁶ *St. Louis &c. R. Co. v. Hitt*, — Ark. —; s. c. 88 S. W. Rep. 908, 990; *Jenkins v. Baltimore &c. R. Co.*, 98 Md. 402; s. c. 56 Atl. Rep. 966; *Gardner v. Friederich*, 25 App. Div. (N. Y.) 521; s. c. 49 N. Y. Supp. 1077; s. c. aff'd, 163 N. Y. 568; 57 N. E. Rep. 1110; *McLean v. Omaha &c. R. &c. Co.*, — Neb. —; s. c. 103 N. W. Rep. 285; aff'g s. c. 100 N. W. Rep. 935.

⁴⁷ *Greenawaldt v. Lake Shore &c. R. Co.*, 165 Ind. 219; s. c. 73 N. E. Rep. 910; 74 N. E. Rep. 1081.

⁴⁸ *Florence v. Snook*, 20 Colo. App. 356; s. c. 78 Pac. Rep. 994; *Mathew v. Wabash R. Co.*, 115 Mo. App. 468; s. c. 78 S. W. Rep. 271; 81 S. W. Rep. 646.

⁴⁹ *Christensen v. Metropolitan St. R. Co.*, 137 Fed. Rep. 708; *Dunworth v. Grand Trunk &c. R. Co.*, 127 Fed. Rep. 307; *Maysville v. Guilfoyle*, 110 Ky. 670; s. c. 62 S. W. Rep. 493; 23 Ky. L. Rep. 43.

⁵⁰ *Babb v. Oxford Paper Co.*, 99 Me. 298; s. c. 59 Atl. Rep. 290; *Silcock v. Rio Grande &c. R. Co.*, 22 Utah 179; s. c. 61 Pac. Rep. 565.

⁵¹ *Bridges v. Jackson &c. R. Co.*,

86 Miss. 584; s. c. 38 South. Rep. 788.

⁵² *Cincinnati &c. Spring Co. v. Brown*, 32 Ind. App. 58; s. c. 69 N. E. Rep. 197 (whether child was imputed with contributory negligence in running into a wire boundary fence, the existence of which he did not know); *Owensboro v. York*, 117 Ky. 294; s. c. 77 S. W. Rep. 1130; 25 Ky. L. Rep. 1397, 1439 (whether boy twelve years old used such care as might be reasonably expected of a child of his age in touching a live electric wire on a dare); *Butler v. New York &c. R. Co.*, 177 Mass. 191; s. c. 58 N. E. Rep. 592 (whether a boy four years old exercised care of a prudent boy of his years to escape being run over by cars); *St. Louis &c. R. Co. v. Shiftet*, 94 Texas 131; s. c. 58 S. W. Rep. 945 (whether boy twelve years old was of sufficient intelligence to be imputed with contributory negligence). In the following cases it was held a question for the jury whether the parent of the child was guilty of contributory negligence in his care of the child at the time of the acci-

§ 447. **In Cases of Injuries Received in Using Defective Highways, Streets, Bridges, Sidewalks.**—It has been held a question for the jury whether a driver exercised reasonable care at the time of an accident due to his vehicle striking an excavation, and whether he was a skillful driver;⁵³ whether the intoxication of a pedestrian contributed to his injury on a defective sidewalk;⁵⁴ whether a person, injured by contact with a defect in a sidewalk, is to be charged with contributory negligence by reason of knowledge of the existence of such defect.⁵⁵

§ 448. **In Cases of Collisions and Similar Accidents in Using the Highway.**—The question of contributory negligence was held a question for the jury where a bicyclist, riding at night, thought that red lights showing the location of a temporary bridge over a trench dug across a street were intended to show that the place of danger was between such lights, and riding outside the lights, was thrown into the trench and injured.⁵⁶

§ 451. **In Cases of Railway Fires.**⁵⁷

§ 457. **When Necessary to Instruct as to Contributory Negligence.**—The practice in many jurisdictions justifies the giving of an instruction on contributory negligence where the plaintiff's own evidence shows that he was guilty of negligence which contributed to the injury, though such negligence is not pleaded,⁵⁸ and such a charge is not requested.⁵⁹

§ 461. **What Instructions on Contributory Negligence Ought to be Given.**⁶⁰

dent: *McNulta v. Jenkins*, 91 Ill. App. 309; *Mellen v. Old Colony St. R. Co.*, 184 Mass. 399; s. c. 68 N. E. Rep. 679; *Walsh v. Loorem*, 180 Mass. 18; s. c. 61 N. E. Rep. 222; *Burke v. Borden's Condensed Milk Co.*, 98 App. Div. (N. Y.) 219; s. c. 90 N. Y. Supp. 527; *Kaplan v. Metropolitan St. R. Co.*, 98 App. Div. (N. Y.) 133; s. c. 90 N. Y. Supp. 585; *Jones v. United Traction Co.*, 201 Pa. 346; s. c. 50 Atl. Rep. 827; *Muhlhaue v. Monongahela St. R. Co.*, 201 Pa. 244; s. c. 50 Atl. Rep. 940; *Duffy v. Sable Ironworks*, 210 Pa. 326; s. c. 59 Atl. Rep. 1100; *Holdridge v. Mendenhall*, 108 Wis. 1; s. c. 83 N. W. Rep. 1109 (whether parents were negligent in permitting a child on the street alone); *O'Brien v. Wisconsin Cent. R. Co.*, 119 Wis. 7; s. c. 96 N. W. Rep. 424.

⁵⁷ *Nosler v. Coos Bay & C. R. & C. Co.*, 39 Or. 331; s. c. 64 Pac. Rep. 644, 855.

⁵⁴ *Rhyner v. Menasha*, 107 Wis. 201; s. c. 83 N. W. Rep. 303.

⁵⁵ *Morrissey v. Smith*, 67 App. Div. (N. Y.) 189; s. c. 73 N. Y. Supp. 673.

⁵⁶ *Cumming v. T. A. Gillespie Co.*, 62 N. J. L. 370; s. c. 41 Atl. Rep. 693, 868.

⁵⁷ *Chicago & C. R. Co. v. Willard*, 111 Ill. App. 225 (whether property owner has exercised care of reasonable man to save his property from destruction).

⁵⁸ *Pim v. St. Louis Transit Co.*, 108 Mo. App. 713; s. c. 84 S. W. Rep. 155.

⁵⁹ *Atlanta & C. R. Co. v. Gardner*, 122 Ga. 82; s. c. 49 S. E. Rep. 818.

⁶⁰ It has been held error for a court to refuse to charge that the law places on all persons the duty to exercise reasonable care to avoid injury, and even though defendant was negligent and the plaintiff was injured thereby, if the evidence

§ 462. What Instructions as to Contributory Negligence not Deemed Erroneous.⁶¹—It has been held proper to instruct the jury that if they believe “the plaintiff failed to exercise that degree of care and caution which persons of his own age, capacity and experience may reasonably be expected ordinarily to use in the same situation and under like circumstances, and that but for the failure to use such care and caution the injury to him would not have occurred,” then such plaintiff was guilty of contributory negligence, and the jury could find for the defendant.⁶² Where there is no evidence of contributory negligence and an instruction on that point might well have been refused, the defendant is not harmed and cannot complain, though an instruction on that point was not literally correct.⁶³

§ 464. What Instructions as to Contributory Negligence have been held Erroneous.⁶⁴

shows that the injury could have been avoided by the exercise of ordinary care by the plaintiff and that he did not exercise such care the defendant was not liable, though the court gave an abstract instruction on this subject: *Cullen v. Higgins*, 216 Ill. 78; s. c. 74 N. E. Rep. 698.

⁶¹ An instruction that reasonable and ordinary care is “the degree of care the plaintiff must exercise before she could recover, and that defendant and its servants must have exercised to avoid liability,” was sustained against the objection that it misled the jury into believing that if the company was negligent it was liable, regardless of the contributory negligence of plaintiff: *Cleveland &c. R. Co. v. Penketh*, 27 Ind. App. 210; 60 N. E. Rep. 1095. The words “any act” in an instruction that plaintiff was guilty of contributory negligence if he did any act directly contributing to the injury, will be construed as “any negligent act”: *Hall v. Cedar Rapids &c. R. Co.*, 115 Iowa 18; s. c. 87 N. W. Rep. 739. Where it was contended that a person killed at a railroad crossing was asleep at the time, and there was no evidence that his condition was not self-imposed, an instruction was held not open to objection which stated that if he was asleep while driving over the crossing, he was guilty of negligence which would prevent a recovery, though the instruction made no distinction between sleep of a voluntary and

sleep of an involuntary character: *Dalton v. Chicago &c. R. Co.*, 114 Iowa 257; s. c. 86 N. W. Rep. 272. An instruction that where plaintiff was careless himself and the injury was primarily due to his own carelessness and his own conduct was the proximate cause of the injury, he cannot recover, though the defendant was negligent, and that it was not sufficient for the defendant to show that plaintiff had been somewhat negligent, but the jury must find such negligence the proximate cause of the injury, was not open to the objection that it impressed on the jury that plaintiff's negligence alone would be considered the proximate cause, without pointing out to them that if any negligence on the part of the plaintiff contributed to the injury, there could be no recovery: *Easler v. Southern R. Co.*, 59 S. C. 311; s. c. 37 S. E. Rep. 938.

⁶² *Illinois Cent. R. Co. v. Wilson*, 63 S. W. Rep. 608; s. c. 23 Ky. L. Rep. 684.

⁶³ *Kentucky &c. Bridge Co. v. Montgomery*, 67 S. W. Rep. 1008; s. c. 24 Ky. L. Rep. 167; 57 L. R. A. 781.

⁶⁴ In Georgia it is held improper to charge the bare language of the statute governing contributory negligence as the method tends to mislead the jury about a point on which they should be fully and correctly instructed, with explanation as to the classes of cases to which these sections are applicable: *Savannah &c.*

§ 466. **Necessity of Confining the Instructions to the Issues made by the Pleadings.**⁶⁵

§ 468. **Instructions which Invade the Province of the Jury.**—It is regarded as an invasion of the prerogative of the jury for the court to instruct that, if the jury find certain enumerated facts established by the evidence, those facts would constitute negligence as a matter of law. In a case where there are a number of facts to be determined bearing on the issue, it would seem the better practice to instruct the jury as to the principles of law by which they are to be controlled, leaving them to apply such principles to the facts found.⁶⁶

R. Co. v. Hatcher, 118 Ga. 273; s. c. 45 S. E. Rep. 239. An instruction that unless the plaintiff had shown by a preponderance of the evidence that he was not guilty of a failure to exercise ordinary care, or, that if he was, such negligence in no way contributed to his injury, he was not entitled to recover, was held open to an objection that it in effect allowed a recovery, though the plaintiff was guilty of slight negligence: Wilder v. Great Western Cereal Co., — Iowa —; s. c. 104 N. W. Rep. 434. A requested instruction that plaintiff is presumed to have known what she could have seen, by the exercise of ordinary and reasonable observation, was held properly refused, the reason being that the charge stated a mere abstract proposition of law: O'Keefe v. St. Louis &c. R. Co., 108 Mo. App. 177; s. c. 83 S. W. Rep. 308. An instruction on the issue of contributory negligence is defective which excludes the idea that defendant was negligent at all, as there can be no contributory negligence unless there has been preceding negligence on the part of the defendant: Graves v. Norfolk &c. R. Co., 136 N. C. 3; s. c. 48 S. E. Rep. 502. An instruction in an action for injuries to a member of a sleighing party from a defective highway was plainly erroneous where it was susceptible of the construction that plaintiff was to be imputed with contributory negligence in joining the sleighing party over the public highway: Templeton v. Warriorsmark Tp., 200 Pa. 165; s. c. 49 Atl. Rep. 950. An instruction on the issue of contributory negligence is erroneous which requires proof of the issue by defendant to the "jury's satisfaction," as such a charge requires a

higher degree of proof in the establishment of the defense than the law demands: Gulf &c. R. Co. v. Condra, 36 Tex. Civ. App. 556; s. c. 82 S. W. Rep. 528. An instruction that if plaintiff places himself in a position of known danger when he might have avoided it and while there received the injury complained of, he was guilty of contributory negligence, although the danger might have been caused by defendant, was held defective on the ground that it omitted the essential that the injury did actually result from the conduct of plaintiff and that an ordinarily prudent person under the circumstances would have reasonably anticipated the infliction of injuries from like conduct: Lynch v. Waldwick, 123 Wis. 351; s. c. 101 N. W. Rep. 925. An instruction is erroneous which charges that, if the plaintiff's want of ordinary care or his negligence contributed in any material degree to the accident, he was not entitled to recover, even though the defendant was negligent, as the use of the word "material" allowed the consideration by the jury of the degree of plaintiff's negligence, since there are no degrees of care and negligence: Laflam v. Missisquoi Pulp Co., 74 Vt. 125; s. c. 52 Atl. Rep. 526. The question of negligence is to be determined from the facts, hence an instruction was properly refused which precluded a recovery if the jury find a certain fact: Kilpatrick v. Grand Trunk Ry. Co., 74 Vt. 288; s. c. 52 Atl. Rep. 531.

⁶⁵ Davis v. Paducah R. &c. Co., 113 Ky. 267; s. c. 68 S. W. Rep. 140; 24 Ky. L. Rep. 135.

⁶⁶ Langbein v. Swift, 121 Fed. Rep. 416. But see Memphis St. R. Co. v. Haynes, 112 Tenn. 712; s. c. 81 S. W.

§ 473. **As to the Fullness and Particularity of Instructions on Contributory Negligence.**—It is not necessary that an instruction should, in express terms, designate the negligence of the plaintiff as contributory negligence. It is enough that the defense is presented with sufficient fullness that the plaintiff cannot recover if he was guilty of negligence.⁶⁷ Where the court presents the issue of contributory negligence in a general way the defendant is entitled to a special instruction applying the law to the particular facts.⁶⁸ In a Texas case where an answer did not allege specific acts of contributory negligence of the plaintiff, but merely the negligence of the father of the plaintiff with whom she was riding at the time of her injury, and claimed that this negligence should be imputed to the plaintiff, and the evidence on this issue was insufficient, the court was sustained in a refusal to charge specially on the plaintiff's contributory negligence, the main charge on the subject being as specific as the pleadings.⁶⁹

§ 474. **Refusing Additional Instructions where the Jury are Already Fully Instructed.**⁷⁰—Generally speaking it is sufficient if the issue of contributory negligence is covered by a proper instruction and the law does not concern itself as to the time of giving this instruction. Accordingly one court has held that it was not error to omit the charge on contributory negligence in an instruction for the plaintiff, where the court, in giving the defendant's instructions covered the point fully.⁷¹

§ 475. **Qualifying or Amending Requests for Instructions before Giving them.**—The court should refuse instructions on the issue of contributory negligence which omit the element of proximate cause, unless this qualification be added where attention is called to the omission.⁷² In one case it was held not error to refuse to modify an in-

Rep. 374, where it is held that the trial judge in a proper case may instruct that particular conduct would be negligence *per se*.

⁶⁷ Louisville & C. R. Co. v. Bowlds, 64 S. W. Rep. 957; s. c. 23 Ky. L. Rep. 1202.

⁶⁸ Texas Loan & C. Co. v. Angel, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 1056; Gulf & C. R. Co. v. Mangham, 95 Tex. 413; s. c. 67 S. W. Rep. 765.

⁶⁹ Central Texas & C. R. Co. v. Gibson, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 862.

⁷⁰ Where in an action for the death of an infant, at the time of the accident in the care and custody of a grandmother, the defendant claimed

that certain facts constituted contributory negligence on the part of the custodian and the court referred to these facts and left them to the jury on the issue of contributory negligence, it was not error for the court to refuse to charge that if the jury find that the custodian failed in each of the facts specified, she would be guilty of contributory negligence: Hayes v. Pitts-Kimball Co., 183 Mass. 262; s. c. 67 N. E. Rep. 249.

⁷¹ Normile v. Wheeling Traction Co., 57 W. Va. 132; s. c. 49 S. E. Rep. 1030.

⁷² Gayle v. Missouri Car & C. Co., 177 Mo. 427; s. c. 76 S. W. Rep. 987;

struction placing the burden of showing contributory negligence on the defendant by adding that the defendant may take advantage of any contributory negligence disclosed by the plaintiff's testimony, the evidence of both parties having been introduced.⁷³

§ 477. Instructions which Use the Expression, "At the Time of the Injury."—An instruction in an action for injuries received in a collision between a vehicle and a street car that if the plaintiff, while in the exercise of ordinary care, was injured through the negligence of the defendants, a recovery could be had against the defendants, was held not open to the serious objection that it limited the duty of the plaintiff in the exercise of due care to the exact time of the accident.⁷⁴

§ 481. Instructions as to the Burden of Proof.—In determining whether the plaintiff is to be imputed with contributory negligence, the jury must consider the whole evidence, and an instruction has a tendency to mislead which broadly states that the burden of proving contributory negligence rests on the defendant.⁷⁵ But an instruction that the burden of proof of contributory negligence is on the defendant and must be proved by the defendant by a preponderance of the evidence has been held not misleading as indicating that this defense must be established by the evidence of the defendant's witnesses only.⁷⁶ Under the rule in Pennsylvania which imposes on the plaintiff the duty to make out a case clear of contributory negligence, it is held not error in that State to speak of this in a charge as a burden resting on the plaintiff.⁷⁷ Where the plea of contributory negligence is sustained by evidence in which there was no conflict, it is the duty of the court to instruct the jury that, if they believe the evidence, they should find for the defendant.⁷⁸

Gulf & C. R. Co. v. Mangham, 29 Tex. Civ. App. 486; s. c. 69 S. W. Rep. 80.

⁷³ *Chicago & C. R. Co. v. Hoover*, 3 Ind. Ter. 693; s. c. 64 S. W. Rep. 579.

⁷⁴ *Chicago & C. R. Co. v. Strathmann*, 213 Ill. 252; s. c. 72 N. E. Rep. 800.

⁷⁵ *Indianapolis v. Cauley*, 164 Ind. 304; s. c. 73 N. E. Rep. 691; *Indianapolis St. R. Co. v. Taylor*, 158 Ind. 274; s. c. 63 N. E. Rep. 456; *Cook v. Missouri Pac. Ry. Co.*, 94 Mo. App. 417; s. c. 68 S. W. Rep. 230. An instruction that "unless the defendant has proven, or it otherwise appears from all the evidence in the cause—by the preponderance of all the evidence—that plaintiff's decedent was guilty of contributory negligence,

the finding should be for plaintiff upon this issue; that is, that plaintiff's decedent was not guilty of contributory negligence," while open to criticism as to its form was held not open to the objection that it violated the rule stated in the text, as a fair construction of the charge was that if, from all the evidence, it appeared that deceased was guilty of contributory negligence, there could be no recovery: *Chicago & C. R. Co. v. Stephenson*, 33 Ind. App. 95; s. c. 69 N. E. Rep. 270.

⁷⁶ *Prior v. Eggert*, 39 Wash. 481; s. c. 81 Pac. Rep. 929.

⁷⁷ *Heiss v. Lancaster*, 203 Pa. 260; s. c. 52 Atl. Rep. 201.

⁷⁸ *Birmingham R. & Co. v. Baker*, 126 Ala. 135; s. c. 28 South. Rep. 87.

§ 484. **Instructions Defining "Ordinary Care," "Reasonable Care," Degrees of Negligence.**—The use of the phrase, "while in the exercise of ordinary care and caution for his own safety," in an instruction, has been held sufficiently comprehensive as to time. In this instruction the word "while" was construed as meaning "during that time" and implied some degree of continuance, and referred to the whole series of circumstances involved in the transaction.⁷⁹

§ 488. **Instructions as to Proximate and Remote Cause in Connection with Contributory Negligence.**—An instruction that if the plaintiff was guilty of negligence that contributed to his injury the jury should find for the defendant, has been upheld as sufficiently specific without adding that the plaintiff's negligence, to preclude a recovery must have "proximately contributed to the injury" particularly where the evidence before the jury showed that the plaintiff's conduct necessarily proximately contributed to his injuries.⁸⁰

§ 489. **Instructions as to the Plaintiff Avoiding the Consequences of the Defendant's Negligence.**⁸¹

§ 490. **Instructions as to the Defendant Avoiding the Consequences of the Plaintiff's Negligence.**—The rule that a person discovering the perilous position of a person guilty of contributory negligence imposes upon such a person the duty to avoid the injury if possible, may be included in a charge of contributory negligence, as the doctrine involved is a modification of the rule that contributory negligence precludes a recovery by the injured person.⁸² Such an instruction is properly refused where the evidence shows that the plaintiff's perilous position was not discovered until it was confessedly too late to avoid injuring him.⁸³

§ 493. **Instructions as to Contributory Negligence in the Case of Injuries to Children.**—An instruction in a case of this character should not omit the element of the intelligence of the child. One court has held that the phrase "for one of his age and experience," describing

⁷⁹ St. Louis Nat. Stockyards v. Godfrey, 101 Ill. App. 40; s. c. aff'd, 198 Ill. 288; 65 N. E. Rep. 90.

⁸⁰ Baca v. San Antonio &c. R. Co., 32 Tex. Civ. App. 210; s. c. 73 S. W. Rep. 1073.

⁸¹ An instruction that if any part or all of the plaintiff's injuries were caused by the lack of medical treatment or improper medical treatment, plaintiff could not recover, being a plainly erroneous statement of law, could not be sustained on the ground that it simply meant

that a person suffering from a disease or previous injuries, who met with another accident, could not recover for injuries which were solely due to the previous injury or disease: Elliott v. Kansas City, 174 Mo. 554; s. c. 74 S. W. Rep. 617.

⁸² St. Louis &c. R. Co. v. Jacobson, 28 Tex. Civ. App. 150; s. c. 66 S. W. Rep. 1111.

⁸³ Philadelphia &c. R. Co. v. Holden, 93 Md. 417; s. c. 49 Atl. Rep. 625.

the care, should have been modified to read "for one of his age, capacity and experience."⁸⁴

§ 499. **General Rule as to Imputed Negligence.**—It is a rule of general acceptance that negligence in the conduct of one person will not be imputed to another if the latter neither authorized such conduct nor participated therein, nor had the right or power to control the action of the former.⁸⁵ The doctrine of imputed negligence applies in full force where the relation of master and servant or principal and agent exists between the injured person and the person whose negligence it is claimed concurred with that of the defendant in causing the injury.⁸⁶ Recent decisions show that the doctrine of imputed negligence has been repudiated in Ohio,⁸⁷ Nebraska,⁸⁸ and Illinois⁸⁹ except with respect to the relation of partnership, principal and agent, and master and servant.

§ 500. **Negligence of Carrier not Imputed to Passenger.**⁹⁰—The doctrine indicated is applied to the case of injuries to a young woman who was a member of a picnic party, consisting of young men and

⁸⁴ Pittsburgh &c. R. Co. v. Moore, 110 Ill. App. 304. See also, Quill v. Southern Pac. Co., 140 Cal. 268; s. c. 73 Pac. Rep. 991.

⁸⁵ Koplitz v. St. Paul, 86 Minn. 373; s. c. 90 N. W. Rep. 794.

⁸⁶ Koslovki v. International Heat-er Co., 75 App. Div. (N. Y.) 60; s. c. 77 N. Y. S. Supp. 794; Crampton v. Ivie, 126 N. C. 894; s. c. 36 S. E. Rep. 351. Negligence of servant driving master in vehicle imputed to master: Read v. City &c. R. Co., 115 Ga. 366; s. c. 41 S. E. Rep. 629; Markowitz v. Metropolitan St. R. Co., 186 Mo. 350; s. c. 85 S. W. Rep. 351. The charterer of a vessel is affected by the contributory negligence of persons in charge of her, resulting in a collision with another vessel: The Livingstone, 104 Fed. Rep. 918. The negligence of a driver of a bus used by the proprietress of a school for children to take children to and fro between their homes and the school is imputed to the proprietress of the school on the theory that the driver is her servant: Reed v. Metropolitan St. R. Co., 58 App. Div. (N. Y.) 87; s. c. 68 N. Y. Supp. 539.

⁸⁷ Toledo Real Estate &c. Co. v. Putney, 10 Ohio C. D. 698; s. c. 44 Ohio Cir. Ct. R. 486.

⁸⁸ Hajsek v. Chicago &c. R. Co., 68 Neb. 539; s. c. 94 N. W. Rep. 609.

⁸⁹ Donk Bros. Coal &c. Co. v. Leavitt, 109 Ill. App. 385; Siegel &c. Co. v. Norton, 209 Ill. 201; s. c. 70 N. E. Rep. 636.

⁹⁰ The proposition that the negligence of a carrier will not be imputed to a passenger injured by the concurrent negligence of the carrier and another, and that he may recover from either or both, is supported by these cases: Landon v. Chicago &c. R. Co., 92 Ill. App. 216; Louisville &c. Packet Co. v. Mulligan, 77 S. W. Rep. 704; s. c. 25 Ky. L. Rep. 1287; Kleiner v. Third Ave. R. Co., 36 App. Div. (N. Y.) 191; s. c. 55 N. Y. Supp. 394; Sluder v. St. Louis Transit Co., 189 Mo. 107; s. c. 88 S. W. Rep. 648 (occupant of livery rig driven by servant of owner not imputed with driver's negligence); Chicago &c. Traction Co. v. Leach, 215 Ill. 184; s. c. 74 N. E. Rep. 119; aff'g s. c. 117 Ill. App. 169 (occupant of closed carriage not imputed with negligence of driver furnished by liveryman); F. Bird Transfer Co. v. Krug, 30 Ind. App. 602; s. c. 65 N. E. Rep. 309; Bradley v. Ohio River &c. R. Co., 126 N. C. 735; s. c. 36 S. E. Rep. 181 (traveller in public hack not imputed with negligence of driver).

women, and received her injuries by the overturning of a bus which had been hired by the young men of the party, and the accident was caused by the negligence of the city as to one of its streets and the contributory negligence of the driver. The young women of the party had nothing to do with the hiring or driving of the bus. The conclusion of the court was that the negligence of the driver was not to be imputed to the plaintiff.⁹¹ Under a rule which seems peculiar to the jurisprudence of Maine, an injured party without knowledge of a defect in a street is charged with the driver's knowledge of the defect, but he is not charged with such driver's breach of duty in failing to give notice of the defect to the municipal authorities, as required by a statute which makes the giving of such a notice a condition to municipal liability.⁹²

§ 501. **Negligence of Carrier, when Imputed to Passenger.**—It is the obvious duty of a passenger, when he has the opportunity to do so as well as the driver, to learn of any danger in the highway and avoid it if practicable. Where he has knowledge of a dangerous condition, he will be imputed with the negligence of the driver in the use of the defective highway.⁹³

§ 502. **Negligence of Driver not Imputed to Passenger on Private Conveyance Riding by Invitation.**—The doctrine generally recognized by the American courts with but few exceptions⁹⁴ is that where one riding in the vehicle of another at the invitation of the latter, and without authority over him as a driver of the vehicle, is injured by an accident caused by the negligence of the driver, concurrently with the negligence of a third person, the negligence of the driver will not be imputed to the injured person so as to preclude recovery for the injuries received.⁹⁵ Thus in a case where a servant

⁹¹ *Kopplitz v. St. Paul*, 86 Minn. 373; s. c. 90 N. W. Rep. 794.

⁹² *Barnes v. Rumford*, 96 Me. 315; s. c. 52 Atl. Rep. 844.

⁹³ *Whitman v. Fisher*, 98 Me. 575; s. c. 57 Atl. Rep. 895; *Evensen v. Lexington & C. R. Co.*, 187 Mass. 77; s. c. 72 N. E. Rep. 355; *Illinois Cent. R. Co. v. McLeod*, 78 Miss. 334; s. c. 29 South. Rep. 76.

⁹⁴ *Lightfoot v. Winnebago Traction Co.*, 123 Wis. 479; s. c. 102 N. W. Rep. 30.

⁹⁵ *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572; s. c. 82 S. W. Rep. 245; *Farley v. Wilmington & C. R. Co.*, 3 Pen. (Del.) 581; s. c. 52 Atl. Rep. 543; *West Chicago St. R. Co. v. Dougherty*, 110 Ill. App. 204;

s. c. aff'd, 209 Ill. 241; 70 N. E. Rep. 586; *West Chicago St. R. Co. v. Dedloff*, 92 Ill. App. 547; *Chicago City R. Co. v. Wall*, 93 Ill. App. 411; *Christy v. Elliott*, 216 Ill. 31; s. c. 74 N. E. Rep. 1035; *Indianapolis St. R. Co. v. Johnson*, 163 Ind. 518; s. c. 72 N. E. Rep. 571; *Louisville R. Co. v. Anderson*, 76 S. W. Rep. 153; s. c. 25 Ky. L. Rep. 666; *United Railways & C. Co. v. Biedler*, 98 Md. 564; s. c. 56 Atl. Rep. 813; *Hampel v. Detroit & C. R. Co.*, 138 Mich. 1; s. c. 100 N. W. Rep. 1002; 11 Det. Leg. N. 468; *Cunningham v. Thief River Falls*, 84 Minn. 21; s. c. 86 N. W. Rep. 763; *Marsh v. Kansas City & C. R. Co.*, 104 Mo. App. 577; s. c. 78 S. W. Rep. 284; *Baxter v. St. Louis*

without his master's permission or authority took the children of the master in the wagon driven by him to deliver the master's goods, and the children were killed by a collision at a railroad crossing while so riding, through the concurrent negligence of the railroad company and the servant, it was held that the contributory negligence of the servant would not bar recovery by the master against the railroad company for the wrongful death of his children.⁹⁶

§ 503. But Passenger not Absolved from Ordinary Care for his own Safety.—The doctrine of the foregoing section must be understood with the qualification that it does not relieve the guest from the duty of exercising reasonable care for his own safety, and having equal opportunity to see and equal ability to appreciate the danger of the driver's conduct, he makes no effort to avoid the danger, he will be imputed with such a want of care as will defeat a recovery for injuries suffered as a result of the negligence of the driver.⁹⁷ Applying the principle to a railroad crossing accident it has been held that a person seated with the driver of a wagon approaching a dangerous railroad crossing at a careless rate of speed cannot rely entirely on the care of the driver. He should at least make an effort to have the speed diminished and if his failure to do so contributes to a collision with a train, he may not recover for injuries sustained.⁹⁸ It is es-

T. Co., 103 Mo. App. 597; s. c. 78 S. W. Rep. 70 (boy helper on ice wagon, delivering ice handed him by driver, not imputed with negligence of driver in driving in dangerous proximity to street railroad track); Noonan v. Consolidated Traction Co., 64 N. J. L. 579; s. c. 46 Atl. Rep. 770; Morris v. Metropolitan St. Ry. Co., 63 App. Div. (N. Y.) 78; s. c. 71 N. Y. Supp. 321; s. c. aff'd, 170 N. Y. 592; 63 N. E. Rep. 1119; Robinson v. Metropolitan St. R. Co., 91 App. Div. (N. Y.) 158; s. c. 86 N. Y. Supp. 442; s. c. aff'd, 179 N. Y. 593; 72 N. E. Rep. 1150; Scarangelo v. Interurban St. R. Co., 90 N. Y. Supp. 430; Fisher v. Mt. Vernon, 41 App. Div. (N. Y.) 293; s. c. 58 N. Y. Supp. 499; Mack v. Shawangunk, 98 App. Div. (N. Y.) 577; s. c. 90 N. Y. Supp. 760; Duval v. Atlantic Coast Line R. Co., 134 N. C. 331; s. c. 46 S. E. Rep. 750; 65 L. R. A. 722; Wheeling & C. R. Co. v. Suhrwiar, 22 Ohio Cir. Ct. R. 560; Hyde Ferry Turnpike Co. v. Yates, 108 Tenn. 428; s. c. 67 S. W.

Rep. 69; Central Texas & C. R. Co. v. Gibson, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 862 (boy in wagon driven by father injured in collision at railroad crossing had no control over father's movements—father's negligence not imputed).

⁹⁶ Faust v. Philadelphia & C. R. Co., 191 Pa. St. 420; s. c. 43 Atl. Rep. 329; 44 W. N. C. 355.

⁹⁷ See generally: Vincennes v. Thuis, 28 Ind. App. 523; s. c. 63 N. E. Rep. 315; Colorado & C. R. Co. v. Thomas, 33 Colo. 517; s. c. 81 Pac. Rep. 801; Bush v. Union Pac. R. Co., 62 Kan. 709; s. c. 64 Pac. Rep. 624; Whitman v. Fisher, 98 Me. 575; s. c. 57 Atl. Rep. 895; Flanagan v. New York Cent. & C. R. Co., 70 App. Div. (N. Y.) 505; s. c. 75 N. Y. Supp. 225; s. c. aff'd, 173 N. Y. 631; 66 N. E. Rep. 1108; Dryden v. Pennsylvania R. Co., 211 Pa. 620; s. c. 61 Atl. Rep. 249; Lohman v. McManus, 9 Pa. Dist. R. 223.

⁹⁸ Holden v. Missouri R. Co., 177 Mo. 456; s. c. 76 S. W. Rep. 973.

sential to the full operation of this principle that the want of care of the guest should have proximately contributed to the injury.⁹⁹

§ 504. Negligence of Husband not Imputed to Wife.¹⁰⁰

§ 505. Negligence of one Co-Employé not Imputable to Another in Favor of Stranger.—In this connection it is to be noted that the doctrine that the master is not liable for injuries caused by the negligence of a fellow servant is based on an implied contract of the servant to assume the risk of his fellow servant's negligence, and this contract cannot inure to the benefit of a stranger, whose negligence in conjunction with that of a fellow servant caused his injury.¹⁰¹

§ 506. Negligence of one Joint Undertaker Imputable to the Other.—The Supreme Court of Minnesota has stated it as the doctrine under this head that if "two or more persons unite in a joint prosecution of a common purpose under such circumstances that each has authority, expressed or implied, to act for all in respect to the control of the means or agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to all the others."¹⁰² Thus in a case where two persons went out in a row-boat, it was held that one of them was imputable with the contributory negligence of the other—who, with his consent, did all of the rowing and had charge of the boat—in getting in front of a steamer having the right of way, so as to bar a recovery for resulting injuries.¹⁰³

§ 509. Negligence of Driver of Hose Cart not Imputable to Fireman Riding on it.¹⁰⁴—The doctrine of this section is not limited in its application to the negligence of drivers of hose carts alone, but

⁹⁹ *Thuis v. Vincennes*, 35 Ind. App. 350; s. c. 73 N. E. Rep. 141.

¹⁰⁰ *Lewin v. Lehigh Val. R. Co.*, 41 App. Div. (N. Y.) 89; s. c. 58 N. Y. Supp. 113; *Lammers v. Great Northern R. Co.*, 82 Minn. 120; s. c. 84 N. W. Rep. 728; *Bailey v. Centerville*, 115 Iowa 271; s. c. 88 N. W. Rep. 379 (wife injured by tripping on a loose board which flew up as her husband stepped on it. The fact that they were returning from church together did not make them engaged in a common enterprise).

¹⁰¹ See generally: *Chicago Transit Co. v. Campbell*, 110 Ill. App. 366; *Chicago & C. R. Co. v. Vipond*, 112 Ill. App. 558; s. c. aff'd, 212 Ill. 199; 72 N. E. Rep. 22; *Kentucky & C. Bridge & C. Co. v. Sydor*, — Ky. —;

s. c. 82 S. W. Rep. 989; 26 Ky. L. Rep. 951; 68 L. R. A. 183; *Philip v. Heraty*, 135 Mich. 446; s. c. 97 N. W. Rep. 963; 100 N. W. Rep. 186; *Ciuffi v. Metropolitan St. R. Co.*, 84 N. Y. Supp. 918; *Le Blanc v. Interurban St. R. Co.*, 88 N. Y. Supp. 150; *Krintzman v. Interurban St. R. Co.*, 84 N. Y. Supp. 243; *Waters v. Metropolitan St. R. Co.*, 85 N. Y. Supp. 1120; *St. Louis & C. R. Co. v. Swinney*, 34 Tex. Civ. App. 219; s. c. 78 S. W. Rep. 547.

¹⁰² *Koplit v. St. Paul*, 86 Minn. 373; s. c. 90 N. W. Rep. 794.

¹⁰³ *Yarnold v. Bowers*, 186 Mass. 396; s. c. 71 N. E. Rep. 799.

¹⁰⁴ *Birmingham R. & C. Co. v. Baker*, 132 Ala. 431; s. c. 31 South. Rep. 618.

extends to the negligence of drivers of other fire apparatus such as fire trucks,¹⁰⁵ and engines.¹⁰⁶

§ 512. **Negligence of Bailee not Imputable to Bailor.**—In opposition to the doctrine indicated in the main section, the Supreme Court of Mississippi has announced the rule that where property in possession of a bailee and being used in accordance with the terms of the bailment, is injured by a third party and the bailee's negligence contributed to the injury, his negligence will be imputed to the bailor.¹⁰⁷

§ 515. **Pleading Imputed Negligence.**—The plaintiff is not required to plead his freedom from imputed negligence even in jurisdictions which require the plaintiff to negative contributory negligence. "Negligence by imputation is a matter of development from the evidence in the trial, and of the incidents not necessarily to be anticipated in the pleading."¹⁰⁸

¹⁰⁵ Geary v. Metropolitan St. R. Co., 33 Misc. (N. Y.) 87; s. c. 67 Co., 84 App. Div. (N. Y.) 514; s. c. N. Y. Supp. 180; aff'g s. c. 66 N. Y. 82 N. Y. Supp. 1016; s. c. aff'd, 177 Supp. 1131.

N. Y. 535; 69 N. E. Rep. 1123.

¹⁰⁶ McKernan v. Detroit &c. R. Co., 77 Miss. 325; s. c. 27 South. Rep. 138 Mich. 519; s. c. 101 N. W. Rep. 527; 49 L. R. A. 322.

812; 11 Det. Leg. N. 685; 68 L. R. A. ¹⁰⁸ Elenz v. Conrad, 115 Iowa 183; 347; Galligan v. Metropolitan St. R. s. c. 88 N. W. Rep. 337.

TITLE FOUR.

DOCTRINE OF RESPONDEAT SUPERIOR.

[§§ 518-616.]

§ 518. General Rule as to Master's Liability for Acts of Servant.¹

—The liability of the master for the negligent act of his servant under the doctrine of *respondeat superior* does not rest on the ground that the master himself was negligent but upon considerations of public policy.² The act complained of must have been within the scope of the servant's duties and unless there is some evidence to show that such is the case the court should direct a verdict for the defendant.³ Whether the act of the servant is within the scope of his duties, or can be implied from the general authority conferred on him, is ordinarily a question of fact dependent upon the nature of the service and the circumstances of the particular case.⁴

§ 519. Limitations of this Rule.—Here as elsewhere there can be no recovery where the injuries complained of are the result of an inevitable accident. Thus, the master was held not liable where an employé, carrying a roll of oilcloth, accidentally stumbled over a roll of matting and, falling, struck the plaintiff, who was in the defendant's store making a purchase.⁵

§ 520. Rule Extends to Negligent and Unintentional Wrongs Committed by the Servant in the Master's Business.—Thus the owner

¹The well-settled rule that the principal or master is responsible for the wrongs committed by his agent or servant while acting about the business of the principal or master, and within the scope of his employment, is recognized and applied in these cases: *Bowen v. Illinois Cent. R. Co.*, 136 Fed. Rep. 306; s. c. 69 C. C. A. 444; *Rooney v. Woolworth*, 78 Conn. 167; s. c. 61 Atl. Rep. 366; *Levins v. Bancroft & Co.*, 114 La. 105; s. c. 38 South. Rep. 72; *Costa v. Yoachim*, 104 La. 170; s. c. 28 South. Rep. 992; *Belt R. Co. v. Banicki*, 102 Ill. App. 642; *Dinsmoor v. Wolber*, 85 Ill. App. 152; *Brudi v. Luhrman*, 26 Ind. App. 221; s. c. 59 N. E. Rep. 409; *Crandall v. Boutell*, 95 Minn. 114; s. c. 103 N. W. Rep. 890; *Clancy v. Barker*, — Neb. —; s. c. 103 N. W. Rep. 446; 69 L. R. A. 642; 98 N. W. Rep. 440; L. W.

Pomerene Co. v. White, — Neb. —; s. c. 97 N. W. Rep. 232; 98 N. W. Rep. 1040; *Holler v. P. Sanford Ross*, 68 N. J. L. 324; s. c. 53 Atl. Rep. 472; 59 L. R. A. 943; rev'g s. c. 67 N. J. L. 60; 50 Atl. Rep. 342; *Harbison v. Iliff*, 10 Ohio S. & C. P. Dec. 58.

²*Helms v. Northern Pac. R. Co.*, 120 Fed. Rep. 389.

³*Paulton v. Keith*, 23 R. I. 164; s. c. 49 Atl. Rep. 635; *St. Louis & C. R. Co. v. Mayfield*, 35 Tex. Civ. App. 82; s. c. 79 S. W. Rep. 365.

⁴*Barmore v. Vicksburg & C. R. Co.*, 85 Miss. 426; s. c. 38 South. Rep. 210; *St. Louis & C. R. Co. v. Mayfield*, 35 Tex. Civ. App. 82; s. c. 79 S. W. Rep. 365; *Connor v. Pennsylvania R. Co.*, 24 Pa. Super. Ct. 241.

⁵*Wall v. Lit*, 195 Pa. St. 375; s. c. 46 Atl. Rep. 4.

of a delivery wagon was held liable for injuries caused by his horse becoming frightened, and running away from a place where the servant, while delivering goods, had left him unhitched in violation of an ordinance forbidding the leaving of horses unsecured in the public streets.⁶

§ 522. **Master not Liable where Servant Abandons the Master's Duty to Effect Some Purpose of his own.**—Generally speaking the master will not be liable for the negligent act of his servant done outside the scope of the servant's employment to effectuate a personal object exclusively, though with facilities owned by the master if these facilities were not used with the authority or consent of the master.⁷ To give the servant's act this effect there must be a complete turning aside from the master's service and an entering on an affair which concerns the servant alone.⁸ In a case where a servant was sent to purchase and bring home materials for the master's business, and was given no specific directions as to the route to take, the fact that he deviated one block from the direct route was not deemed such a turning aside from the master's business as to absolve him from liability.⁹ In another case where a servant driving a water tank for a threshing machine, went out of his usual course to obtain oil to be used on the threshing machine at the request of a fellow servant, and while thus engaged his team caused the damages for which suit was brought, it was held that this deviation would not authorize the court to determine, as a matter of law, that the servant was engaged in services for

⁶ *Healy v. Johnson*, 127 Iowa 221; s. c. 103 N. W. Rep. 92 (principle not affected by fact that master had furnished servant with strap and weight and instructed him to use same).

⁷ *Clark v. Buckmobile Co.*, 107 App. Div. (N. Y.) 120; s. c. 94 N. Y. Supp. 771; *Chicago Consol. Bottling Co. v. McGinnis*, 86 Ill. App. 38; *Stewart v. Barauch*, 103 App. Div. (N. Y.) 577; s. c. 93 N. Y. Supp. 167 (chauffeur taking out master's automobile for his own pleasure).

⁸ *Loomis v. Hollister*, 75 Conn. 718; s. c. 55 Atl. Rep. 561; *Vara v. R. M. Quigley Const. Co.*, 114 La. 261; s. c. 38 South. Rep. 162; *Chicago Consol. Bottling Co. v. McGinnis*, 86 Ill. App. 38; *Krzikowsky v. Sperring*, 107 Ill. App. 493; *Barmore v. Vicksburg & c. R. Co.*, 85 Miss. 426; s. c. 38 South. Rep. 210. Driver of delivery wagon, turned over to boarding stable after hours of employment is engaged in service for him-

self alone where he rides the horse for pleasure after having turned same into boarding stable: *Reaume v. Newcomb*, 124 Mich. 137; s. c. 82 N. W. Rep. 806. The owner of a horse was held not liable for injuries caused by the horses while driven by the coachman for his own pleasure during the absence of his master and in open violation of his instructions not to drive them at the place where the accident took place: *Fiske v. Enders*, 73 Conn. 338; s. c. 47 Atl. Rep. 681. Owner of a carriage is not liable for injuries caused by the running away of a team where the driver, in violation of instructions to return the carriage to the barn, goes in the opposite direction for the sole purpose of getting a drink, and leaves the team unattended outside: *McCarty v. Timmins*, 178 Mass. 378; s. c. 59 N. E. Rep. 1038.

⁹ *Krzikowsky v. Sperring*, 107 Ill. App. 493.

himself and not for the master at the time the injuries were inflicted.¹⁰ Where the purpose of a deviation has been accomplished, and the work of the master is again resumed by the servant, the master's liability under the doctrine again attaches as though no deviation had occurred.¹¹ Under this section may be included the cases where the injuries suffered are due solely to the pranks or playfulness of employes. The authorities do not charge the master with liability for injuries so caused.¹² Thus, where a night watchman in an ice factory invited a person at night to watch the process, and to perpetrate a practical joke, he turned out all the electric lights in the building, allowed the steam to escape with a loud noise, and dragged a coal shovel up and down the iron stairs of the engine, and uttered loud cries, thereby frightening the visitor, it was held that the master was not liable for the injuries suffered by the visitor in an attempt to escape, as the act of the watchman was totally disconnected with his employment and his master's business.¹³ So, where the janitor of a building who, while riding in the elevator, removed the elevator boy's stool without his knowledge, the owner of the building was held not liable for injuries to a passenger caused by the premature starting of the elevator by the boy taking hold of the lever when clutching for something to gain his balance while attempting to sit down.¹⁴ So, the act of a track foreman in placing and leaving a torpedo on the railroad track with the view of frightening the engineer or fireman by its explosion, was held insufficient to create liability as against the railroad company for injuries to another person by its explosion.¹⁵

§ 523. **Liability of Master where Servant, in Effecting some Purpose of his own, Fails to Guard Dangerous Agencies Committed to his Care.**—An exception to the general doctrine of *respondeat superior* exists where the service has to do with dangerous instrumentalities. Here the rule seems well established that a master, who intrusts the custody and control of a dangerous appliance or agency to the management of a servant, will not be permitted to avoid responsibility for injuries inflicted thereby on the ground that the servant, in the particular act complained of, was acting outside the scope of his employment.¹⁶

¹⁰ Lovejoy v. Campbell, 16 S. D. 231; s. c. 92 N. W. Rep. 24.

¹¹ Barmore v. Vicksburg & c. R. Co., 85 Miss. 426; s. c. 38 South. Rep. 210.

¹² Berry v. Boston & c. R. Co., 188 Mass. 536; s. c. 74 N. E. Rep. 933.

¹³ Canton Cotton Warehouse Co. v. Pool, 78 Miss. 147; s. c. 28 South. Rep. 823.

¹⁴ Gibson v. International Trust Co., 177 Mass. 100; s. c. 58 N. E. Rep. 278.

¹⁵ Sullivan v. Louisville & c. R. Co., 115 Ky. 447; s. c. 74 S. W. Rep. 171; 24 Ky. L. Rep. 2344.

¹⁶ Barmore v. Vicksburg & c. R. Co., 85 Miss. 426; s. c. 38 South. Rep. 210 (whether a railroad bicycle such an appliance a question for the

§ 525. **Master not Liable where Servant Acts Outside the Scope of his Employment and Authority.**¹⁷—The rule under this head is thus stated by the Supreme Court of Ohio: “The test of a master’s liability is not whether a given act was done during the existence of the servant’s employment, but whether such act was done by the servant while engaged in the service of, and while acting for, the master in the prosecution of the master’s business, and such is the rule whether the act complained of be wanton and willful or whether it be merely negligent on the part of the servant or employé.”¹⁸

§ 526. **Test by which to Determine whether Servant Acts within the Scope of his Employment.**—Generally the test of the scope of the employment is the purpose of the act under investigation, and not its method of performance.¹⁹

§ 527. **What Acts not Deemed within the Scope of the Employment of Agents and Servants under Various Circumstances.**—The following acts of servants were held to have been outside the scope of their employments:—The act of a trainer in compelling a jockey to ride a horse not belonging to the common master after the day’s work had been finished;²⁰ the act of an elevator boy in transferring control of the elevator to a person employed in painting the elevator;²¹ the expression of an opinion by a wharfinger of a vessel to fishermen out in a boat that they could safely anchor at a designated place and as a result

jury). A railroad company was held liable for injuries to a child which took up a torpedo and through childish curiosity struck and exploded it, where the agent of the company having custody of such explosives, and charged with their safe keeping, negligently placed the torpedo on the railroad track on a public street, whence it was taken up by the child: *Merschel v. Louisville &c. R. Co.*, — Ky. —; s. c. 85 S. W. Rep. 710; 27 Ky. L. Rep. 465. But see a similar case where a brakeman threw a signal torpedo at a flagman at a crossing who threw it back, and on failure of the brakeman to catch it, it fell to the ground, from whence it was taken up by a boy eight years old, who cracked it with a rock and was injured. In this case it was held that the company was not liable in the absence of any evidence that the throwing of the torpedo was in the course of the employment of the brakeman and fireman: *Obertoni v. Boston &c.*

R. Co., 186 Mass. 481; s. c. 71 N. E. Rep. 980; 67 L. R. A. 422.

¹⁷ *Cullen v. Higgins*, 216 Ill. 78; s. c. 74 N. E. Rep. 698 (hotel keeper not liable for injuries to waitress received while attempting to board elevator through carelessness of bell boy who had nothing to do with the operation of the elevator). A line-man of an electric light company, while acting at fires under the directions of city authorities in pursuance of an ordinance, cannot render his employers liable for his acts in the absence of special authority: *New Omaha Thomson Houston Electric Light Co. v. Anderson*, — Neb. —; s. c. 102 N. W. Rep. 89.

¹⁸ *Lima R. Co. v. Little*, 67 Ohio St. 91; s. c. 65 N. E. Rep. 861.

¹⁹ *Cobb v. Simon*, 119 Wis. 597; s. c. 97 N. W. Rep. 276.

²⁰ *Ray v. Keene*, 19 App. Div. (N. Y.) 147; s. c. 45 N. Y. Supp. 896; s. c. aff’d, 160 N. Y. 706; 57 N. E. Rep. 1123.

²¹ *Arzt v. Lit*, 198 Pa. 519; s. c. 48 Atl. Rep. 297.

of the adoption of this opinion the fishermen were run into by a steamer which the wharfinger was serving;²² the act of an employé not the *alter ego* of the master in inviting or permitting children on the master's premises;²³ the act of an engine wiper in moving an engine over side tracks for the convenience of other employés engaged in making up trains;²⁴ the act of a servant, employed in dragging bales of cotton from the sidewalk to a warehouse, in making a motion to throw his hook at playing children whereupon the hook slipped from his hand and struck a child;²⁵ the dropping of a beer bottle by a member of a band playing at races, which bottle struck a person below the band stand, since the use of beer by members of the band was not within the scope of their employment;²⁶ the act of an elevator boy in running an elevator to the bottom of the shaft, thereby striking a person employed thereunder, though the injured person had directed the elevator boy not to come to the bottom, it not appearing that the elevator boy had authority to agree with an outsider as to the distance he would descend;²⁷ the act of a section hand in taking a hand car from its house for his personal use without notice to the company;²⁸ the act of a street car conductor, travelling on a street car as a passenger after his day's work, in giving a premature signal to start the car;²⁹ the act of the driver of a wagon in allowing a child to ride thereon in disobedience of the orders of the master;³⁰ the act of a servant directed to take ponies to a certain place and afterward to return them, in allowing a third person to ride one of them which became unmanageable, and ran into a horse and wagon injuring them.³¹ So the mere fact that an employé, when off duty for a day, performed an errand for his master, has been held not to show that he was so far in the service of the master as to render the master liable for injuries caused by his negligence through intoxication after he had performed the errand for his employer.³²

²² Chesley v. Nantasket Beach Steam-Boat Co., 179 Mass. 469; s. c. 61 N. E. Rep. 50.

²³ Formall v. Standard Oil Co., 127 Mich. 496; s. c. 86 N. W. Rep. 946; 8 Det. Leg. N. 453.

²⁴ Bequette v. St. Louis &c. R. Co., 86 Mo. App. 601.

²⁵ Guille v. Campbell, 200 Pa. 119; s. c. 49 Atl. Rep. 938.

²⁶ Williams v. Mineral City Park Ass'n. 123 Iowa 32; s. c. 102 N. W. Rep. 783.

²⁷ Hall v. Poole, 94 Md. 171; s. c. 50 Atl. Rep. 703.

²⁸ Harrell v. Cleveland &c. R. Co.,

27 Ind. App. 29; s. c. 60 N. E. Rep. 717; Sammis v. Chicago &c. R. Co., 97 Ill. App. 28.

²⁹ Lima R. Co. v. Little, 67 Ohio St. 91; s. c. 65 N. E. Rep. 861.

³⁰ Schulwitz v. Delta Lumber Co., 126 Mich. 559; s. c. 85 N. W. Rep. 1075; Mahler v. Stott, 129 Mich. 614; s. c. 89 N. W. 340; 8 Det. Leg. N. 1058.

³¹ Long v. Richmond, 68 App. Div. (N. Y.) 466; s. c. 73 N. Y. Supp. 912; s. c. aff'd, 175 N. Y. 495; 67 N. E. Rep. 1084.

³² Corper Brewing &c. Co. v. Huggins, 96 Ill. App. 144.

§ 529. **Liability of Master for Selecting Incompetent or Improper Servants.**³³—Where the alleged negligence relates to the employment of a physician or surgeon by the master it is the rule that the plaintiff must show a want of reasonable care in the selection, or actual notice of the unfitness of the physician, or proof of such acts of unfitness, as would give the master notice had he exercised due care in making the selection.³⁴ In one case an accident insurance company was held liable for the negligence of a physician employed to make an examination of a sprained foot encased in a plaster cast which was to remain thereon until the injured ligaments healed, and the physician removed the cast and failed to replace it.³⁵ A railroad company was similarly held liable for the negligence of a surgeon employed to care for an employé afflicted with smallpox in hiring an incompetent nurse, and by reason of the negligence of the nurse in going on the public streets without disinfecting himself, the disease was communicated to a person who died therefrom.³⁶

§ 530. **Acting without Orders or Against Orders.**—It is the rule under this head that the master is liable for the negligence of his servant in the course of his employment, though the particular act complained of was unauthorized and in disobedience to the master's command.³⁷

§ 535. **Other Conclusions Resulting from the Foregoing Doctrines.**—Where the act of the servant is clearly unauthorized and without the scope of his employment, the master cannot be held liable on the ground that the servant did the act with the intent to benefit or serve the master.³⁸

§ 536. **Master Liable for Accidental Death Produced by his Servant.**—It is held that a brakeman returning to board his train after having gone to a restaurant at a stopping place, is in the discharge of

³³ On the general proposition that the master is liable for selecting incompetent servants, see: *The Elton*, 131 Fed. Rep. 562; *Ellsworth v. Franklin Co. Agricultural Soc.*, 99 App. Div. (N. Y.) 119; s. c. 91 N. Y. Supp. 1040; *St. Louis & C. R. Co. v. Miller*, 27 Tex. Civ. App. 344; s. c. 66 S. W. Rep. 139. The fact that a negligent employé was intoxicated at the time may be shown on this question: *Connor v. Koch*, 63 App. Div. (N. Y.) 257; s. c. 71 N. Y. Supp. 836.

³⁴ *Big Stone Gap Iron Co. v. Ketrone*, 102 Va. 23; s. c. 45 S. E. Rep. 740.

³⁵ *Tompkins v. Pacific Mut. Life Ins. Co.*, 53 W. Va. 479; s. c. 44 S. E. Rep. 439.

³⁶ *Missouri & C. R. Co. v. Freeman* (Tex. Civ. App.), 73 S. W. Rep. 542.

³⁷ *Payne v. Missouri Pac. R. Co.*, 105 Mo. App. 155; s. c. 79 S. W. Rep. 719; *Wickham v. Wolcott*, — Neb. —; s. c. 95 N. W. Rep. 366; *Houston & C. R. Co. v. Bulger*, 35 Tex. Civ. App. 478; s. c. 80 S. W. Rep. 557; *Southwestern R. Co. v. Mayfield*, 35 Tex. Civ. App. 82; s. c. 79 S. W. Rep. 365.

³⁸ *Daniel v. Atlantic Coast Line R. Co.*, 136 N. C. 517; s. c. 48 S. E. Rep. 816; 67 L. R. A. 455.

his duties so as to render the company liable for his running into a person standing near the train and knocking him under the train already in motion, thus causing his death.³⁹

§ 537. **Respondeat Superior in the Relation of Parent and Child.**⁴⁰

§ 539. **Liability of the Master by Ratification or Adoption.**⁴¹

§ 541. **Instances of Acts Deemed within the Scope of Servant's Employment.**—The acts of the servant were deemed within the scope of his employment under these circumstances:—Where a section foreman loaned a hand car to a person to take away some rotten ties for his own use;⁴² where the servants using a cellar left open a trap door without safeguards and a passerby was injured by falling into the opening;⁴³ where employes of an electric company, pursuant to general instructions, cut branches from overhanging trees to prevent contact with the wires and this effect could have been avoided by insulation;⁴⁴ where the brakeman of a freight train blocking a street told a pedestrian that he had plenty of time and to pass through, and he was injured by the starting of the train while he was attempting to do so;⁴⁵ where a farmer returning home with one team, directed his servant to follow him immediately, and the servant disobeyed and stayed until night, and then negligently drove against a carriage—the servant in this case being plainly engaged in his master's business at the time of the accident;⁴⁶ where employes sent to put up a stove with instructions to remove refuse from the chimney, failed to do so, and the purchaser of the stove was asphyxiated by gases escaping into the room due to the clogged condition of the chimney;⁴⁷ where a brakeman kicked a piece of ice from the platform of a caboose, which struck a

³⁹ *Missouri &c. R. Co. v. Edwards* (Tex. Civ. App.), 67 S. W. Rep. 891.

⁴⁰ The owner of an automobile is not liable for an injury resulting from the negligent operation of the machine by a son without the father's knowledge and consent and not at the time in his employ or about his business: *Reynolds v. Buck*, 127 Iowa 601; s. c. 103 N. W. Rep. 946.

⁴¹ On the proposition that the master may make himself liable for the unauthorized act of servant by ratification, see: *Healy v. Patterson*, 123 Iowa 73; s. c. 98 N. W. Rep. 576. Retention of the servant in the employ of the master after notice as ratification, see: *Cobb v. Simon*, 119 Wis. 597; s. c. 97 N. W. Rep. 276. It is not necessary, in order to show ratification by the master, that the

information as to the tort should come from the injured person: *Cobb v. Simon*, 119 Wis. 597; s. c. 97 N. W. Rep. 276.

⁴² *Erie R. Co. v. Salisbury*, 66 N. J. L. 233; s. c. 50 Atl. Rep. 117; 55 L. R. A. 578.

⁴³ *Minns v. Omemees*, 2 Ont. L. Rep. 579; *L. W. Pomerene Co. v. White*, — Neb. —; s. c. 97 N. W. Rep. 232; 98 N. W. Rep. 1040.

⁴⁴ *Van Siclen v. Jamaica &c. Light Co.*, 45 App. Div. (N. Y.) 1; s. c. 61 N. Y. Supp. 210; s. c. aff'd, 168 N. Y. 650; 61 N. E. Rep. 1135.

⁴⁵ *Scott v. St. Louis &c. R. Co.*, 112 Iowa 54; s. c. 83 N. W. Rep. 818.

⁴⁶ *Dinsmoor v. Wolber*, 85 Ill. App. 152.

⁴⁷ *Crandall v. Boutell*, 95 Minn. 114; s. c. 103 N. W. Rep. 890.

bystander, inflicting injuries;⁴⁸ where a bell boy in a hotel opened the faucets of a bath tub and left the room to procure towels and did not return for a considerable time, during which time the tub overflowed, and the water injured goods in a store below;⁴⁹ where a servant drove his master's cattle to a pasture and, instead of returning at once on horseback, waited until dark when his horse ran away and ran over the plaintiff,—in this case the servant was at the time in the master's service though acting without his knowledge and against his orders;⁵⁰ where a servant charged with the duty of sweeping his master's sidewalk, poured water on the walk, which congealed and caused a pedestrian to sustain injuries by slipping.⁵¹ In a case where a servant committed a trespass in removing a gas meter, it was held that there was evidence to justify a finding that the servant was acting within the general scope of his employment, the evidence showing that the servant had authority to collect the rent or remove the meter, and it was endorsed on the order giving this authority that the meter had been removed.⁵² In another case, evidence that a conductor caught hold of a passenger about to enter a car, and ordered him to stand aside until a passenger had alighted, was held sufficient to show that the conductor was in the performance of his duties so as to make his employer liable for unnecessary violence used by him in pushing the passenger aside.⁵³

§ 544. Power of Corporations to Employ Surgeons or Nurses for Wounded Employés, etc.—A railroad relief department authorized to furnish medical attendance to injured employés belonging to the department, but not bound to do so, is liable for malpractice only where it has failed to exercise reasonable care in selecting a physician or surgeon of average skill.⁵⁴

§ 556. The True Distinction Stated and Illustrated.—The better rule makes the liability of the master for the willful or malicious torts of his servant depend on whether the act was done while the servant was in the exercise of his employment. If the servant was acting within the scope of his authority, the master will be liable for his acts, whether negligent or willful or malicious,⁵⁵ and this although the mas-

⁴⁸ *Willis v. Maysville &c. R. Co.*, — Ky. —; s. c. 85 S. W. Rep. 716; 27 Ky. L. Rep. 459.

⁴⁹ *Steele v. May*, 135 Ala. 483; s. c. 33 South. Rep. 30.

⁵⁰ *Weber v. Lockman*, 66 Neb. 469; s. c. 92 N. W. Rep. 591; 60 L. R. A. 313.

⁵¹ *Kavanagh v. Vollmer*, 84 N. Y. Supp. 475.

⁵² *Reed v. New York &c. Gas Co.*, 93 App. Div. (N. Y.) 453; s. c. 87 N. Y. Supp. 810.

⁵³ *McFarlan v. Pennsylvania R. Co.*, 199 Pa. 408; s. c. 49 Atl. Rep. 270.

⁵⁴ *Haggerty v. St. Louis &c. R. Co.*, 100 Mo. App. 424; s. c. 74 S. W. Rep. 456.

⁵⁵ *City Delivery Co. v. Henry*, 139

ter may have expressly forbidden the particular act.⁵⁶ If on the other hand the wrongful act was committed outside the servant's employment and not in the execution of his master's business and solely to gratify his own malice, the master will not be liable, though the servant was at the time in his employment.⁵⁷ So far as the master's liability for the willful and wanton act of his servant within the scope of his employment is concerned, it is not material with what method, or for what purpose, the servant neglects the duty entrusted to him.⁵⁸

§ 557. **Application of this Doctrine to Corporations.**—The doctrine of *respondeat superior* makes no distinction between a private individual and a corporation,⁵⁹ or its receiver,⁶⁰ as employers.

§ 559. **Illustrations of the Liability of a Master for Malicious Injuries Committed by his Servants.**—Masters have been held liable for the acts of their servants on the theory of malice in these cases:—Where the driver of a wagon moving at a brisk speed, struck at a small boy riding on the wagon, and caused him to fall;⁶¹ where the engineer of a stationary engine maliciously blew the whistle and caused a mule to run away and throw his rider;⁶² where a motorman in charge of an electric car so operated his car as to increase the fright of horses after discovery of that fact;⁶³ where a locomotive engineer blew off steam in order to frighten children, and a child was so frightened that it fell from a shed and broke a limb;⁶⁴ where an engineer, operating an engine having a blow pipe projecting over a canal, discharged steam just as a boat was passing and injured a passenger on the boat;⁶⁵ where a station agent maliciously refused to sell tickets to colored girls and drew a re-

Ala. 161; s. c. 34 South. Rep. 389; *Dinsmoor v. Wolber*, 85 Ill. App. 152; *Franklin Life Ins. Co. v. People*, 103 Ill. App. 554; s. c. aff'd, 200 Ill. 619; 66 N. E. Rep. 379; *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269; s. c. 68 N. E. Rep. 238; *Chicago & C. R. Co. v. Kerr*, — Neb. —; s. c. 104 N. W. Rep. 49; *Magar v. Hammond*, 95 App. Div. (N. Y.) 249; s. c. 88 N. Y. Supp. 796; *Harbison v. Iliff*, 10 Ohio S. & C. P. Dec. 58; *St. Louis & C. R. Co. v. Mayfield*, 35 Tex. Civ. App. 82; s. c. 79 S. W. Rep. 365. ⁵⁹*St. Louis & C. R. Co. v. Mayfield*, 35 Tex. Civ. App. 82; s. c. 79 S. W. Rep. 365.

⁵⁷*Evers v. Krouse*, 70 N. J. L. 653; s. c. 58 Atl. Rep. 181; *Sandles v. Levenson*, 78 App. Div. (N. Y.) 306; s. c. 79 N. Y. Supp. 959; *Brennan v. Merchant & Co.*, 205 Pa. 258; s. c. 54 Atl. Rep. 891.

⁵⁸*Harbison v. Iliff*, 10 Ohio S. & C. P. Dec. 58.

⁵⁹*Central of Georgia R. Co. v. Brown*, 113 Ga. 414; s. c. 38 S. E. Rep. 989; *Greene v. New York & C. R. Co.*, 102 App. Div. (N. Y.) 322; s. c. 92 N. Y. Supp. 424; *Brooks v. Jennings Co. Agricultural Joint-Stock Ass'n*, 35 Ind. App. 221; s. c. 73 N. E. Rep. 951.

⁶⁰*Larsen v. United States Mortgage & C. Co.*, 104 App. Div. (N. Y.) 76; s. c. 93 N. Y. Supp. 610.

⁶¹*Hyman v. Tilton*, 208 Pa. 641; s. c. 57 Atl. Rep. 1124.

⁶²*Skipper v. Clifton Mfg. Co.*, 58 S. C. 143; s. c. 36 S. E. Rep. 509.

⁶³*Pioneer Fireproof Const. Co. v. Sunderland*, 87 Ill. App. 213; s. c. aff'd, 188 Ill. 341; 58 N. E. Rep. 928.

⁶⁴*Alsever v. Minneapolis & C. R. Co.*, 115 Iowa 338; s. c. 88 N. W. Rep. 841.

⁶⁵*Regan v. Reed*, 96 Ill. App. 460.

volver and drove them outside and one of the girls fell into a pool of water and sustained injuries;⁶⁶ where a brakeman pushed a boy off a moving freight car;⁶⁷ where a locomotive engineer, solely for his own amusement, placed a torpedo on the track and drove the locomotive over it, causing an explosion and injuring a bystander.⁶⁸ On the theory that the act was without the scope of the servant's employment, the master was held not liable where a janitor in his employ, being tantalized by a crowd of boys, chased them and threw a missile which accidentally struck a mere onlooker.⁶⁹ So, a railroad company has been held not liable for the act of a locomotive fireman in purposely throwing a piece of coal at one standing beside the track, as the act was not done for the purpose of protecting the master's property or furthering his interests.⁷⁰

§ 560. Liability of Master for Trespasses of Servant.—Under the following circumstances the act was held to have been committed in furtherance of the master's business and within the scope of the servant's employment:—Where a watchman employed to protect the property of his employer, and authorized to search for such property when taken away, entered a house on information that some of his master's property was concealed therein, and conducted the search in a brutal manner;⁷¹ where an employé of a gas company, intending to force some water out of its pipes, entered the works of another gas company by mistake, and opened valves therein, producing an excessive pressure and causing an explosion which destroyed the property of a customer of the latter company.⁷²

§ 563. Liability of Master for Assaults Committed by his Servants.—The general doctrine here is that the master is liable for assaults committed by his servants upon third persons only where such servant acted within the general scope of his employment, or in the exercise of authority conferred upon him⁷³ and not otherwise.⁷⁴ Where

⁶⁶ Ward v. Yazoo &c. R. Co., 79 Miss. 145; s. c. 29 South. Rep. 829.

⁶⁷ Williams v. Southern R. Co., 115 Ky. 320; s. c. 73 S. W. Rep. 779; 24 Ky. L. Rep. 2214.

⁶⁸ Euting v. Chicago &c. R. Co., 116 Wis. 13; s. c. 92 N. W. Rep. 358; 60 L. R. A. 158.

⁶⁹ Kennedy v. White, 91 App. Div. (N. Y.) 475; s. c. 86 N. Y. Supp. 852.

⁷⁰ Louisville &c. R. Co. v. Routt, 76 S. W. Rep. 513; 25 Ky. L. Rep. 887.

⁷¹ Lesch v. Great Northern R. Co., 93 Minn. 435; s. c. 101 N. W. Rep. 965.

⁷² Garner v. Citizens' Natural Gas Co., 198 Pa. St. 16; s. c. 47 Atl. Rep. 965.

⁷³ Missouri Pac. R. Co. v. Divinney, 66 Kan. 776; s. c. 69 Pac. Rep. 351; 71 Pac. Rep. 855; Southern R. Co. v. James, 118 Ga. 340; s. c. 45 S. E. Rep. 303; 63 L. R. A. 257; Collins v. Butler, 179 N. Y. 156; s. c. 71 N. E. Rep. 746; rev'g s. c. 81 N. Y. Supp. 1074; Canton v. Grinnell, 138 Mich. 590; s. c. 101 N. W. Rep. 811; 11 Det. Leg. N. 658.

⁷⁴ Lynch v. Florida Cent. &c. R. Co., 113 Ga. 1105; s. c. 39 S. E. Rep. 411; Bowen v. Illinois Cent. R. Co.,

the authority of the servant is broad enough to allow the commission of an act of violence under certain conditions, the master will be liable for the consequences of such an act when committed by the servant under the belief that such a contingency had occurred.⁷⁵ But the mere employment of a watchman to guard property and keep away trespassers does not authorize the watchman to shoot the trespassers, and such authority is not presumed.⁷⁶ Under the evidence in these cases it was held that the assaults committed by servants were without the scope of their employment:—Where an employé threw a piece of iron and struck some children who were annoying his fellow workers;⁷⁷ where an employé punished children for injuring his master's property;⁷⁸ where railroad employés, directed to build a snow fence on property owned by another person, on being forbidden to erect the fence by the owner's servant, assaulted the servant, being commanded by the foreman of the crew to "go after" the servant.⁷⁹ An employer will be liable for his collector's assault on a debtor where it is committed to compel the payment of the debt, though he may have never authorized that method of collection;⁸⁰ but not where the assault is the outcome of a personal quarrel between the servant and the debtor.⁸¹ Where the fact of liability for an assault is clear, it is not a defense

136 Fed. Rep. 306; s. c. 69 C. C. A. 444 (shipper shot by station agent); Birmingham R. & C. Co. v. Mason, 137 Ala. 342; s. c. 34 South. Rep. 207; Central of Georgia R. Co. v. Morris, 121 Ga. 484; s. c. 49 S. E. Rep. 606.

⁷⁵ Harbison v. Iliff, 10 Ohio S. & C. P. Dec. 58. So a railroad company has been held liable for an assault committed by depot hands in the discharge of their duty of protecting freight from rough handling, though they may have exceeded their precise instructions: Houston & C. R. Co. v. Bell (Tex. Civ. App.), 73 S. W. Rep. 56.

⁷⁶ Belt R. Co. v. Banicki, 102 Ill. App. 642; Turley v. Boston & M. R. R., 70 N. H. 348; s. c. 47 Atl. Rep. 261; Holler v. P. Sanford Ross, 68 N. J. L. 324; s. c. 53 Atl. Rep. 472; 59 L. R. A. 943; rev'g s. c. 67 N. J. L. 60; 50 Atl. Rep. 342; Sandles v. Levensen, 78 App. Div. (N. Y.) 306; 79 N. Y. Supp. 959; s. c. aff'd, 176 N. Y. 610; 68 N. E. Rep. 1124; Grimes v. Young, 51 App. Div. (N. Y.) 239; s. c. 64 N. Y. Supp. 859 (servant employed to guard master's property, and furnished a pistol with instructions to use it only

if the property was in danger, and then to shoot in the air, cannot render employer liable for shooting a bather using waters in vicinity of his establishment). In an action for shooting, an instruction that if the defendant recklessly and wantonly shot plaintiff the jury must find for him, unless the shooting was done in self-defense, was erroneous, as involving a contradiction in terms, for if the jury found the shooting was reckless and wanton, they could not properly from the evidence have found it to have been done in self-defense: Deck v. Baltimore & C. R. Co., 100 Md. 168; s. c. 59 Atl. Rep. 650.

⁷⁷ Benton v. James Hill Mfg. Co., 26 R. I. 192; s. c. 58 Atl. Rep. 664.

⁷⁸ Brown v. Boston Ice Co., 178 Mass. 108; s. c. 59 N. E. Rep. 644.

⁷⁹ Waaler v. Great Northern R. Co., 18 S. D. 420; s. c. 100 N. W. Rep. 1097.

⁸⁰ Bergman v. Hendrickson, 106 Wis. 434; s. c. 82 N. W. Rep. 304.

⁸¹ Collette v. Rebori, 107 Mo. App. 711; s. c. 82 S. W. Rep. 552; McDermott v. American Brewing Co., 105 La. 124; s. c. 29 South. Rep. 498, 52 L. R. A. 684.

that the employé lost his temper and used an unreasonable amount of force in accomplishing his object.⁸²

§ 565. **Liability of Master for Unlawful Arrests, False Imprisonment, Malicious Prosecution, by his Servants.**—It is generally held that ordinary clerks and agents are not clothed with an implied authority to institute a prosecution or cause an arrest so as to render the master liable in case these acts are malicious.⁸³ Neither can an implied authority to do these things be inferred from a printed general instruction to employés to use the utmost diligence in the performance of their duties.⁸⁴ The master will become liable where he ratifies the act of his servant,⁸⁵ and this ratification may be shown by retaining the servant in his employ with knowledge of his wrongful act.⁸⁶ On the question of the scope of the authority of a conductor to cause the arrest of a passenger, it may be shown that the rules of the company directed conductors to call a policeman in case of trouble on the car.⁸⁷ On the ground that the act of the servant was within the scope of his authority, courts have held employers liable for unlawful arrest, false imprisonment, etc., instigated by servants under these circumstances:—Where a street car conductor wrongfully charged a passenger with offering him a counterfeit coin and caused the passenger's arrest;⁸⁸ where the driver of a wagon for a department store delivered an article marked "C. O. D." by mistake, and demanded the price of the article, on which there was only a small balance due, and on the refusal of the customer to pay the entire price or return the article, charged the purchaser with theft and caused his arrest;⁸⁹ where a street car conductor ejected a passenger and caused his arrest because his transfer ticket was not properly punched;⁹⁰ where a floor walker of a store falsely accused a customer of stealing goods, confined her in a room and searched her.⁹¹ In these cases it was held that the act of a

⁸² *Texas &c. R. Co. v. Taylor*, 31 Tex. Civ. App. 617; s. c. 73 S. W. Rep. 1081.

⁸³ *Vara v. R. M. Quigley Const. Co.*, 114 La. 261; s. c. 38 South. Rep. 162; *Staton v. Mason*, 106 App. Div. (N. Y.) 26; s. c. 94 N. Y. Supp. 417 (credit clerk not authorized to institute prosecution).

⁸⁴ *Waters v. Anthony*, 20 App. (D. C.) 124.

⁸⁵ *Simmon v. Bloomingdale*, 39 Misc. (N. Y.) 847; s. c. 81 N. Y. Supp. 499.

⁸⁶ *Cobb v. Simon*, 119 Wis. 597; s. c. 97 N. W. Rep. 276.

⁸⁷ *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1; s. c. 71 S. W. Rep. 1055.

⁸⁸ *West Chicago St. R. Co. v. Leich*, 85 Ill. App. 643.

⁸⁹ *Craven v. Bloomingdale*, 54 App. Div. (N. Y.) 266; s. c. 66 N. Y. Supp. 525; aff'g s. c. 64 N. Y. Supp. 262.

⁹⁰ *Jacobs v. Third Ave. R. Co.*, 71 App. Div. (N. Y.) 199; s. c. 75 N. Y. Supp. 679; 10 N. Y. Ann. Cas. 462; rev'g s. c. 34 Misc. (N. Y.) 512; 69 N. Y. Supp. 981.

⁹¹ *Cobb v. Simon*, 119 Wis. 597; s. c. 97 N. W. Rep. 276. But not where he knew the accusation was false and used the circumstance to extort money: *Cobb v. Simon*, 124 Wis. 467; s. c. 102 N. W. Rep. 891.

servant was not properly within the scope of his employment:—Where some three months after the burning of a barn belonging to a partnership, a person was arrested at the instance of the superintendent of the partners, and charged with setting it on fire;⁹² where a conductor charged a party to a suit against the railroad with the commission of a crime, and presented the matter to the grand jury, but it refused to return an indictment;⁹³ where the purser of a boat required the plaintiff and another woman, who charged the plaintiff with theft, to enter a waiting room after disembarking and asked the plaintiff to establish her innocence, which she did, after which she was allowed to depart,—in this case the relation of passenger had ceased and the steamboat company owed the plaintiff no duty;⁹⁴ where an employé of a jewelry house charged with the duty of looking after lost jewelry belonging to the house, caused the arrest of a person for the theft of jewelry belonging to a customer and not to his employer.⁹⁵

§ 568. Where the Servant Making the Arrest is also a Police Officer.—There is a presumption that an officer is acting in his official capacity in making an arrest, and not as an agent for the party who pays him.⁹⁶ The master will be liable, however, for an assault committed in making an arrest by such a person where the arrest is directed by an employé having authority to command it.⁹⁷ The authority to arrest persons caught stealing coal, given a special officer of a railroad company by his employers, does not limit the officer's authority to make arrests to the premises of the railroad company so as to relieve the company from liability for a wrongful arrest made elsewhere.⁹⁸

§ 569. Liability of Master for Libels Published by his Servant.⁹⁹

§ 571. Liability of Master for a Homicide Committed by Servant.—An employer will be liable for the murder of a trespasser by his watchman where the act is within the scope of the employment of the serv-

⁹² Markley v. Snow, 207 Pa. 447; s. c. 56 Atl. Rep. 909.

⁹³ Patterson v. Maysville & C. R. Co., 78 S. W. Rep. 870; s. c. 25 Ky. L. Rep. 1750.

⁹⁴ McKay v. Hudson River Line, 56 App. Div. (N. Y.) 201; s. c. 67 N. Y. Supp. 651.

⁹⁵ Lubliner v. Tiffany & Co., 54 App. Div. (N. Y.) 326; s. c. 66 N. Y. Supp. 659.

⁹⁶ Foster v. Grand Rapids R. Co., 140 Mich. 689; s. c. 104 N. W. Rep. 380; 12 Det. Leg. N. 311.

⁹⁷ Foster v. Grand Rapids R. Co.,

140 Mich. 689; s. c. 104 N. W. Rep. 380; 12 Det. Leg. N. 311.

⁹⁸ Kastner v. Long Island R. Co., 76 App. Div. (N. Y.) 323; s. c. 78 N. Y. Supp. 469; 12 N. Y. Ann. Cas. 77.

⁹⁹ That a master is liable for libel published by his agent acting in the course and within the scope of his employment, see: Citizens' Life Assur. Co. v. Brown [1904], App. Cas. 423; s. c. 73 L. J. P. C. 102; 90 L. T. 739; 53 Wkly. Rep. 176; 20 Times L. R. 497; Trapp v. Du Bois, 76 App. Div. (N. Y.) 314; s. c. 78 N. Y. Supp. 505.

ant,¹⁰⁰ except in some jurisdiction where the servant is also a public officer. Here the law indulges a presumption that the servant acted in his official capacity, and not as agent of the person employing him.¹⁰¹

§ 575. Liability of Master for Kidnapping.—In a case where a passenger was injured in a railroad accident for which the railroad company was not responsible, and the employes of the company forcibly and against his will placed him on a train, and carried him to another town and left him unattended on the station platform, it was held that the act of the employes was not within the scope of their employment, and that the railroad company could not be held liable for injuries resulting therefrom.¹⁰²

§ 579. Tests by which to Determine whether the Relation of Master and Servant Exists.—The power to control the action of a person, claimed to sustain the relation of servant,¹⁰³ and discharge him, determines whether the relation of master and servant exists.¹⁰⁴ The method of paying the employé is not conclusive. The servant is no less a servant by reason of being paid by commission.¹⁰⁵ The relation

¹⁰⁰ Letts v. Hoboken R. & Co., 70 N. J. L. 358; 57 Atl. Rep. 392.

¹⁰¹ Sharp v. Erie R. Co., 90 App. Div. (N. Y.) 502; s. c. 85 N. Y. Supp. 553.

¹⁰² St. Louis & C. R. Co. v. Mayfield, 35 Tex. Civ. App. 82; s. c. 79 S. W. Rep. 365.

¹⁰³ Jahn v. Wm. H. McKnight & Co., 117 Ky. 655; s. c. 78 S. W. Rep. 862; 25 Ky. L. Rep. 1758; Crudup v. Schreiner, 98 Ill. App. 337; Alldritt v. Gillette-Herzog Mfg. Co., 85 Minn. 206; s. c. 88 N. W. Rep. 741; Brady v. Chicago & C. R. Co., 114 Fed. Rep. 100; s. c. 52 C. C. A. 48; 57 L. R. A. 712; Kelton v. Fifer, 26 Pa. Super. Ct. 603. The owner of a street roller outfit, consisting of a roller, engine and engineer to operate the same, is the master of the engineer under the doctrine of *respondent superior*, and not the city hiring the outfit from the owner at a stipulated price per day, where the control of the city was merely as to the mode and the place where the streets should be rolled: Stewart v. California Imp. Co., 131 Cal. 125; s. c. 63 Pac. Rep. 177; 52 L. R. A. 205; rev'g s. c. 61 Pac. Rep. 280. Where the defendant's employé, on the occasion of an accident with an automobile, had been directed by defendant to accompany

the operator of the machine for the purpose of instructing and assisting him in its operation, and that the machine was under defendant's control at the time, the negligence of the operator was imputable to defendant: Parker v. Homan, 88 N. Y. Supp. 137. There is an example of a transfer of the relation in a case where the purchaser of a load of coal on its arrival ordered the same put in the coal house and opened the door through which the coal was to be thrown, and asked the driver to throw him a number of lumps to make a barricade in the doorway. The purchaser carried the lumps thrown to him and made the barricade, and while thus engaged, was struck by a lump of coal thrown by the driver. It was held that the teamster, when engaged in throwing the coal to the purchaser, was acting under his direction and not under the direction of his employer and the latter was not liable: Atherton v. Kansas City Coal & C. Co., 106 Mo. App. 591; s. c. 81 S. W. Rep. 223.

¹⁰⁴ Crudup v. Schreiner, 98 Ill. App. 337.

¹⁰⁵ Riggs v. Standard Oil Co., 130 Fed. Rep. 199.

of master and servant has been held to exist between an accident insurance company and a medical officer of the company making an examination of an injured person;¹⁰⁶ and between the owner of a licensed cab and a cabman to whom he lets the same at a fixed price per day.¹⁰⁷ The relation has been held not to exist between a shipper and an expressman employed by him at a fixed sum per year to cart his freight, where the expressman transports freight for any one requiring his services.¹⁰⁸

§ 580. Evidence to Prove the Relationship.¹⁰⁹

§ 581. Status of one Hiring a Team and a Driver to a Third Person.¹¹⁰

§ 582. Livery-Stable Keeper and Coachman.—In an English case where the owner of a brougham and horse and harness kept them at a livery stable, and hired a driver from the livery stable keeper at a certain weekly sum, and the owner of the equipage supplied the driver with his livery, it was held that the driver was the servant of the owner of the equipage, and not the livery stable keeper, though the latter paid the driver's wages.¹¹¹

§ 585. Lessor and Lessee.—It is held that the owners of a scow are not liable for its negligent handling where the vessel at the time of the accident was under the control of the street-cleaning department of a city.¹¹²

§ 586. Vendor and Vendee.—The vendor of an article who furnishes a servant to exhibit or set up the article, the servant, during this time being under the control of the vendor to the exclusion of the

¹⁰⁶ *Tompkins v. Pacific Mut. Life Ins. Co.*, 53 W. Va. 479; s. c. 44 S. E. Rep. 439.

¹⁰⁷ *Cargill v. Duffy*, 123 Fed. Rep. 721.

¹⁰⁸ *Lochrain v. Autophone Co.*, 77 App. Div. (N. Y.) 542; s. c. 78 N. Y. Supp. 919.

¹⁰⁹ In a case where the question involved was whether the owner of a building, who gave up the use of his elevator for a day to a company to raise machinery, was, during that time, the master of the elevator operator, it was held error to exclude evidence that he was detached from the employ of the owner of the building for the day, and employed and paid by the company using the elevator: *Connor v. Koch*,

63 App. Div. (N. Y.) 257; s. c. 71 N. Y. Supp. 836.

¹¹⁰ In support of the proposition that one letting a team to a person and furnishing a driver is liable for negligence of the driver, see: *Moore v. Stainton*, 80 App. Div. (N. Y.) 295; s. c. 80 N. Y. Supp. 244; s. c. aff'd, 177 N. Y. 581; 69 N. E. Rep. 1127; *Abraham v. Bullock*, 86 L. T. 796; s. c. 50 Wkly. Rep. 626; *Waldock v. Winfield* [1901], 2 K. B. 596; s. c. 70 L. J. K. B. 925; 85 L. T. 202.

¹¹¹ *Jones v. Scullard* [1898], 2 Q. B. 565; s. c. 67 L. J. Q. B. 895; 79 L. T. (N. S.) 386; 47 Wkly. Rep. 303.

¹¹² *Dooley v. Healey*, 95 App. Div. (N. Y.) 271; s. c. 88 N. Y. Supp. 965.

purchaser, is the master of the servant thus employed, and liable for his acts of negligence.¹¹³

§ 588. Assistants, Deputies, and Agents of Public Officers.¹¹⁴

§ 589. Master not Liable for Negligence of Third Persons Called in by his Servants to Assist them.—The general rule relieves the master from liability for the negligence of a person called in by his servant to assist him without being authorized thereto by the master.¹¹⁵ But the master cannot escape liability on this ground where the negligence of his servant was the efficient and proximate cause of the accident and the negligence of the helper was remote.¹¹⁶

§ 593. Whether Master Liable to Persons Temporarily Called in to Assist his Servants.¹¹⁷

§ 596. Where one Railroad Company uses the Track, Facilities or Servants of Another.—The ordinary contracts between a depot company and various companies for the use of its depot and yards do not establish a partnership between the companies nor make the depot corporation the servant of the railroad companies so that they become liable for the negligence of the servants of the depot company.¹¹⁸ The element of exclusive control over the operation of trains necessary under the rule of *respondeat superior* does not exist where the track is owned by one company, and the defendant company runs its trains over the same under a track agreement with the owner.¹¹⁹

§ 599. Liability of Master Furnishing Servant to Third Person.¹²⁰
—It is clear that a master furnishing servants to a third person will

¹¹³ Consolidated Fireworks Co. v. Koehl, 206 Ill. 283; s. c. 68 N. E. Rep. 1077; aff'g s. c. 103 Ill. App. 152; Wright Steam-Engine Works v. Lawrence Cement Co., 167 N. Y. 440; s. c. 60 N. E. Rep. 739; rev'g s. c. 61 N. Y. Supp. 1152.

¹¹⁴ It is held in Louisiana that a public officer is not liable for the act of a subordinate, unless it is clearly shown that the negligent subordinate was under the control of the superior officer in the matter of appointment and removal: De Armas v. Bell, 109 La. 181; s. c. 33 South. Rep. 188.

¹¹⁵ Appel v. Eaton & Co., 97 Mo. App. 428; s. c. 71 S. W. Rep. 741; Williams v. Gobble, 106 Tenn. 367; s. c. 61 S. W. Rep. 51.

¹¹⁶ Chicago v. O'Malley, 196 Ill. 197; s. c. 63 N. E. Rep. 652; aff'g s. c. 95 Ill. App. 355.

¹¹⁷ A person who is interested in

the work to be performed, and, to expedite his own work, or that of his employer, assists the servants of the person engaged to perform the work, at their request, is not a mere volunteer and hence not deprived of his right to be protected against the carelessness of the other's servants: Meyer v. Kenyon-Rosing Mach. Co., 95 Minn. 329; s. c. 104 N. W. Rep. 132.

¹¹⁸ Brady v. Chicago & C. R. Co., 114 Fed. Rep. 100; s. c. 52 C. C. A. 48; 57 L. R. A. 712.

¹¹⁹ Gustafson v. Chicago & C. R. Co., 128 Fed. Rep. 85.

¹²⁰ On the general proposition that the master furnishing a servant to perform services for a third person is liable for his negligence unless the servant passes under the control of such person, see: Thayer v. Checkley, 127 Fed. Rep. 556; Gulf & C. R. Co. v. Shelton, 30 Tex. Civ.

not be responsible for their negligence on the ground of employing incompetent and careless servants, where the injury was not due to any negligence in their selection.¹²¹ In a case where an elevator was used to raise a fire extinguisher system with the consent of the owner of the building, and at the completion of the service the foreman of the crew putting in the system gave the elevator operator five dollars, which was shown to be usual in such cases, it was held that the elevator operator was not transferred or loaned to the person putting in the system, so as to relieve the owner of the building from liability for his negligence in and about this particular work.¹²²

§ 607. **Negligence of an Intermeddler.**¹²³

§ 608. **Mortgagor and Mortgagee.**—It is held that the grantor of a deed of trust who constitutes the trustee his attorney in fact to take possession, management, and control of the mortgaged premises, receive the rents, etc., does not thereby change his relation so as to escape liability for injuries caused by the negligence of an elevator operator hired by the trustee.¹²⁴

§ 609. **Driver of Wagon Employed by Agent of Express Company.**—It is held that the driver of a wagon of an express company used in hauling parcels from the city office to the railroad station is the servant of the express company, and not the servant of the local agent, though the agent under his contract with the company is required to furnish both the driver and the horse.¹²⁵

§ 610. **Form of Action Against Master to Recover Damages Arising from Wrong of Servant.**¹²⁶

App. 72; s. c. 69 S. W. Rep. 653; 70 S. W. Rep. 359. A lighterage company which chartered a lighter to transfer goods of a third person under direction of an employé of the owner of the lighter made such employé its own servant for the time, and is liable for a loss of goods through his own negligence in unloading: *Smith v. Booth*, 110 Fed. Rep. 680; s. c. aff'd, 122 Fed. Rep. 626; 58 C. C. A. 479. A partnership is not liable for the negligence of a member of the firm in another line of business resulting in injury to a servant though the injured person is a servant of the partnership, but temporarily employed by the partner: *Hedge v. Williams*, 131 Cal. 455; s. c. 63 Pac. Rep. 721.

¹²¹ *Swackhamer v. Johnson*, 39 Or. 383; s. c. 65 Pac. Rep. 91 (laborers furnished committed trespass and cut timber without right under the

impression that the land belonged to their employer).

¹²² *Walsh v. Reisenberg*, 94 App. Div. (N. Y.) 466; s. c. 89 N. Y. Supp. 58.

¹²³ In a case where the gates at a railroad crossing were raised by one not an employé of the railroad company without authority from the gate keeper, and without his knowledge, while his back was turned, it was held that the railroad company was not liable to a person crossing the track and injured by the lowering of the gates: *Haines v. Atlantic City R. Co.*, 65 N. J. L. 27; s. c. 46 Atl. Rep. 595.

¹²⁴ *Luckel v. Century Bldg. Co.*, 177 Mo. 608; s. c. 76 S. W. Rep. 1035.

¹²⁵ *Adams Exp. Co. v. Schofield*, 111 Ky. 832; s. c. 64 S. W. Rep. 903; 23 Ky. L. Rep. 1120.

¹²⁶ A count based on the willful acts of the servant of defendant, as

§ 611. **When Master and Servant may be Jointly Sued.**—To render a master and servant jointly liable for injuries to a third person there must be actual negligence on the part of both, as distinguished from mere imputed negligence on the part of the master which concurs with a purely negligent act of the servant, as this would involve the union of two separate and distinct causes of action.¹²⁷

§ 612. **Questions of Pleading.**—The declaration should allege that the negligent act was committed either by the defendant's authority, or that it was an act within the scope of the servant's employment.¹²⁸ It is not absolutely required everywhere that there should be a direct averment in terms that a servant was acting within the scope of his employment in order to charge the employer with his negligence; it is sufficient if the pleader sets out the facts from which that conclusion may be inferred.¹²⁹

§ 613. **Burden of Proof on Question of Employment of Servant.**—In an action for injuries caused by the negligence of a servant the plaintiff has the burden of proof to establish the fact that the person

distinguished from the negligence of defendant, is in case: *Southern R. Co. v. Yancy*, 141 Ala. 246; s. c. 37 South. Rep. 341. A count which avers actual participation of the master in an act of a servant is in trespass and not in case, and can be sustained only by proof of the actual participation of the master: *City Delivery Co. v. Henry*, 139 Ala. 161; s. c. 34 South. Rep. 389.

¹²⁷ *McIntyre v. Southern R. Co.*, 131 Fed. Rep. 985.

¹²⁸ *Radke v. Schlundt*, 30 Ind. App. 213; s. c. 65 N. E. 770; *Mace v. Ashland Coal & C. R. Co.*, — Ky. —; s. c. 82 S. W. Rep. 612; 26 Ky. L. Rep. 865; *Fisher v. Brooklyn Jockey Club*, 50 App. Div. (N. Y.) 446; s. c. 64 N. Y. Supp. 69; *Benton v. James Hill Mfg. Co.*, 26 R. I. 192; s. c. 58 Atl. Rep. 664; *Sekator v. Lannon*, 26 R. I. 125; s. c. 58 Atl. Rep. 456. The bare allegation that the servant in making a murderous attack upon a person passing along a highway was acting within the scope of his employment is not sufficient to show the master's liability: *Letts v. Hoboken R. & C. Co.*, 70 N. J. L. 358; s. c. 57 Atl. Rep. 392. A complaint in an action against a railroad company for injury to a horse which alleged that defendant's servants riding on a hand car willfully and intentionally frightened the plaintiff's

horse by making loud noises, and willfully and intentionally drove him along the track at great speed by shouting and rapidly following him to a culvert across the track, in which he fell and was injured, was held open to the objection that it failed to show that the willful acts complained of were instigated by or committed for the defendant, or in the line of the servants' duty: *Wabash R. Co. v. Linton*, 26 Ind. App. 596; s. c. 60 N. E. Rep. 313. A complaint was held not open to the objection that it failed to allege that the servant was acting within the scope of his employment, which averred that a railroad employé was afflicted with smallpox and isolated by order of the local surgeon of the railroad company, and that an incompetent, untrustworthy, and unfit nurse was employed to care for him and that this nurse was permitted to leave the place of detention and, by reason of his incompetency, communicated the disease to the plaintiff, with whom he came in contact on the public street: *Missouri & C. R. Co. v. Freeman* (Tex. Civ. App.), 73 S. W. Rep. 542.

¹²⁹ *Indianapolis & C. Transit Co. v. Derry*, 33 Ind. App. 499; s. c. 71 N. E. Rep. 912. A declaration in an action for wrongful death was held sufficient which alleged that defend-

inflicting the injury was an employé of the defendant at the time¹³⁰ and was acting within the general scope of his employment.¹³¹

§ 614. **Matters of Evidence.**—Miscellaneous holdings as to the admissibility of evidence in this connection are collected in the margin.¹³²

§ 615. **Whether Servant Acted within the Scope of his Employment a Question of Fact.**¹³³—In a case where the undisputed evidence showed an unjustifiable assault by a clerk in the employ of the defendant on a customer on whom he was waiting, the question

ant, by its agents and servants, made an assault on decedent: Letts v. Hoboken R. & Co., 70 N. J. L. 358; s. c. 57 Atl. Rep. 392.

¹³⁰ Axtell v. Northern Pac. R. Co., 9 Idaho 392; s. c. 74 Pac. Rep. 1075; Connor v. Pennsylvania R. Co., 24 Pa. Super. Ct. 241.

¹³¹ Dholshagen v. Union Depot R. Co., 186 Mo. 258; s. c. 85 S. W. Rep. 344; Kessler v. Deutsch, 44 Misc. (N. Y.) 209; s. c. 88 N. Y. Supp. 846.

¹³² Where the master is being driven by the servant at the time of the accident, it may be inferred without other proof that he was engaged in the master's business, and subject to his orders: Kelton v. Fifer, 26 Pa. Super. Ct. 603. Where the person who shot the plaintiff after ejecting him from a train testified that he was a police officer in the employ of defendant, it was proper to allow him to testify that he was commissioned as a policeman by the State, and to permit him to produce his commission and read it to the jury. In such a case it was not incumbent on the plaintiff to show that the servant was at the time of the shooting attending to the business of his employer: Deck v. Baltimore & C. R. Co., 100 Md. 168; s. c. 59 Atl. Rep. 650. Proof that defendant owned the automobile which ran over plaintiff, and that the chauffeur was employed by defendant is sufficient to establish *prima facie* that the chauffeur was acting within the scope of his employment at the time of the collision: Stewart v. Baruch, 103 App. Div. (N. Y.) 577; s. c. 93 N. Y. Supp. 161. Where the servant in charge of a pumping station testi-

fied that no authority had been given him to invite any one to come on the premises where plaintiff was injured, it was not regarded as material to show that instructions to refuse admission to outsiders had been given to the servant, as this authority would be implied from the nature of his employment: Houston & C. R. Co. v. Bulger, 35 Tex. Civ. App. 478; s. c. 80 S. W. Rep. 557. Where actionable negligence is admitted, and exemplary damages cannot be awarded because the employer did not direct or affirm the wrongful act of the servant, and there is no mental suffering to be compensated for, evidence of the circumstances of the injury and of gross negligence should not be received: Rueping v. Chicago & C. R. Co., 116 Wis. 625; s. c. 93 N. W. Rep. 843. In an action for false imprisonment on a charge of shop-lifting made by a floorwalker, the floorwalker having died before the trial and the woman charged with the offense having failed to testify in her own behalf, it was held that evidence of a daughter, accompanying her mother at the time, to the effect that the floorwalker asked her mother for "the lace," and then stepped behind her and apparently took a bolt of lace from under her mother's arm, saying, "Here it is," was not conclusive that the floorwalker had produced the lace by a trick: Cobb v. Simon, 119 Mis. 597; s. c. 97 N. W. Rep. 276.

¹³³ See generally: Brennan v. Merchant & Co., 205 Pa. 258; s. c. 54 Atl. Rep. 891; Greene v. New York & C. R. Co., 102 App. Div. (N. Y.) 322; s. c. 92 N. Y. Supp. 424.

of the defendant's liability was held one solely for the court, and the only question for the jury was the amount of damages sustained.¹³⁴

§ 616. Whether the Relation of Master and Servant Existed a Question of Fact.¹³⁵

¹³⁴ Collins v. Butler, 83 App. Div. 67 Ohio St. 91; s. c. 65 N. E. Rep. (N. Y.) 12; s. c. 81 N. Y. Supp. 1074. 861; Sacker v. Waddell, 98 Md. 43; ¹³⁵ In support of the proposition indicated, see: Lima R. Co. v. Little, s. c. 56 Atl. Rep. 399.

TITLE FIVE.

INDEPENDENT CONTRACTORS.

[§§ 621-689.]

§ 621. **General Rule.**—One court states the rule in these words: “Where a person is employed to perform work which requires the exercise of skill and judgment, and the execution of it is left entirely to his discretion, with no restriction as to its exercise, and no limitation as to the authority conferred, and the compensation is dependent upon the value of the services, such a person does not occupy the relation of a servant under the control of a master, but is an independent contractor and the owner is not liable for his acts, or the acts of his workmen, who are negligent and cause injury to another.”¹ The mode of payment for the work may be considered in determining whether one is an independent contractor, but this test is not conclusive.²

§ 622. **General Statement as to who are Independent Contractors.**—Again the same idea is expressed by saying that an independent contractor is one who carries on an independent business, and in the line of this business is employed to perform a piece of work, and in doing it determines for himself in what manner the work shall be done, and represents the will of his employer only as to the result of the work.³ “The test to be applied is whether the employé repre-

¹ Patterson, J., in *Kueckel v. Ryder*, 54 App. Div. (N. Y.) 252; s. c. 66 N. Y. Supp. 522; s. c. aff'd, 170 N. Y. 562; 62 N. Y. Supp. 1096.

² *Indiana Iron Co. v. Cray*, 19 Ind. App. 565; s. c. 48 N. E. Rep. 803. One who contracts with a city to excavate a reservoir and do the preliminary work, using his own men, teams, and material, and adopting his own method of doing the work, without interference, or the right to interfere on the part of the city, is an independent contractor, for whose negligence the city is not responsible, although his compensation is fixed at a specified sum per day and his expenses: *Groesbeck v. Pinson*, 21 Tex. Civ. App. 44; s. c. 50 S. W. Rep. 620.

³ *Zimmerman v. Baur*, 11 Ind. App.

607; s. c. 39 N. E. Rep. 299; *Keys v. Second Baptist Church*, 99 Me. 308; s. c. 59 Atl. Rep. 446. See also: *Bjornson v. Saccone*, 88 Ill. App. 6; *Knowlton v. Hoit*, 67 N. H. 155; s. c. 30 Atl. Rep. 346. An instruction that, if the defendant employed an experienced contractor to perform a service he was not liable, was held defective, on the ground that it did not require the jury to find the work was being performed under an independent contract which gave the contractor exclusive control over the work: *Hearn v. Quillen*, 94 Md. 39; s. c. 50 Atl. Rep. 402. In a case where one of two adjoining proprietors employed a man to repair a wall in his building nearest plaintiff's structure, and the man so employed dug up the ground in

sents his employer as to the result of the work or as to the means. If the former, he is to be regarded as an independent contractor, but, if the latter, merely an agent or servant."⁴ It is always essential that the contractor should be free from the control of the person employing him.⁵

§ 623. Some Illustrations of this Statement.⁶

the passageway and left it so piled up that when a storm occurred the water was turned into plaintiff's cellar, it was held that the relation of master and servant was not established between the employer and the employé and his workmen, and hence he was not liable for the resulting injury: *Dutton v. Amesbury Nat. Bank*, 181 Mass. 154; s. c. 63 N. E. Rep. 405.

⁴*Parrott v. Chicago Great Western R. Co.*, 127 Iowa 419; s. c. 103 N. W. Rep. 352.

⁵*Ridgeway v. Downing Co.*, 109 Ga. 591; s. c. 34 S. E. Rep. 1028; *Berg v. Parsons*, 156 N. Y. 109; s. c. 47 Cent. L. J. 237; 50 N. E. Rep. 957; 41 L. R. A. 391; rev'g s. c. 90 Hun (N. Y.) 267. An owner will not be liable to have abandoned or properly transferred the possession, management and control of a wreck by employing an independent contractor to raise it, although the person so employed be placed in the actual physical custody of the wreck: *The Snark*, 68 Law T. (N. S.) 25; s. c. 47 Wkly. Rep. 398; 8 Asp. 483.

⁶The employer of an independent contractor, consenting to the use of a defective appliance belonging to him by the servants of the contractor, is not liable for injuries caused thereby where he is under no obligation to furnish the appliance: *Bush v. Grant*, 61 S. W. Rep. 363; s. c. 22 Ky. L. Rep. 1766; *Central Coal & Co. v. Grider*, 115 Ky. 745; s. c. 74 S. W. Rep. 1058; 25 Ky. L. Rep. 165. The relation of independent contractor exists between the owner of land and a person he employs to move a building, in which service, the contractor is to furnish the labor and appliances for a specified price, and the landowner will not be liable for damages to a third person for injuries due to the negligence of the contractor: *Wilbur v. White*, 98 Me. 191; s. c. 56 Atl. Rep. 657. The assignee of a lease, and not

the assignor, is liable for the negligence of the janitor employed by the assignee of the lease, though the assignor may have had no authority to assign the lease: 182 Mass. 405; s. c. 65 N. E. Rep. 797. A lumberman contracting for logs to be delivered at the mouth of a stream is not liable for the destruction of a bridge by reason of the contractor allowing the logs to jam in the stream with those of other owners, the accident occurring by reason of the breaking of the jam by a freshet: *Overseer of Highways of Road Dist. No. 4 of St. Ignace Tp. v. Pelton*, 129 Mich. 31; s. c. 87 N. W. Rep. 1029; 8 Det. Leg. N. 842. One is not liable for the negligent piling of lumber by another who has contracted to take the lumber from a car, pile and dry it, use a portion of it in making articles to be paid for by the piece and turn the rest over to the former for use on portions of the premises remaining in his control, the owner having no control or supervision as to the piling: *Wright v. Big Rapids Door & Co.*, 124 Mich. 91; s. c. 82 N. W. Rep. 829; 50 L. R. A. 495. The owner of paper stored in a warehouse is not liable for injuries caused by the negligence of a truckman whom he employed to remove the paper, and the truckman employed other men in the work and when the work was finished sent the total bill to the owner of the paper, the owner giving no instructions and exercising no superintendence as to the way in which the paper was to be moved. *Kueckel v. Ryder*, 54 App. Div. (N. Y.) 252; s. c. 66 N. Y. Supp. 522; s. c. aff'd, 170 N. Y. 562; 62 N. E. Rep. 1096. One employed to do a certain service under a contract providing that the owner shall furnish the material, and that the contractor shall employ the labor, and superintend the work according to certain plans, and receive a per diem for himself and each of his em-

§ 624. Statement of the Rule in Case of Building Contracts.⁷—

A property owner, who undertakes the erection of a building thereon, and employs a competent architect to draw the plans and specifications and to supervise the work, and a competent contractor to construct the foundation and building, is not responsible for an accident caused by the defective execution of the plan by the contractor and the failure of the architect carefully to inspect the work. These persons, under

ployés, is an independent contractor: *Emerson v. Fay*, 94 Va. 60; s. c. 26 S. E. Rep. 386. The owner of a beer wagon, bought from a brewing company and used by the owner in delivering beer purchased from the brewery to his own customers, is liable for the negligence of the driver of the wagon and not the brewing company: *Bryson v. Philadelphia Brewing Co.*, 209 Pa. 40; s. c. 57 Atl. Rep. 1105. In a case where the father of contractors engaged in the removal of cinders from the yard of an electric company was killed by a shock of electricity communicated from an electric wire through a metal hoe which he hung over a wire while raking down a pile of cinders thereunder, the electric company was held not liable since it was the duty of the sons as contractors to warn their father of the danger from this act: *Proctor v. San Antonio St. R. Co.*, 26 Tex. Civ. App. 148; s. c. 62 S. W. Rep. 939. A person employed to take charge of a shingle mill, employ and pay all laborers, make all repairs, manufacture the shingles from lumber furnished by the owner, install at his own expense any new machinery to be furnished on his requisition by the owner, and to receive a stipulated sum for the product of the mill, is an independent contractor in the employ of the owner of the mill: *Ziebell v. Eclipse Lumber Co.*, 33 Wash. 591; s. c. 74 Pac. Rep. 680.

⁷In support of the proposition that the owner of a building in course of erection, rearrangement or reparation, who contracts with a third person to perform the work, is not liable under the independent contractor doctrine, see: *Louthan v. Hewes*, 138 Cal. 116; s. c. 70 Pac. Rep. 1065 (servants of stair builder improperly placed cleats on stairs to protect them from injury before

being painted); *Ridgeway v. Downing Co.*, 109 Ga. 591; s. c. 34 S. E. Rep. 1028 (failure of contractor to safeguard a trench); *Bjornson v. Saccone*, 88 Ill. App. 6; *Geist v. Rothschild*, 90 Ill. App. 324; *Murray v. Arthur*, 98 Ill. App. 331; *Hoff v. Shockley*, 122 Iowa 720; s. c. 98 N. W. Rep. 573 (failure of contractor to barricade and place lights on pile of sand); *Callahan v. Phillips Academy*, 180 Mass. 183; s. c. 62 N. E. Rep. 260; *Eldred v. Mackie*, 178 Mass. 1; s. c. 59 N. E. Rep. 673; *Burns v. McDonald*, 57 Mo. App. 599 (plumber); *Hogan v. Arbuckle*, 73 App. Div. (N. Y.) 591; s. c. 77 N. Y. Supp. 22 (case of injury to employé of contractor having charge of electrical work in falling through a hole in a floor which was concealed by rubbish); *Korn v. Weir*, 88 N. Y. Supp. 976; *Nelson v. Young*, 91 App. Div. (N. Y.) 457; s. c. 87 N. Y. Supp. 69; *Rubin v. Miller*, 30 Pittsb. Leg. J. (N. S.) 351; *Southwestern Tel. & Co. v. Paris*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 724; *Richmond v. Sitterding*, 101 Va. 354; s. c. 43 S. E. Rep. 562. A corporation contracting to place an elevator in running order in a building at a stipulated price, without direction or control of the owner of the building in doing the work, is an independent contractor: *Parkhurst v. Swift*, 31 Ind. App. 521; s. c. 68 N. E. Rep. 620. One employed to do work on a building under a contract authorizing him to procure labor and material in his own way, provided it be such as the contract demands, and to use such machinery and appliances as he deems proper, if it does not unnecessarily injure the building or interfere with work done by others, is an independent contractor: *Hughbanks v. Boston Inves. Co.*, 92 Iowa 267; s. c. 60 N. W. Rep. 640.

the doctrine now under consideration are regarded as in the exercise of an independent calling.⁸ The contractors are regarded as independent contractors, though the owner's superintendent is charged with the duty to see whether the contractors are carrying out their agreement.⁹ The owner is not made liable for the negligence of the contractor resulting in injury to a tenant's family in a building in course of reparation because of his failure to obtain the tenant's consent to enter the premises.¹⁰ When building material is hauled on the ground by the owner of the property, the contractor does not become liable for injuries caused by defective piling until he has taken control of the timbers and entered upon the erection of the structure.¹¹ An ordinance imposing a penalty upon the owner or general contractor engaged in the construction of a building over a certain height, who fails to build a temporary roof over the sidewalk in front of the building, is construed not to enlarge the liability of the property owner. It only applies to cases where the building is being erected under the direction and control of the owner.¹² A statute, requiring the contractors or owners of a building in course of construction to enclose the openings in each floor on which a hoisting apparatus is operated, places this duty on the owner of the building as to an employé of an independent contractor, as well as on the contractor, and this though all the work on the building is being done by independent contractors, and the hoisting machine is installed by a company which is paid by the contractors.^{12a}

§ 626. **In Case of Railway Contracts.**—The general rule relieves a railroad company from liability for injuries due to the negligence of contractors where the work they are engaged in performing is not essentially hazardous, and ordinary care has been used in the selection of the contractors.¹³ In an Iowa case the conclusion was reached that a grading contractor was a servant of the railroad company, and not an independent contractor, where he furnished his own tools, but performed the work under the direction and to the satisfaction of an engineer having power to terminate the contract whenever he deemed it for the best interest of the railroad company.¹⁴

⁸ *Burke v. Ireland*, 166 N. Y. 305; s. c. 59 N. E. Rep. 914.

⁹ *Miller v. Merritt & Co.*, 211 Pa. 127; s. c. 60 Atl. Rep. 508.

¹⁰ *McDermott v. McDonald*, 55 Ill. App. 226.

¹¹ *Macdonald v. O'Reilly*, 45 Or. 589; s. c. 78 Pac. Rep. 753.

¹² *Koch v. Fox*, 71 App. Div. (N. Y.) 288; s. c. 75 N. Y. Supp. 913.

^{12a} *Rooney v. Brogan Const. Co.*,

107 App. Div. (N. Y.) 258; s. c. 95 N. Y. Supp. 1.

¹³ *Norfolk & C. R. Co. v. Stevens*, 97 Va. 631; s. c. 34 S. E. Rep. 525; 46 L. R. A. 367; *Reilly v. Chicago & C. R. Co.*, 122 Iowa 525; s. c. 98 N. W. Rep. 464.

¹⁴ *Parrott v. Chicago & C. R. Co.*, 127 Iowa 419; s. c. 103 N. W. Rep. 352.

§ 629. Working by the Day or by the Job.¹⁵

§ 633. Surgeons Employed by Steamship Companies, Railroad Companies, etc.—In a case where an employé was injured in a street car accident and the company sent a physician to examine him, and this physician directed the injured person, who claimed he could not stand on his left leg, to try to stand on it, and in an effort to do so the plaintiff fell and sustained other injuries, the court held that the company was not liable for the later injury, as the physician in making the examination was an independent contractor and free from the control or direction of the company employing him.¹⁶

§ 647. Proprietor Continues Liable for his Own Negligence.—The obvious principle that the proprietor will continue liable for his own negligence in any event covers the case where there is substantial identity between the contractor and his employer, as, for example, where the work of a corporation is performed by an operating company, whose personnel is substantially identical with that of the corporation itself.¹⁷ Under this head properly falls that class of cases where the contractor follows designs and plans furnished him by his employer, in which case the liability is placed upon the employer.¹⁸

§ 648. Proprietor Liable where the Work Contracted for is Wrongful Per se.—Both the owner and the contractor will be liable where the act contracted to be done is itself wrong.¹⁹

¹⁵ *Foster v. Wadsworth-Howland Co.*, 168 Ill. 514; s. c. 48 N. E. Rep. 163; aff'g s. c. 68 Ill. App. 600 (expressman contracting to haul goods for a house at a certain price per week is an independent contractor); *O'Neill v. Blase*, 94 Mo. App. 648; s. c. 68 S. W. Rep. 764 (laborer engaged at 50 cents per day to drive an animal is the owner's servant and not an independent contractor); *Macdonald v. O'Reilly*, 45 Or. 589; s. c. 78 Pac. Rep. 753 (mere fact that teamster is paid at a certain rate per foot for hauling lumber insufficient to constitute the teamster an independent contractor). A person employed and paid by a contractor as driver of a horse and wagon, which, together with the driver, the contractor lets by the day to a city to be used in the work of paving a street, and who has the entire management of the horse as to the manner of driving him, and whose duty it is to see that he is properly shod, is the servant of the contractor in so driving the horse and having him shod, and, for an

injury to a third person, caused by his negligence in these respects, the contractor is liable: *Huff v. Ford*, 126 Mass. 24. The fact that a person alleged to be an independent contractor is employed at \$2 per day and hires other persons at the rate of \$1.50 per day does not take away the independent character of his employment: *Karl v. Juniata Co.*, 206 Pa. 633; s. c. 56 Atl. Rep. 78.

¹⁶ *Pearl v. West End St. R. Co.*, 176 Mass. 177; s. c. 57 N. E. Rep. 339; 49 L. R. A. 826.

¹⁷ *James McNeil & Co. v. Crucible Steel Co.*, 207 Pa. 493; s. c. 56 Atl. Rep. 1067.

¹⁸ *Board of Com'rs of Cloud Co. v. Vickers*, 62 Kan. 25; s. c. 61 Pac. Rep. 391; *Rector & Co. of Church of Holy Communion v. Peterson Extension R. Co.*, 68 N. J. L. 399; s. c. 53 Atl. Rep. 449, 1079.

¹⁹ *Murray v. Arthur*, 98 Ill. App. 331; *Wilbur v. White*, 98 Me. 191; s. c. 56 Atl. Rep. 657; *Crisler v. Ott*, 72 Miss. 166; s. c. 16 South. Rep. 416.

§ 650. Proprietor Liable where the Injury Proceeds from the Nature of the Work Itself.—The doctrine here indicated²⁰ is applied to render the proprietor liable for injuries due to the obstruction of a street which was a direct and necessary incident of the work;²¹ and this was the conclusion where the independent contractor, employed by the proprietor to construct stone work, drew heavy loads of stone over the sidewalk in front of the premises so as to render the walk defective and unsafe and an injury to a pedestrian resulted therefrom.²² But a proprietor was held not liable for the negligence of a servant of an independent contractor in throwing a piece of lime in a mortar-bed in the street, causing injury to a passer-by, as the work itself was not a nuisance, and the injury did not necessarily result therefrom.²³

§ 651. Proprietor cannot Relieve himself from Liability by an Agreement with the Contractor.²⁴

§ 652. Where the Work is, in its Nature, Dangerous, and Likely to Lead to Mischief.—The rule that the proprietor will not be absolved from liability for the negligence of an independent contractor where the work is, in itself, dangerous, and likely to lead to mischief,²⁵ is illustrated by these cases:—Where the contractor for brick work on a building failed to erect barricades to prevent injuries to persons on the sidewalk from falling materials;²⁶ where the property owner employed a contractor to blast within a few feet of the house of an adjoining owner, and took no precautions against injuries;²⁷ where the owner of shore land contracted with another to dredge in front of it and deposit

²⁰ *Chicago v. Norton Milling Co.*, 97 Ill. App. 651; s. c. aff'd, 196 Ill. 580; 63 N. E. Rep. 1043; *Murray v. Arthur*, 98 Ill. App. 331; *Omaha Bridge & Co. v. Hargadine*, — Neb. —; s. c. 98 N. W. Rep. 1071; *Holliday v. National Tele. Co.* [C. A.] [1899], 2 Q. B. 392; rev'g s. c. [1899], 1 Q. B. 221; 68 L. J. Q. B. (N. S.) 302. To render an employer liable for injuries to a third person during the performance of a contract by an independent contractor the injury must have arisen not from the work being done, but from the method adopted in doing it: *Sullivan v. Dunham*, 35 App. Div. (N. Y.) 342; s. c. 54 N. Y. Supp. 962.

²¹ *Johnston v. Phoenix Bridge Co.*, 44 App. Div. (N. Y.) 581; s. c. 60 N. Y. Supp. 947; s. c. aff'd, 169 N. Y. 581; 62 N. E. Rep. 1096.

²² *Mullins v. Siegel & Co.*, 95

App. Div. (N. Y.) 234; s. c. 88 N. Y. Supp. 737.

²³ *Strauss v. Louisville*, 108 Ky. 155; s. c. 55 S. W. Rep. 1075.

²⁴ *Covington & Co. v. Bridge Co.* v. Steinbrock, 61 Ohio St. 215; s. c. 55 N. E. Rep. 618; *Vosbeck v. Kellogg*, 78 Minn. 176; s. c. 80 N. W. Rep. 957; *Keys v. Second Baptist Church*, 99 Me. 308; s. c. 59 Atl. Rep. 446.

²⁵ *Toledo Brewing & Co. v. Bosch*, 101 Fed. Rep. 530; s. c. 41 C. C. A. 482; *Sullivan v. Dunham*, 35 App. Div. (N. Y.) 342; s. c. 54 N. Y. Supp. 962 (blasting); *Penny v. Wimbledon Urban Council* [1899], 2 Q. B. 72; s. c. 68 L. J. Q. B. 704; 80 L. T. (N. S.) 615; 47 Wkly. Rep. 565; 63 J. P. 406.

²⁶ *Young & Humphrey v. Trapp*, 118 Ky. 813; s. c. 82 S. W. Rep. 429; 26 Ky. L. Rep. 752.

²⁷ *Wetherbee v. Partridge*, 175 Mass. 185; s. c. 55 N. E. Rep. 894.

the dredging on the rear, and failed to provide means to prevent it from sliding on the land of an adjoining owner;²⁸ where a telephone company laying wires in a highway employed a plumber to solder the joints of tubes, and through the use of a defective benzoline lamp an explosion resulted, injuring a passer-by.²⁹ But the work of raising a party wall is neither dangerous nor extraordinary in itself, so as to make the person for whom it is done liable for the negligence of an independent contractor in doing the work.³⁰

§ 653. As in Case of Dangerous Excavations in Streets.³¹

§ 654. Or in Failing to Support Adjacent Land in Building.—

The employment of an independent contractor to make an excavation adjoining the premises of another does not relieve the proprietor from the obligation to take reasonable precautions to prevent injury to his adjoining proprietor,³² who is entitled to notice of the nature and extent of the intended excavation.³³ As between the contractor and the sub-contractor the duty of shoring a building is held to rest on the former in the absence of contrary proof.³⁴

§ 655. Other Illustrations.³⁵

²⁸ *Braisted v. Brooklyn &c. R. Co.*, 46 App. Div. (N. Y.) 204; s. c. 61 N. Y. Supp. 674. An abutting owner who obtains from the city authority to grade the streets, and contracts with an independent contractor to grade such streets and his lots, was held liable for the dumping into a ravine by the contractor, with his knowledge and procurement, of mud and quicksand which overflowed another's land several hundred feet distant, although permission was obtained of the intervening owners to overflow their lots: *Koch v. Sackman-Phillips Invest. Co.*, 9 Wash. 405; s. c. 37 Pac. Rep. 703.

²⁹ *Holliday v. National Tel. Co.*, [1899], 2 Q. B. 392; s. c. 68 L. J. Q. B. 1016; 81 L. T. (N. S.) 252; 47 Wkly. Rep. 658.

³⁰ *Negus v. Becker*, 143 N. Y. 303; s. c. 38 N. E. Rep. 290; 25 L. R. A. 667; 42 Am. St. Rep. 724; 62 N. Y. St. Rep. 313.

³¹ That the proprietor will be liable for the failure of his contractor to safeguard an excavation in a street, see: *Fisher v. Tryon*, 15 Ohio C. C. 541; *McCarrier v. Hollister*, 15 S. D. 366; s. c. 89 N. W. Rep. 862; *Cameron Mill &c. Co. v. Anderson*, 98 Tex. 156; s. c. 81 S. W. Rep. 282; aff'g s. c. 78 S. W. Rep. 8; *Thomas*

v. Harrington, 72 N. H. 45; s. c. 54 Atl. Rep. 285; *Murphy v. Perlstein*, 73 App. Div. (N. Y.) 256; s. c. 76 N. Y. Supp. 657; *Ann v. Herter*, 79 App. Div. (N. Y.) 6; s. c. 79 N. Y. Supp. 825.

³² *Samuel v. Novak*, 99 Md. 558; s. c. 58 Atl. Rep. 19; *Davis v. Summerfield*, 133 N. C. 325; s. c. 45 S. E. Rep. 654; 63 L. R. A. 492.

³³ *Davis v. Summerfield*, 133 N. C. 325; s. c. 45 S. E. Rep. 654; 63 L. R. A. 492.

³⁴ *Nelson v. Young*, 91 App. Div. (N. Y.) 457; s. c. 87 N. Y. Supp. 69; s. c. aff'd, 180 N. Y. 523; 72 N. E. Rep. 1146.

³⁵ One contracting for the repair or tearing down of a building destroyed by fire is under the duty of guarding the servant of an independent contractor against the danger of his employment: *Butler v. Lewman*, 115 Ga. 752; s. c. 42 S. E. Rep. 98. Licensees of a mine, contracting with a third person to mine the ore and divide the products, were held obligated to see that the mine was in a reasonably safe condition: *Rice v. Smith*, 171 Mo. 331; s. c. 71 S. W. Rep. 123. A manufacturer, contracting with a third person for the manufacture of his product and furnishing a dangerous ma-

§ 656. **Responsibility of Proprietor for Fires set on his Premises by Contractor.**—In a case where the property owner employed a painter to paint his house for a lump sum, and gave him no directions as to the manner of the work, the painter was held an independent contractor, for the result of whose act in setting out a fire by the negligent operation of a paint burner the proprietor was not liable.³⁶ But a land-owner was held liable for the negligence of a contractor in permitting fire to escape to adjacent lands from lands which he had contracted to clear and make ready for the plow, where such negligence flowed directly from the acts which the contractor agreed to do, and was by the land-owner authorized to do, and which was the natural and probable consequence of the performance of the work in the manner agreed upon.³⁷

§ 658. **Proprietor Responsible where he Interferes with the Work, etc.**—This principle is illustrated by a case where an employé of a person hired to build a water tank was injured by its bursting during a test because of defective rivet holes, and it was shown that the owner's engineer was responsible for the substitution of an insufficient method of making these holes instead of having them drilled, as required by the plans prepared by the owner.³⁸ So the owner of premises who assumes control of building stones as they are delivered, or directs the contractor where to put them, may be held responsible for negligence in having them placed in an exposed position in the street, where they are liable to fall or be thrown down and injure passers-by, although the contractor alone would have been responsible except for his interference.³⁹ A mere request by the proprietor that the contractor hasten his work will not be regarded as an interference with the work under the rule.⁴⁰

§ 659. **Proprietor Responsible where he Retains or Assumes General Supervision and Control of the Work.**—The proprietor is clearly liable where he interferes with and supervises the work of the contractor with reference to its methods and results.⁴¹ The mere fact

chine without instructions, was held liable for injury to an employé of such third person: *Jacobs v. Fuller & Co.*, 67 Ohio St. 70; s. c. 65 N. E. Rep. 617. But the construction of the brick work of a house abutting on a street is not regarded as an enterprise inherently dangerous to the users of the street, so as to make the proprietor liable for injuries to a pedestrian by the placing of a plank across the sidewalk for use of laborers in carrying brick and mortar into the building: *Richmond v.*

Sitterding, 101 Va. 354; s. c. 43 S. E. Rep. 562.

³⁶ *Francis v. Johnson*, 127 Iowa 391; s. c. 101 N. W. Rep. 878.

³⁷ *Cameron v. Oberlin*, 19 Ind. App. 142; s. c. 48 N. E. Rep. 386.

³⁸ *Duerr v. Consolidated Gas. Co.*, 86 App. Div. (N. Y.) 14; s. c. 83 N. Y. Supp. 714.

³⁹ *Mahar v. Steur*, 170 Mass. 454; s. c. 49 N. E. Rep. 741.

⁴⁰ *Eldred v. Mackie*, 178 Mass. 1; s. c. 59 N. E. Rep. 673.

⁴¹ *Salliotte v. King Bridge Co.*, 122

that the agent of a proprietor when asked by an employé of the contractor what he should do, told him to go to a certain portion of the premises and engage in a certain line of work, and the employé was injured in such work, has been held not to show a masterful direction by the proprietor to the employé to work at a place which the proprietor was legally bound to provide as safe.⁴²

§ 660. What Supervision by the Proprietor will not Render the Proprietor Liable.—The fact that the proprietor retains a general supervision over the place where the work is done and the right to inspect the work to see if it conforms with the contract,⁴³ or requires the work to be done under the supervision and to the satisfaction of his representative, does not make him responsible for the negligence of the contractor.⁴⁴ Under the New York statute, which imposes the duty of furnishing or erecting safe and suitable scaffoldings upon a person directing another to perform labor in altering a building, it was held that a proprietor, employing an independent contractor to instal machinery, and furnishing workmen to assist, was not made liable for injuries caused by an insufficient scaffold, by the mere fact

Fed. Rep. 378; s. c. 58 C. C. A. 466 (the employer of a contractor for the erection of a bridge held liable where work was done under the direct supervision of an engineer in his employ); Louisville & C. R. Co. v. Tow, 63 S. W. Rep. 27; s. c. 23 Ky. L. Rep. 408; Watson Lodge v. Drake, 16 Ky. L. Rep. 669; s. c. 29 S. W. Rep. 632; Corrigan v. Elsing, 81 Minn. 42; s. c. 83 N. W. Rep. 492; Klages v. Gillette-Herzog Mfg. Co., 86 Minn. 458; s. c. 90 N. W. Rep. 1116; Appel v. Eaton & Co., 97 Mo. App. 428; s. c. 71 S. W. Rep. 741; James McNeil & Co. v. Crucible Steel Co., 207 Pa. 493; s. c. 56 Atl. Rep. 1067 (the owner and not the maker of boiler liable for explosion by reason of insufficient repairs where the repairs were made under the supervision of the owner); Southern Cotton-Oil Co. v. Wallace, 23 Tex. Civ. App. 12; s. c. 54 S. W. Rep. 638. Where, by contract between defendant and a transfer company for the removal of defendant's boiler, the transfer company had nothing to do with the removal of the brick foundation of the boiler, and defendant's servant while removing brick, under order of defendant's foreman, was killed by the boiler falling on him, owing to the

breaking of a chain by which the transfer company had hoisted the boiler and then had it suspended, the transfer company was not liable, since it was the removal of the brick under defendant's order that caused the death: Chicago Edison Co. v. Moren, 185 Ill. 571; s. c. 57 N. E. Rep. 733; aff'g s. c. 86 Ill. App. 152.

⁴² Glaser v. Michelson, 86 N. Y. Supp. 286.

⁴³ Kelleher v. Schmitt & Co. Mfg. Co., 122 Iowa 635; s. c. 98 N. W. Rep. 482; Boomer v. Wilbur, 176 Mass. 482; s. c. 57 N. E. Rep. 1004; Vosbeck v. Kellogg, 78 Minn. 176; s. c. 80 N. W. Rep. 957; Gayle v. Missouri Car & Co., 177 Mo. 427; s. c. 76 S. W. Rep. 987; Cullom v. McKelvey, 26 App. Div. (N. Y.) 46; s. c. 49 N. Y. Supp. 669; Hawke v. Brown, 28 App. Div. (N. Y.) 37; s. c. 50 N. Y. Supp. 1032; Omaha Bridge & Co. v. Hargadine, — Neb. —; s. c. 98 N. W. Rep. 1071; Jaskoey v. Consolidated Gas Co., 33 Misc. (N. Y.) 790; s. c. 67 N. Y. Supp. 976; Simonton v. Perry (Tex. Civ. App.), 62 S. W. Rep. 1090.

⁴⁴ Indiana Iron Co. v. Cray, 19 Ind. App. 565; s. c. 48 N. E. Rep. 803; Thomas v. Altoona & C. R. Co., 191 Pa. 361; s. c. 43 Atl. Rep. 215.

that one of his foremen in the course of the work directed the workmen of the independent contractor to erect the scaffold.⁴⁵

§ 661. Proprietor Liable where he Reserves Full Control as to the Results and Methods.—Under this rule a railroad company was held liable for injuries in blasting for a tunnel where it in fact controlled the work which resulted in the injury.⁴⁶

§ 662. Application of this Doctrine to Building Contracts where Control is Reserved to Architects and Superintendents.—The mere fact that the proprietor of a building undergoing erection or repair employs an architect to inspect the work, and see that it is constructed according to contract, does not render the owner liable for the negligence of the contractor or his servants in the prosecution of the work.⁴⁷ Neither can an owner be held liable for personal injuries resulting from the failure of an independent contractor to conform to the plans and specifications because he failed to employ an architect to supervise the work of the contractor as contemplated by the contract.⁴⁸ The architect in the matter of inspection is regarded as an independent contractor.⁴⁹

§ 663. Application of this Doctrine to Municipal Corporations.—It is the general rule that a city will be liable for the negligence of a contractor in its employ, where the work is performed under the direct supervision of the city's own officers;⁵⁰ and the case is stronger where the contract not only allows this supervision, but gives the official the power to discharge incompetent and disobedient employés.⁵¹ If, however, the municipality in letting the contract retains no control over the contractor except through an official, whose duty it is to see that the work is conducted according to contract, the municipality will not be liable for negligence of the contractor.⁵² A Massachu-

⁴⁵ *Wingert v. Krakauer*, 92 App. Div. (N. Y.) 223; s. c. 87 N. Y. Supp. 261.

⁴⁶ *Louisville &c. R. Co. v. Tow*, 63 S. W. Rep. 27; s. c. 23 Ky. L. Rep. 408.

⁴⁷ *Geist v. Rothschild*, 90 Ill. App. 324; *Frassi v. McDonald*, 122 Cal. 400; s. c. 55 Pac. Rep. 139.

⁴⁸ *Hawke v. Brown*, 28 App. Div. (N. Y.) 37; s. c. 50 N. Y. Supp. 1032.

⁴⁹ *Burke v. Ireland*, 166 N. Y. 305; s. c. 59 N. E. Rep. 914.

⁵⁰ *Smith v. Seattle*, 20 Wash. 613; s. c. 58 Pac. Rep. 389; *Penny v. Wimbledon Urban Dist. Council* [1898], 2 Q. B. 212; s. c. 67 L. J. Q. B. (N. S.) 754; 78 Law T. Rep.

748. One whose bid for a street improvement has been accepted, and who has in part performed the work under the direction of the municipality's engineer and street committee, does not become an independent contractor so as to exempt the municipal corporation from liability for an accident sustained because of a road obstruction, although there-after a formal independent contract is tendered to him for signature: *Hookey v. Oakdale (Pa.)*, 29 Pitts. L. J. (N. S.) 453.

⁵¹ *Scott v. Springfield*, 81 Mo. App. 312.

⁵² *Lenderink v. Rockford*, 135 Mich. 531; s. c. 98 N. W. Rep. 4; 10 Det. Leg. N. 832. See also *McMullen v.*

setts case, difficult to reconcile with these principles, holds that a municipal corporation by reserving the right to supervise the work of a contractor, and requiring him to employ only its own citizens, does not thereby exercise such control of the work as to render it liable for the acts of his employes.⁵³ Here as elsewhere the employer will be liable for injuries which proceed from the nature of the work itself, and not from the manner in which the contractor has executed it.⁵⁴

§ 664. Proprietor Liable if he Accepts Defective Work from Contractor.⁵⁵

§ 665. Proprietor Remains Liable who Delegates an Absolute Duty to an Independent Contractor.⁵⁶

§ 669. Railway Companies Remain Liable if they Devolve the Execution of their Franchises upon Independent Contractors.—Here a contractor is regarded as the agent or servant of the corporation employing him if the work involves the exercise of a charter privilege or power of the corporation, and which he could not have exercised independently of its charter.⁵⁷ But the railroad company will not be liable for the negligent performance of an act not necessary to the execution of the contract and not called for by it.⁵⁸

§ 670a. Other Corporations.—*Quasi* public corporations—such as electric light companies—are answerable for the negligence of contractors employed by them to exercise any of their powers and privileges.⁵⁹

§ 675. Liability in Respect of Premises upon Which the Public are Invited upon the Payment of a Fee.—On the grounds stated in the

New York, 104 App. Div. (N. Y.) 337; s. c. 93 N. Y. Supp. 772.

⁵³ *Harding v. Boston*, 163 Mass. 14; s. c. 39 N. E. Rep. 411.

⁵⁴ *Ray v. Poplar Bluff*, 70 Mo. App. 252 (failure of contractor to guard opening in bridge); *Penny v. Wimbledon Urban District Council* [C. A.] [1899], 2 Q. B. 72; s. c. 68 L. J. Q. B. (N. S.) 704; aff'g s. c. [1899] 2 Q. B. 212; 67 L. J. Q. B. (N. S.) 754; 78 Law T. Rep. 748 (failure to safeguard street excavation).

⁵⁵ See *post*, § 686.

⁵⁶ *Downey v. Low*, 22 App. Div. (N. Y.) 460; s. c. 48 N. Y. Supp. 207 (servant of contractor left coal chute unguarded); *Reuben v. Swigart*, 7 Ohio C. Dec. 638; s. c. 15 Ohio C. C. 565 (failure to light and guard building material deposited in street).

⁵⁷ *Suburban R. Co. v. Balkwill*, 94 Ill. App. 454; *Taylor & Co. v. Warner* (Tex. Civ. App.), 60 S. W. Rep. 442. Rule held to apply where a servant of a contractor engaged in work on an elevated railroad dropped a heavy piece of steel on a person passing under the structure: *Metropolitan West Side El. R. Co. v. Dick*, 87 Ill. App. 40. Railroad liable for injuries caused by an obstruction erected in the highway by a contractor engaged in construction: *Deming v. Terminal R. Co.*, 49 App. Div. (N. Y.) 493; s. c. 63 N. Y. Supp. 615.

⁵⁸ *Chattahoochee & Co. R. Co. v. Behrman*, 136 Ala. 508; s. c. 35 South. Rep. 132.

⁵⁹ *Capital Electric Co. v. Hauswald*, 78 Ill. App. 359.

principal section a street railway company was held liable for an injury received by a spectator at an exhibition of marksmanship given at a pleasure resort owned and advertised by it, although the performance was provided and conducted by an independent contractor.⁶⁰ In another case a street railway company advertising a balloon ascension at a park owned and controlled by it was held liable for the death of a child at such ascension caused by the fall of a pole to which the balloon was attached, where proper notice of the fact that it would fall was not given, even though the person making the ascension was employed as an independent contractor.⁶¹ In still another case a street railroad company owning a park was held not liable to a visitor for injuries due to negligence in shooting off rockets where all the work in connection with sending off the fireworks was done by another person, under a contract with the street railroad company to give the exhibition, and the street railroad company had no control over the details of the work nor over the men who performed it.^{61a}

§ 676. Liability of Landlord to Tenant for Negligence of Contractor in Repairing Building.⁶²

§ 677. Effect of Negligence in Selecting the Contractor.—The doctrine of independent contractor makes it the duty of the proprietor to exercise reasonable care in the selection of the contractor engaged to perform services for him, and where this care has been exercised he will not be liable for negligence of the contractor that he, by ordinary care, could not have anticipated.⁶³ The inquiry must be with reference to the contractor's ability to perform the service for which he is employed. Thus, one employing a contractor to do blasting for a cellar was held not to have performed this duty by making inquiry of a law clerk, who claimed to have seen a piece of blasting done by the contractor and said it was reasonably well done, but did not inquire as to his ability to do this particular kind of blasting.⁶⁴

§ 680. Whether Proprietors Liable for Injuries to Servants of Contractors.—The proprietor does not owe to a person employed on his premises in the service of an independent contractor the duty to furnish a safe place to work or safe appliances, and is not liable in dam-

⁶⁰ *Thompson v. Lowell St. R. Co.*, 170 Mass. 577; s. c. 40 L. R. A. 345; 49 N. E. Rep. 913.

⁶¹ *Richmond & C. R. Co. v. Moore*, 94 Va. 493; s. c. 27 S. E. Rep. 70; 37 L. R. A. 258; 3 Va. L. Reg. 572.

^{61a} *Devo v. Kingston Consol. R. Co.*, 94 App. Div. (N. Y.) 578; s. c. 88 N. Y. Supp. 487.

⁶² *Anderson v. Moore*, 108 Ill. App. 106 (landlord liable where no contract has been let to mechanic making repairs).

⁶³ *White v. Green* (Tex. Civ. App.), 82 S. W. Rep. 329.

⁶⁴ *Berg v. Parsons*, 84 Hun (N. Y.) 60; s. c. 65 N. Y. St. Rep. 31; 31 N. Y. Supp. 1091.

ages for injuries occasioned by his failure to do so. This duty belongs to the master of the servant.⁶⁵ Thus where the owner of a building damaged by fire employed a contractor to make repairs, he was held not liable for injuries to his contractor's servant due to his unfamiliarity with its interior arrangement.⁶⁶ So an employer who furnishes a contractor with a safe appliance will not be liable for injuries to the contractor's servants resulting from defects due to wear incident to its use.⁶⁷

§ 685. Liability of the Contractor.—The contractor, like any one else, is liable for the consequences of his own negligent acts without reference to the doctrine of independent contractors;⁶⁸ and this more especially where he assumes this liability in his contract of employment.⁶⁹ His obligation to trespassers and licensees on the premises upon which he is at work is no greater than that of the property owner, though the trespasser or licensee is the servant of the proprietor. His only duty is to refrain from doing any willful injury and from setting traps.⁷⁰

§ 685a. Whose Duty to Furnish Plans to Subcontractors.—It is held that it is the duty of an independent contractor for the construction of a building, and not of the owner, to furnish subcontractors and their subordinates a truthful copy of the plans and specifications as approved for their guidance, and the owner cannot be held liable for

⁶⁵ Omaha Bridge &c. Co. v. Hargadine, — Neb. —; s. c. 98 N. W. Rep. 1071; Callan v. Pugh, 54 App. Div. (N. Y.) 545; s. c. 66 N. Y. Supp. 1118; Southern Oil Co. v. Church, 32 Tex. Civ. App. 325; s. c. 74 S. W. Rep. 797; 75 S. W. Rep. 817 (proprietor not liable for injuries to servant of contractor by reason of defective condition of derrick furnished by him in absence of proof that it was inherently dangerous). But see Kentucky Stove Co. v. Bryan, — Ky. —; s. c. 84 S. W. Rep. 537; 27 Ky. L. Rep. 136, where it is held that a person owning and operating machinery is required to use reasonable care to make it safe for the protection of persons working in its vicinity, regardless of whether the person is an employé of the owner, or is at work under an independent contractor.

⁶⁶ Butler v. Lewman, 115 Ga. 752; s. c. 42 S. E. Rep. 98.

⁶⁷ Central Coal &c. Co. v. Bailey,

76 S. W. Rep. 842; 25 Ky. L. Rep. 973.

⁶⁸ Schutte v. United Electric Co., 68 N. J. L. 435; s. c. 53 Atl. Rep. 204; Bill v. New York Expanding Metal Co., 60 App. Div. (N. Y.) 470; s. c. 69 N. Y. Supp. 989; Straus v. Buchman, 96 App. Div. (N. Y.) 270; s. c. 89 N. Y. Supp. 226. One contracting with a landlord to heat a building is liable in tort for the breach of a legal duty to a tenant for damage to him, proximately arising from the bursting of a water pipe due to freezing because of his negligence in permitting the fires to go out: Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co., 71 N. H. 522; s. c. 53 Atl. Rep. 807; 60 L. R. A. 116.

⁶⁹ Chicago Bridge &c. Co. v. La Mantia, 112 Ill. App. 43.

⁷⁰ Blackstone v. Chelmsford Foundry Co., 170 Mass. 321; s. c. 49 N. E. Rep. 635.

injury to an employé of a subcontractor for failure to perform that duty personally.⁷¹

§ 686. **Contractor not Liable to Stranger After Work Turned Over and Accepted.**⁷²—The rule in this connection does not require a formal acceptance of the contractor's work. The liability of the contractor will cease with a practical acceptance after completion of the work.⁷³ But the work must be completed. It is not enough that the time fixed for its completion in the contract has expired.⁷⁴ The contractor and not the owner is liable for injuries due to negligence in the removal of materials and appliances belonging to the contractor after the completion of the work, in which act the proprietor does not participate.⁷⁵

§ 689. **Contractor not Liable for Negligence of Subcontractor.**—Broadly stated the principle which exonerates a proprietor from liability for the negligence of an independent contractor applies, subject to the same qualification as to control, as between the contractor and the subcontractor, and exempts the former from liability for the negligence of the latter.⁷⁶ In this view the contractor will not be liable to third persons for the negligent act of his subcontractor, unless the thing contracted to be done is necessarily a nuisance, or the injury is a direct result of the act or thing which the independent contractor is required to do.⁷⁷ The negligence for which the contractor will be

⁷¹ *Hawke v. Brown*, 28 App. Div. (N. Y.) 37; s. c. 50 N. Y. Supp. 1032.

⁷² See generally in support of proposition indicated: *Salliotte v. King Bridge Co.*, 122 Fed. Rep. 378; s. c. 58 C. C. A. 466 (accident after bridge completed and accepted by owners); *Daugherty v. Herzog*, 145 Ind. 255; s. c. 44 N. E. Rep. 457; 32 L. R. A. 837; 57 Am. St. Rep. 204; *Khron v. Brock*, 144 Mass. 516 (traveller injured by fall of material from roof after contractor for repairs had completed his contract).

⁷³ *Read v. East Providence Fire Dist.*, 20 R. I. 574; s. c. 20 R. I. (Part 3) 178; 4 Am. Neg. Rep. 589; 40 Atl. Rep. 760 (standpipe for municipality collapsed flooding land prior to formal acceptance but the municipality had filled it with water).

⁷⁴ *Blackstone v. Chelmsford Foundry Co.*, 170 Mass. 321; s. c. 49 N. E. Rep. 635.

⁷⁵ *Swart v. Justh*, 24 App. (D. C.) 596.

⁷⁶ *Pioneer Fireproof Constr. Co. v.*

Hansen, 176 Ill. 100; s. c. 52 N. E. Rep. 17; aff'g s. c. 69 Ill. App. 659; *Schutte v. United Electric Co.*, 68 N. J. L. 435; s. c. 53 Atl. Rep. 204. The fact that a building is to be erected under the supervision of an architect, and the right to make alterations is reserved, does not change the relation: *Green v. Soule*, 145 Cal. 96; s. c. 78 Pac. Rep. 337.

⁷⁷ *Salliotte v. King Bridge Co.*, 122 Fed. Rep. 378; s. c. 58 C. C. A. 466; *Green v. Soule*, 145 Cal. 96; s. c. 78 Pac. Rep. 337; *Crudup v. Schreiner*, 98 Ill. App. 337; *Aldritt v. Gillette-Herzog Mfg. Co.*, 85 Minn. 206; s. c. 88 N. W. Rep. 741. A general contractor employing a subcontractor to put in some floors which are to be delivered as complete, is not liable for injuries to an employé from falling through a repaired portion of the floor which had not dried, as the subcontractor should have foreseen the likelihood of using the floor by other employés and should have protected the incomplete portion: *St. Louis Expanded Metal Fire-*

liable must be some act of personal negligence on his part which caused the accident, independent of all other causes.⁷⁸ The rule is without application, however, where the original contractor and his subcontractor have joint supervision over the work, and co-operation between them is necessary to its completion. Under these circumstances they are jointly liable to persons injured by reason of their negligence.⁷⁹

Proofing Co. v. Dawson, 30 Tex. Civ. App. 261; s. c. 70 S. W. Rep. 450.

⁷⁸ In a case of injuries to an employé of a subcontractor by the fall of a building it was held competent to show knowledge of the dangerous condition by the contractor long before the happening of the accident: Nelson v. Young, 91 App. Div. (N.

Y.) 457; s. c. 87 N. Y. Supp. 69; s. c. aff'd, 180 N. Y. 523; 72 N. E. Rep. 1146.

⁷⁹ Baumeister v. Markham, 101 Ky. 122; s. c. 19 Ky. L. Rep. 308; 39 S. W. Rep. 844; 2 Am. Neg. Rep. 363; 41 S. W. Rep. 816; 19 Ky. L. Rep. 316.

TITLE SIX.

CARE AND RESTRAINT OF DANGEROUS AGENCIES.

[§§ 694-833.]

§ 694. General Duty so to Use One's Own Land or to Conduct One's Own Business as not to Injure One's Neighbor.—Generally speaking the owner of land may put it to any reasonable use, considering his interest and that of other persons affected,¹ and the test to determine whether a particular use is reasonable is to inquire whether or not it is such a use as an ordinary man would make of his premises.² But he has no right so to use his land as to injure that of his neighbor.³ The latter principle has been invoked in cases where the owner conducted on his premises the business of coking, with its attendant smoke, vapor and acid fumes;⁴ and where a manufacturing plant discharged hot water and steam through a pipe which projected over a path,⁵ and in both instances the property owner was held liable for injuries the result of negligence in the conduct of the particular business.

§ 695. English Doctrine as to the Liability for Artificially Collecting upon One's Own Land Substances which have a Tendency to Escape and Get upon the Land of Another.—In England an action for an injunction will lie against a person who allows the branches of his trees to overhang his neighbor's land to the damage of the neighbor's trees.⁶

§ 696. American Doctrine on the Same Subject.—The American doctrine imposes on the owner of premises the duty to use reasonable care to restrain agencies artificially collected on his premises, and makes him liable only for a failure to exercise such care.⁷

¹ *Hamlin v. Blankenburg*, 73 N. H. 258; s. c. 60 Atl. Rep. 1010.

² *Hamlin v. Blankenburg*, 73 N. H. 258; s. c. 60 Atl. Rep. 1010.

³ *Froelicher v. Oswald Iron Works*, 111 La. 705; s. c. 35 South. Rep. 821; 64 L. R. A. 228.

⁴ *Campbell v. Bessemer Coke Co.*, 23 Pa. Super. Ct. 374.

⁵ *Wilson v. American Bridge Co.*, 74 App. Div. (N. Y.) 596; s. c. 77 N. Y. Supp. 820.

⁶ *Smith v. Giddy* [1904], 2 K. B.

448; s. c. 73 L. J. K. B. 894; 91 L. T. 296; 20 Times L. R. 596.

⁷ *Bermuda grass planted on railroad right of way to preserve embankment spread to adjoining land—railroad company not liable in absence of showing of negligence: Gulf & C. R. Co. v. Oakes*, 94 Tex. 155; s. c. 58 S. W. Rep. 999; 52 L. R. A. 293. Owner of premises filling a ravine which opened on a creek containing sand deposits belonging to a neighbor liable for injuries to the

§ 707. **Rule of Diligence in Restraining Water is Ordinary Care.**—Applying the American rule a defendant was held not liable for injuries caused by water overflowing a tank on his premises where it appeared that he had no control over the supply of water to the tank, and that it was furnished with an overflow pipe of usual size which had hitherto proved adequate, and it was not shown that there was any appliance that would have been entirely effective under the circumstances.⁸ So in a case where the water was brought to the premises by ordinary service pipes, it was held that the occupant was not liable to the owner of adjoining premises for injuries to his property caused by a break in the pipes, in the absence of negligence, on the theory that having brought the water on his premises he was bound at his peril to prevent its escape.⁹ The case is also authority for the doctrine that a tenant, on taking possession of a building, is not required to examine the plumbing under his cellar floor to see whether it is in proper condition.¹⁰ Ordinary care is lacking where tenants allow the outlet of basins, bathtubs, etc., to become clogged, causing an overflow of water to the injury of other tenants.¹¹ A person fitting his building with gutters and downspouts sufficient to carry off the water that would ordinarily fall upon his roof has performed his duty, and is not chargeable with negligence toward an adjoining proprietor for water thrown on his premises during an extraordinary downpour of rain which the gutters and spouts can not carry off.¹²

§ 708. **Liability for Escape of Water, How Affected by Relation of Landlord and Tenant.**—A landlord is liable to a tenant for injury from water where the part of the premises from which the water came was occupied by him and in his possession.¹³ Where he is free from

beds by failure to take precautions to prevent the earth from being washed upon them by the rain: *American Security &c. Co. v. Lyon*, 21 App. (D. C.) 122.

⁸ *Bertsch v. Unterberg*, 88 N. Y. Supp. 983.

⁹ *McCord Rubber Co. v. St. Joseph Water Co.*, 181 Mo. 678; s. c. 81 S. W. Rep. 189.

¹⁰ *McCord Rubber Co. v. St. Joseph Water Co.*, 181 Mo. 678; s. c. 81 S. W. Rep. 189.

¹¹ *Olin P. Ely Co. v. Rhoads*, 30 Misc. (N. Y.) 111; s. c. 61 N. Y. Supp. 817.

¹² *Miller v. Wilson*, 104 Ill. App. 556. Evidence was held sufficient to justify a finding that the owner of a house took all necessary precautions, and that the gutter was suffi-

cient to take all water that would naturally fall in the usual rainstorms: *Philips v. Taylor*, 93 Minn. 28; s. c. 100 N. W. Rep. 649. He will be liable to his adjoining landowner where he fails to take measures to care for ordinary roof flow, and so constructs his house that this water is cast on his neighbor to his injury, unless this right is secured by express grant or prescription: *Huber v. Stark*, 124 Wis. 359; s. c. 102 N. W. Rep. 12.

¹³ *Levin v. Habicht*, 45 Misc. (N. Y.) 381; s. c. 90 N. Y. Supp. 349. Whether the landlord in such a case exercised due care is properly a question for the jury: *Harris v. Boardman*, 68 App. Div. (N. Y.) 436; s. c. 73 N. Y. Supp. 963.

negligence he is not liable to one of his tenants for injury to his property occasioned by the negligence of another tenant in allowing water to accumulate and overflow.¹⁴ In a case where the injuries were caused by slipping on ice formed by drippings from a defective closet, the existence of which defect was known to the janitor of the building, it was held that the liability of the landlord was determined by the diligence displayed in removing the defect in the water apparatus, and not by his diligence in removing the ice.¹⁵ In another case the premises of a tenant were flooded by the bursting of pipes in the landlord's portion of the premises, which were filled with water under pressure as a protection against fire. The entire building was heated by a contractor, who allowed his fires to become low on the day in question, and when sued sought to escape liability on the ground that the landlord was negligent in keeping the pipes filled with water. The court, however, held that the contractor, and not the landlord, was liable, as he ought reasonably to have foreseen the consequences of the failure to maintain a temperature that would prevent the freezing of the pipes.¹⁶

§ 710. Other Questions of Liability for Escape of Water.¹⁷

§ 711. Evidence of Negligence in Such Cases.¹⁸

¹⁴ *Sheridan v. Forsee*, 106 Mo. App. 495; s. c. 81 S. W. Rep. 494; *Becker v. Bullock*, 36 Misc. (N. Y.) 524; s. c. 73 N. Y. Supp. 944; *Leonard v. Gunther*, 47 App. Div. (N. Y.) 194; s. c. 62 N. Y. Supp. 99; *Beaulieu v. Beaudry*, 16 Rap. Jud. Que. C. S. 475.

¹⁵ *Hoag v. Williamsburgh Sav. Bank*, 75 App. Div. (N. Y.) 306; s. c. 78 N. Y. Supp. 141.

¹⁶ *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.*, 72 N. H. 546; s. c. 58 Atl. Rep. 242.

¹⁷ A cause of action against a fellow tenant is stated by an averment that there was an overflow from the floor above, caused by the defendant's leaving open a stopcock attached to the water apparatus on that floor, and allowing the water to run into a basin which overflowed: *Citron v. Bayley*, 36 App. Div. (N. Y.) 130; s. c. 55 N. Y. Supp. 382. A complaint against a landlord was held sufficient which averred that the plaintiff was a tenant and occupied storerooms in a building above which there were portions of the building over which the landlord had exclusive control and posses-

sion, and in which the tenant had no interest; that it was the duty of the landlord to use the portion of the building over which he had exclusive control so as not to injure his tenant's business and property located in the storeroom, but that the defendant negligently permitted a large quantity of water to escape from closets and basins located above the storeroom, by reason of which the water came through the ceiling of the storeroom, fell upon the plaintiff's goods and merchandise and damaged the same, rendering them unfit for any use: *Sheridan v. Forsee*, 106 Mo. App. 495; s. c. 81 S. W. Rep. 494.

¹⁸ Where the evidence showed that water flowed through a hatchway in the roof and into the apartments occupied by a tenant and his family, and that the landlord had the management and oversight of the portion of the building in which the hatchway was situated, it was held a verdict for plaintiff was supported by sufficient evidence: *Kneeland v. Beare*, 11 N. D. 233; s. c. 91 N. W. Rep. 56; *Levy v. Korn*, 30 Misc. (N. Y.) 199; s. c. 61 N. Y. Supp. 1109.

§ 714. **Injury Caused by the Giving Way of Retaining Walls.**—A person placing loose earth on his own land in such a way that it will slide is imputable with negligence where he fails to erect a sufficient retaining wall to prevent encroachment on the premises of an adjacent owner.¹⁹

§ 718. **Liability for Damages Caused by Escape of Noxious Gases and Liquids.**—It has been held that the lessor of lots for an oil well, reserving a portion of the oil produced, but having no control over the erection of tanks thereon, was not liable to one whose property was injured by an overflow of oil caused solely by the lessee's negligence.²⁰

§ 719. **Liability of Gas-Light Companies for Damages Caused by the Escape of Illuminating Gas.**²¹—Corporations and persons manufacturing and distributing illuminating gas are held to the exercise of reasonable care and vigilance to prevent injury to third persons from the gas while it remains on the premises of the manufacturer, or while being carried through their own pipes to different parts of a city.^{21a} Negligence in allowing the escape of gas from a main was held the proximate cause of injuries to an occupant of rooms by inhaling the gas, though the gas reached the room through a private pipe connecting with a sewer into which it had escaped.²² The tenant does not assume the risk of gas escaping from pipes put up by his landlord and used by him exclusively in another part of the premises.²³

Evidence merely that water commenced to leak through a portion of a ceiling about three hours before the water-soaked ceiling fell, which occasioned the damage, but which did not show what caused the leak, was held insufficient to show the landlord's negligence: *Goldberg v. Besdine*, 76 App. Div. (N. Y.) 451; s. c. 78 N. Y. Supp. 776.

¹⁹ *Abrey v. Detroit*, 127 Mich. 374; s. c. 86 N. W. Rep. 785; 8 Det. Leg. N. 311.

²⁰ *Langabaugh v. Anderson*, 68 Ohio St. 131; s. c. 67 N. E. Rep. 286.

²¹ *German-American Ins. Co. v. Standard Gaslight Co.*, 67 App. Div. (N. Y.) 539; s. c. 73 N. Y. Supp. 973; s. c. aff'd, 174 N. Y. 508; 66 N. E. Rep. 1109 (gas company held liable for property destroyed by fire by the negligence of a gas fitter sent out by it to locate a leak). Where a gas company negligently suffers gas to leak from its street mains and accumulate and remain in an

excavation underneath a street, it is liable for the ignition and explosion of the gas by any cause which should have been foreseen as a probability: *Koplan v. Boston Gaslight Co.*, 177 Mass. 15; s. c. 58 N. E. Rep. 183.

^{21a} *Tiehr v. Consolidated Gas Co.*, 51 App. Div. (N. Y.) 446; s. c. 65 N. Y. Supp. 10; *Armbruster v. Auburn Gaslight Co.*, 18 App. Div. (N. Y.) 447; s. c. 46 N. Y. Supp. 158; s. c. aff'd, 162 N. Y. 655; 57 N. E. Rep. 1103. But the mere fact of the ownership of the gas in the pipes will not, of itself, render the company liable for injuries caused by its escape unless the company is guilty of negligence: *People's Gaslight & Co. v. Amphlett*, 93 Ill. App. 194.

²² *Richmond v. Gay*, 103 Va. 320; s. c. 49 S. E. Rep. 482.

²³ *Indianapolis Abattoir Co. v. Temperly*, 159 Ind. 651; s. c. 64 N. E. Rep. 906.

§ 721. **Liability of Gas Company for Explosions on the Premises of their Customers.**—An employé sent out to locate a leak in a sidewalk, lighted a paper and moved it along the surface of the sidewalk and ignited a jet of escaping gas, and having determined its location covered it with dirt to extinguish it. A few minutes afterward an explosion occurred in an adjoining house by reason of the flames being carried into the cellar through a tunnel dug by the property owner from his cellar under the pavement to connect with a sewer. The employé had no knowledge of the existence of the sewer. The gas company was held not liable, as the method of locating the leak was the usual one, and ordinary care had been exercised.²⁴ There is a proper holding that an occupant of a flat, who discovers in his apartment the odor of escaping gas, and enters an adjoining unoccupied apartment, without permission of the landlord, for the purpose of discovering the source of the difficulty, does not, by so doing, become a trespasser to such an extent as to affect his right of recovery for injuries received while in such apartments.^{24a}

§ 723. **Negligence in the Use or Waste of Natural Gas.**—The rule under this head is that a natural gas company furnishing gas for lighting and heating houses is bound to exercise such care as is called for by the dangerous nature of the business.^{24b} The gas company will be liable for the consequences of an explosion caused by the escape of gas from defective pipes where it knew, or by the exercise of ordinary care could have known of the existence of such defects.²⁵ The negligence of the natural gas company must, of course, be the proximate cause of the injury complained of, and a recovery will not be sustained where the injuries were caused solely by the use of defective stoves or furnaces by the consumer.²⁶

§ 724. **Contributory Negligence of the Gas Consumer.**—The owner of vacant premises wrecked by an explosion of gas will not be imputed with the negligence of a person sent to the premises by others to locate the leak.²⁷ The question whether a person, injured by the escape of gas, was negligent in remaining in the house, was held a question for the jury, in a case where there was evidence that gas had previously escaped into other parts of the house to his knowledge, and

²⁴ *Littman v. New York*, 36 App. Div. (N. Y.) 189; s. c. 55 N. Y. Supp. 383.

^{24a} *People's Gaslight & Co. v. Amphlett*, 93 Ill. App. 194.

^{24b} *Barrickman v. Marion Oil Co.*, 45 W. Va. 634; s. c. 32 S. E. Rep. 327.

²⁵ *Hartman v. Citizens' Natural*

Gas Co., 210 Pa. 19; s. c. 59 Atl. Rep. 315.

²⁶ *Westfield Gas & Co. v. Hinshaw*, 22 Ind. App. 499; s. c. 53 N. E. Rep. 1069.

²⁷ *Consolidated Gas Co. v. Getty*, 96 Md. 683; s. c. 54 Atl. Rep. 660; 94 Am. St. 603.

the gas company had made some effort to remedy the defect.²⁸ Contributory negligence has been held sufficiently negated by a complaint which alleged that the plaintiff, on the day of the injury, without negligence, and without knowledge that the gas had escaped and filled his room, and not knowing the danger of so doing, entered such room.²⁹

§ 725. Questions of Evidence in Actions for Injuries from Gas.³⁰

§ 730. Fires—Measure of Diligence Reasonable or Ordinary Care.—

One kindling a fire on his own land will not be charged with negligence where he takes such precautions as a man of ordinary prudence would take to confine it to his own premises and prevent its escape therefrom.³¹ Whether the owner of a building is guilty of negligence in failing to provide means to extinguish fires which will render him liable for an injury to property of others to which the fire is communicated depends upon the character of the structure and its contents and the purpose for which they are used.³² But the failure to keep these appliances will not be imputed to him as negligence where an extinguisher would have been ineffective if provided.³³

§ 731. This Rule Applicable to the Use of Fire in Clearing Land.—

The degree of care required to prevent the spread of fire set out to clear lands is such care as would be exercised by persons of ordinary prudence under the circumstances.³⁴ Where this care is exercised, a person will not be charged with negligence in not guarding against

²⁸ *Richmond v. Gay*, 103 Va. 320; s. c. 49 S. E. Rep. 482.

²⁹ *Indianapolis Abattoir Co. v. Temperly*, 159 Ind. 651; s. c. 64 N. E. Rep. 906.

³⁰ *Benson v. Allegheny Heating Co.*, 188 Pa. St. 614; s. c. 41 Atl. Rep. 729 (evidence of an explosion insufficient to submit the case of negligence to jury on that ground). In an action for injuries from an explosion, evidence is admissible that the odor of escaping gas had been noticed in the neighborhood of the house for two years before the explosion to show plaintiff's knowledge of the defect: *Hartman v. Citizens' Natural Gas Co.*, 210 Pa. 19; s. c. 59 Atl. Rep. 315. The mere fact that a person maintained a gas well fifty feet from plaintiff's premises, and that gas accumulated in his cellar causing an explosion, and that gas was found in water wells within a radius of two hundred feet

of the gas well, was held insufficient to warrant the conclusion that the gas came from defendant's well, or that he was negligent: *Maxwell v. Coffeyville Mining & Co.*, 68 Kan. 821; s. c. 75 Pac. Rep. 1047.

³¹ *Warden v. Miller*, 112 Wis. 67; s. c. 87 N. W. Rep. 828.

³² *World's Columbian Exposition Co. v. Republic of France*, 91 Fed. Rep. 64; rev'g s. c. 83 Fed. Rep. 109.

³³ *Balding v. Andrews*, 12 N. D. 267; s. c. 96 N. W. Rep. 305.

³⁴ *Bock v. Grooms*, 2 Neb. (unoff.) 803; s. c. 92 N. W. Rep. 603; *Hitchcock v. Riley*, 44 Misc. (N. Y.) 260; s. c. 89 N. Y. Supp. 890; *Meadows v. Truesdell* (Tex. Civ. App.), 56 S. W. Rep. 932. Fire can only be rightfully set out in the removal of rubbish after every reasonable precaution has been taken to prevent damage to the property of others: *Harris v. Savage*, 70 Kan. 561; s. c. 79 Pac. Rep. 113.

whirlwinds and gales suddenly arising, which carry the fire beyond his control.³⁵

§ 732. Whether the Fact of the Fire Being Communicated from the Premises of Another is Prima Facie Evidence of Negligence.—The failure to have a spark arrester upon a stationary engine is not negligence *per se*.³⁶ A complaint in an action for damages from this source is defective unless it sets out the facts showing the particular negligence. The law does not presume negligence. It has been held not sufficient merely to allege that the defendant set out a fire on his premises and that it spread to the plaintiff's premises and caused damage.³⁷

§ 733. Facts which have been held Evidence of Negligence in Setting or Guarding Fires.—The act of a person in setting fire to a field of high wheat stubble, in which there were stacks of wheat belonging to another, shows actionable negligence where he does nothing to prevent the fire from reaching the stacks, though he had a right to burn the stubble and had no intent to burn the stacks.³⁸

§ 741. Liability for Fires Communicated by Steam Threshing Machines.³⁹

§ 742. Liability for Fires Communicated by Steam Saw-Mills.—A person conducting a saw-mill is liable only for negligence in its operation.⁴⁰ He is only required to exercise the care usually used by men of ordinary care and prudence, generally engaged in the same or similar business under the same or similar circumstances, and not the care exercised by men in a given locality.⁴¹

§ 745. Liability, How Affected by Relation of the Landlord and Tenant.—Where the fire doing the damage is set out by the owner of the land and his tenant, the liability of the lessor will not depend upon the character of the rental agreement between the parties, but,

³⁵ Bock v. Grooms, 2 Neb. (unoff.) 803; s. c. 92 N. W. Rep. 603; Hitchcock v. Riley, 44 Misc. (N. Y.) 260; s. c. 89 N. Y. Supp. 890.

³⁶ Collins v. George, 102 Va. 509; s. c. 46 S. E. Rep. 684.

³⁷ Vansyoc v. Freewater Cemetery Ass'n, 63 Neb. 143; s. c. 88 N. W. Rep. 162.

³⁸ Harris v. Savage, 70 Kan. 561; s. c. 79 Pac. Rep. 113.

³⁹ The owner of a threshing machine by whose negligence a stack of grain is set on fire while being threshed is liable for the value of horses, hired by him for use in the

operation of the outfit, which were burned while attempting to move the separator from the vicinity of the fire, the owner himself being free from negligence: Thorn v. James, 14 Man. R. 373; Lieuellen v. Mosgrove, 37 Or. 446; s. c. 61 Pac. Rep. 1022 (instruction held not open to the objection that it tended to charge defendants with the consequences of any extraordinary wind which might occur).

⁴⁰ Gerrish v. Whitfield, 72 N. H. 222; s. c. 55 Atl. Rep. 551.

⁴¹ Rylander v. Laursen, 124 Wis. 2; s. c. 102 N. W. Rep. 341.

rather, upon the question whether in setting out the fire the landowner and his tenant were acting in the prosecution of a joint enterprise and for their mutual benefit.⁴²

§ 747. Statutes Prohibiting or Restraining the Setting of Fires in Dry Woods, Marshes, Prairies, etc.—Where the setting out of a fire at a particular season is prohibited by law, it is not material in an action for damages whether the fire was set out negligently.⁴³

§ 749. Contributory Negligence of the Person Damaged.—A person whose property is threatened with injury by a fire negligently set out is required to exercise only such a degree of care to prevent injury as a reasonable man would exercise under like conditions and circumstances.⁴⁴ Thus in a case where property was burned by fire set out by a defective threshing engine, it was held that the plaintiff was not bound to guard against the consequences of the defect of the engine until he knew his property was in danger.⁴⁵ So, it was held that a person whose sheep were destroyed by fire allowed to escape from the premises of another was not negligent, as a matter of law, in allowing his sheep to run at large without being in charge of a herder.⁴⁶

§ 752. Questions of Evidence in Actions for Damages from Fire.—In an action for damages from fire communicated from a defective furnace, it was held that the fact that the furnace was set up without permission from the city as required by ordinance, and that the plans were not in accordance with the rules of the city governing the erection of such furnaces, did not dispense with the necessity of the plaintiff proving that the construction of the furnace was the cause of the fire which destroyed his property.⁴⁷ Testimony that the plaintiff had notified the defendant a few days before the fire that the defendant's servant was burning refuse near his land, and warned him of the danger, was held inadmissible as too remote on the issue of negligence in permitting the later fire to spread to the plaintiff's pasture.⁴⁸

§ 758. Liability for Damages Caused by Explosives Kept on One's Premises.—The regulation of the storage and use of explosives by statutes and ordinances is a legitimate exercise of the police power of the State.⁴⁹ An ordinance prohibiting storage of explosives within a

⁴² *Meadows v. Truesdell* (Tex. Civ. App.), 56 S. W. Rep. 932.

⁴³ *Kelley v. Anderson*, 15 S. D. 107; s. c. 87 N. W. Rep. 579.

⁴⁴ *Chicago &c. R. Co. v. Willard*, 111 Ill. App. 225.

⁴⁵ *Mansfield v. Richardson*, 118 Ga. 250; s. c. 45 S. E. Rep. 269.

⁴⁶ *Kelley v. Anderson*, 15 S. D. 107; s. c. 87 N. W. Rep. 579.

⁴⁷ *Seibert v. McManus*, 104 La. 404; s. c. 29 South. Rep. 108.

⁴⁸ *Dunn v. Newberry*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 626.

⁴⁹ *Standard Oil Co. v. Danville*, 101 Ill. App. 65; s. c. aff'd, 199 Ill. 50;

certain distance of other buildings will apply to storage violating the law though the storage started before the erection of buildings which made the storage illegal.⁵⁰ A law authorizing public work commissioners to do all things necessary to carry out a municipal project employing dynamite does not give the commissioners power to store dynamite at places prohibited by ordinance.⁵¹ Courts have refused to declare as a matter of law that the keeping of dynamite in a store for sale⁵² and the possession of powder by a manufacturer⁵³ is a nuisance, but hold the question one of fact for the jury.

§ 759. **Degree of Care Demanded of One who Keeps Explosive Substances on his Premises.**—In the matter of the custody and use of explosives the law imposes a degree of care commensurate with their dangerous character;⁵⁴ that is, such care and caution as prudent and careful persons in this business ordinarily exercise.⁵⁵ Manifestly a greater amount of care is required in the use of dynamite than with less dangerous explosives.⁵⁶ Sulphuric acid is not such a dangerous substance as to require a railroad to exercise more than ordinary care in handling it or storing it in its freight stations.⁵⁷ Before the owner of a cylinder used to transport explosive gases and liquids can be charged with negligence in failing to test the cylinder it must be shown that there was some recognized and effective method of making such a test.⁵⁸

64 N. E. Rep. 1110 (storage of inflammable oils prohibited within a certain distance of other buildings); *Spiegler v. Chicago*, 216 Ill. 114; s. c. 74 N. E. Rep. 718 (oils in tank wagons to be handled so as not to escape on street surface); *Crowley v. Ellsworth*, 114 La. 308; s. c. 38 South. Rep. 199; 69 L. R. A. 276 (storage of inflammable oils prohibited within corporate limits); *Walter v. Bowling Green*, 26 Ohio Cir. Ct. R. 756 (city may prohibit transportation of nitroglycerin through city).

⁵⁰ *Standard Oil Co. v. Danville*, 199 Ill. 50; s. c. 64 N. E. Rep. 1110; aff'g s. c. 101 Ill. App. 65.

⁵¹ *Ricker v. Shaler*, 89 App. Div. (N. Y.) 300; s. c. 85 N. Y. Supp. 825.

⁵² *Barnes v. Zettlemoyer*, 25 Tex. Civ. App. 468; s. c. 62 S. W. Rep. 111.

⁵³ *Reilly v. Erie R. Co.*, 72 App. Div. (N. Y.) 476; s. c. 76 N. Y. Supp. 620; s. c. aff'd, 177 N. Y. 547; 69 N. E. Rep. 1130 (fact of storage of large quantity of dynamite near

other buildings justified finding that it was a private nuisance in case of unexplained explosion); *Kleebauer v. Western Fuse & Co.*, 138 Cal. 497; s. c. 71 Pac. Rep. 617; 60 L. R. A. 377; rev'g s. c. 69 Pac. Rep. 246 (storage building in secluded place when erected and explosion was due to willful act of stranger).

⁵⁴ *Mattson v. Minnesota & C. R. Co.*, 95 Minn. 477; s. c. 104 N. W. Rep. 443.

⁵⁵ *Lanza v. Le Grand Quarry Co.*, 124 Iowa 659; s. c. 100 N. W. Rep. 488.

⁵⁶ *Lanza v. Le Grand Quarry Co.*, 124 Iowa 659; s. c. 100 N. W. Rep. 488; *Nelson v. McLellan*, 31 Wash. 208; s. c. 71 Pac. Rep. 747 (actionable negligence to partially bury box of dynamite in vacant lot used as children's playground).

⁵⁷ *Means v. Southern California R. Co.*, 144 Cal. 473; s. c. 77 Pac. Rep. 1001.

⁵⁸ *Kilbride v. Carbon Dioxide & C. Co.*, 201 Pa. 552; s. c. 51 Atl. Rep. 347.

§ 760. **Whether the Fact of an Explosion is Prima Facie Evidence of Negligence.**⁵⁹

§ 761. **Contributory Negligence of the Person Injured by Explosive Substance.**⁶⁰

§ 762. **Liability for Damages Caused by the Explosion of Steam-Boilers.**—The liability of the owner of a boiler for injuries caused by its explosion is based solely on negligence in its use.⁶¹ The rule does not require him to use the very safest and best machinery in his business. If the boiler is operated with such skill that it is not a nuisance, the owner will not be liable to a neighbor for damages caused by its explosion in the absence of proof of fault or negligence.⁶² There is evidence to take the case to the jury where it is shown that the boiler was old, rusty and patched,⁶³ or that it was operated under a pressure in excess of its capacity.⁶⁴

§ 764. **Liability for Damages Caused by Blasting Rock.**—In a case where the person sued for injuries received while blasting merely assisted to carry out a contract made by his son, much as a foreman might have done, and for that purpose loaned his tools, gave his time, conversed with the help, and at times gave orders to the men, but there was no evidence that he personally directed the loading of the holes or explosion of the dynamite which injured the plaintiff, it was held that he was not liable as a superintendent or assistant directly participating in the negligent use of the explosives.⁶⁵

§ 765. **Decisions which Proceed upon the Principle of Negligence.**—In New York, at least, the casting of materials upon the lands of another, by exploding blasts is regarded as a trespass and one injured thereby may recover without proof of negligence.⁶⁶ In other jurisdictions, the use of gunpowder or dynamite to remove rock impeding the construction of railroad road beds and other improvements is rec-

⁵⁹ *Glaser v. Seitz*, 35 Misc. Rep. (N. Y.) 341; s. c. 71 N. Y. Supp. 942 (explosion of syphon of seltzer water without more, insufficient).

⁶⁰ A question for the jury, see: *Smith v. Pittsburg & C. R. Co.*, 210 Pa. 345; s. c. 59 Atl. Rep. 1077 (explosion of naphtha tank); *Standard Oil Co. v. Wakefield*, 102 Va. 824; s. c. 47 S. E. Rep. 830 (explosion of naphtha tank); *King v. National Oil Co.*, 81 Mo. App. 155 (one partner imputed with notice of dangerous condition of tank communicated to another partner so as to prevent recovery for his injuries).

⁶¹ *Davis v. Charleston & C. R. Co.*, 72 S. C. 112; s. c. 51 S. E. Rep. 552.

⁶² *Vieth v. Hope Salt & C. Co.*, 51 W. Va. 96; s. c. 41 S. E. Rep. 187; 57 L. R. A. 410.

⁶³ *Davis v. Charleston & C. R. Co.*, 72 S. C. 112; s. c. 51 S. E. Rep. 552.

⁶⁴ *Beunk v. Valley City Desk Co.*, 128 Mich. 562; s. c. 87 N. W. Rep. 793; 8 Det. Leg. N. 767.

⁶⁵ *Paige v. Dempsey*, 99 App. Div. (N. Y.) 152; s. c. 90 N. Y. Supp. 1019.

⁶⁶ *Sullivan v. Dunham*, 161 N. Y. 290; s. c. 55 N. E. Rep. 923; 47 L. R. A. 715; aff'g s. c. 56 N. Y. Supp. 1117.

ognized as reasonable and justifiable, and may be used, provided reasonable care to protect others from injury is exercised.⁶⁷ A contractor will be charged with negligence where he unnecessarily sets off a blast to remove material that could have been removed by other means without risk of injury.⁶⁸ The fact that a contractor fully complied with the regulations of the city authorities as to the method of blasting will not relieve him from liability if the blasting was done without reasonable care.⁶⁹

§ 767. Precautions to be Taken in Such Blasting: Giving Warnings, Covering the Blast, etc.—The law only requires reasonable care in the matter of the warning. It does not, for instance, demand that a person blasting along a shore should board a passing boat and wake up a sleeping passenger and notify him;⁷⁰ nor is it required that he should make minute search for possible fissures in the rocks leading to unexploded blasts.⁷¹

§ 770. The Fact of an Injury by Blasting Prima Facie Evidence of Negligence.⁷²

§ 772. Whether Injuries from Concussion and Vibration Actionable.—In Illinois it is held that a public contractor, who uses dynamite in excavating a tunnel at a place where such use is not necessary or permitted by his contract with the city, is liable for injury done to buildings in the neighborhood from the concussion or vibration of the explosion, however great the care used in the work.⁷³ In New York a different view prevails. "Where the injury is not direct, but consequential, such as is caused by concussion which by shaking the earth injures property, there is no liability in the absence of negligence."⁷⁴

⁶⁷ Cary Bros. & Hannon v. Morrison, 129 Fed. Rep. 177; s. c. 63 C. C. A. 267; 65 L. R. A. 659.

⁶⁸ Wheeler v. Norton, 92 App. Div. (N. Y.) 368; s. c. 86 N. Y. Supp. 1095; aff'g s. c. 84 N. Y. Supp. 524.

⁶⁹ Central of Georgia R. Co. v. Bernstein, 113 Ga. 175; s. c. 38 S. E. Rep. 394.

⁷⁰ Smith v. Day, 136 Fed. Rep. 964.

⁷¹ Murphy v. Hallinan, 93 App. Div. (N. Y.) 48; s. c. 86 N. Y. Supp. 927.

⁷² Evidence was held sufficient to make a *prima facie* case of negligence where it appeared that the blast occasioning the injury was set off within six feet of the injured building, and heavy blasting on previous occasions had damaged the building to the knowledge of the defendant: St. Nicholas Skating & Co. v. Cody, 28 Misc. (N. Y.) 764; s. c. 56 N. Y. Supp. 1063.

⁷³ Fitzsimons & Connell Co. v. Braun, 199 Ill. 390; s. c. 65 N. E. Rep. 249; aff'g s. c. 94 Ill. App. 533.

To the same effect, see: Bradford v. St. Mary's Co., 60 Ohio St. 560; s. c. 54 N. E. Rep. 528.

⁷⁴ Sullivan v. Dunham, 161 N. Y. 715; s. c. 47 L. R. A. 715; 55 N. E. Rep. 923. See also, Tucker v. Mack Pav. Co., 61 App. Div. (N. Y.) 521; s. c. 70 N. Y. Supp. 688. A non-suit was proper where there was no evidence showing negligence, or that the injury to the building did not naturally result from the blasting in connection with some weakness in the construction of the building: Holland House Co. v. Baird, 169 N. Y. 136; s. c. 62 N. E. Rep. 149; rev'g s. c. 49 App. Div. (N. Y.) 180; 63 N. Y. Supp. 73.

§ 774. **Contributory Negligence of Person Injured.**—A person in the vicinity of blasting though on his own premises, and warned of a coming explosion, is required to use reasonable diligence to escape danger on account of it, and a failure to exercise such care will be fatal to his action for damages for injuries received.⁷⁵ If he has actual knowledge of the coming explosion he cannot complain because no warning was given him.⁷⁶

§ 775. **Other Holdings with Reference to Injuries Caused by Blasting.**⁷⁷—Where it was claimed that the blasting was conducted in so careless a manner that the wall of a building was damaged, and the owner was compelled to tear it down and rebuild it, it was held proper to admit evidence as to the weight of the blasting charges used, the preparation of the holes for the charge, the weight on the blasts, and the effect of the blasts on the wall.⁷⁸ In a case involving the question of the proper method of shooting an oil well it was held that the fact that the contractor after lowering the torpedo, did not run a measuring line down to see if it had reached the bottom, did not show negligence, as a matter of law, there being on evidence that it was customary to do so.⁷⁹

§ 778. **Constitutional Right to Keep and Bear Arms.**⁸⁰

§ 791. **Liability for Injuries Caused by Fireworks.**—It is not unlawful or a nuisance *per se* to shoot off skyrockets, bombs, and other

⁷⁵ Cary Bros. & Hannon v. Morrison, 129 Fed. Rep. 177; s. c. 63 C. C. A. 267; 65 L. R. A. 659.

⁷⁶ Smith v. Day, 117 Fed. Rep. 956.

⁷⁷ If a torpedo company fails to use the proper appliances, and does not observe ordinary skill, and the torpedo is exploded in the well itself far above the point where the explosion was intended to occur, the company will be liable for the destruction of the well: *Donnan v. Pennsylvania Torpedo Co.*, 26 Pa. Super. Ct. 324.

⁷⁸ *Cebrelli v. Church Const. Co.*, 84 N. Y. Supp. 919.

⁷⁹ *East End Oil Co. v. Pennsylvania Torpedo Co.*, 190 Pa. St. 350; s. c. 42 Atl. Rep. 707; 44 W. N. C. 33; 29 Pittsb. Leg. J. (N. S.) 351.

⁸⁰ That the constitutional provision is not violated by statutes prohibiting the carrying of concealed weapons, see: *Walburn v. Territory*, 9 Okl. 23; s. c. 59 Pac. Rep. 972. The Idaho statute prohibiting private persons from carrying deadly weapons

within the limits of cities and villages in that State is held a violation of the constitutional provision: *In re Brickey*, 8 Idaho 597; s. c. 70 Pac. Rep. 609. A Vermont ordinance prohibiting persons from carrying within the city limits any brass knuckles, pistols, slung shot or weapon of similar character or any weapon concealed on the person without permission of the authorities is held to violate the constitutional provision so far as it relates to carrying a pistol under any circumstances: *State v. Rosenthal*, 75 Vt. 295; s. c. 55 Atl. Rep. 610. The Ohio Supreme Court intimates that the tramp law of that State making it a penal offense for any tramp to carry firearms would not violate the provision as the guaranty is not intended as a warrant for vicious persons to carry arms, but it is to be noted that this question was not involved in the case considered: *State v. Hogan*, 63 Ohio St. 202; s. c. 58 N. E. Rep. 572.

explosives in a careful manner upon one's own premises.⁸¹ The care demanded of persons giving fireworks exhibitions is the care and prudence of ordinarily prudent and intelligent men. Where such persons are without experience it is enough if they exercise reasonable care in the employment of competent and skillful persons to manufacture, produce and discharge the fireworks and exercise proper precautions to protect the spectators by keeping them at a reasonable distance from the place of discharge.⁸² Neither the seller⁸³ nor the exhibitor⁸⁴ of fireworks is liable for injuries due to defects in their manufacture not discoverable by a careful examination. An exhibitor using dynamite bombs, so improperly prepared and manufactured that they would not explode in the air, was imputed with negligence in firing them at such an angle that they fell outside of his grounds at places where children and persons unacquainted with their dangerous nature could pick them up, handle them, and cause them to explode.⁸⁵ A person voluntarily going in the neighborhood of an exhibition, and injured by a falling rocket, must show that the rockets were set off in a negligent manner.⁸⁶

§ 795. General Views of the Liability of Private Electrical Corporations Owning Public Works.—The right to regulate and control these corporations in their use of the streets and the construction, erection and maintenance of their appliances exists under the police power delegated to the cities by the States.⁸⁷ Where two companies are granted similar franchises on the same streets, and the construction of both lines would result in unavoidable interference, the company having the later franchise must give way to the earlier. Priority carries superiority of right.⁸⁸ The mere fact that the later corporation is under a contract to furnish public lights does not give it any claim of preference.⁸⁹ These companies have no right to invade the premises of a property owner and needlessly cut off overhanging branches of trees to prevent contact with the wires where this sacrifice can be avoided

⁸¹ *Bianki v. Greater American Exposition Co.*, 3 Neb. (unoff.) 656; s. c. 92 N. W. Rep. 615.

⁸² *Sebeck v. Plattdeutsche Volksfest Verein*, 124 Fed. Rep. 11; s. c. 59 C. C. A. 531.

⁸³ *Consolidated Fireworks Co. v. Koehl*, 190 Ill. 145; s. c. 60 N. E. Rep. 87; rev'g s. c. 92 Ill. App. 8.

⁸⁴ *Sebeck v. Plattdeutsche Volksfest Verein*, 124 Fed. Rep. 11; s. c. 59 C. C. A. 531.

⁸⁵ *Bianki v. Greater American Exposition Co.*, 3 Neb. (unoff.) 656; s. c. 92 N. W. Rep. 615.

⁸⁶ *Frost v. Josselyn*, 180 Mass. 389; s. c. 62 N. E. Rep. 469.

⁸⁷ *Commonwealth Electric Co. v. Rose*, 214 Ill. 545; s. c. 73 N. E. Rep. 780; aff'g s. c. 114 Ill. App. 181. A statute authorizing cities to require electric wires to be placed in underground conduits does not amount to imposing taxation on such corporations without their consent or opportunity of being heard: *Geneva v. Geneva Tel. Co.*, 30 Misc. Rep. 236; s. c. 62 N. Y. Supp. 172.

⁸⁸ *Edison Electric Light & Co. v. Merchants' & Electric Co.*, 200 Pa. 209; s. c. 49 Atl. Rep. 766.

⁸⁹ *Edison Electric Light & Co. v. Merchants' & Electric Co.*, 200 Pa. 209; s. c. 49 Atl. Rep. 766.

by the use of a reasonable degree of care and proper insulation.⁹⁰ The law implies a contract between electrical companies and their customers to supply a safe current and appliances,⁹¹ and this obligation rests upon purchasers of the plant,⁹² and persons or corporations operating it under a license.⁹³ On grounds of public policy liability for negligence cannot be avoided by stipulations to that effect in contracts with customers.⁹⁴ Nor can such a corporation escape liability on the ground that it was not in control of its plant, if the evidence shows the plant was in actual operation, and the company was collecting for the lights furnished at the time in question.⁹⁵

§ 797. Reasonable Care is Proportionate to Danger of Mischief.—

Persons and corporations engaged in the business of supplying electricity are bound to use reasonable care in the construction and maintenance of their wires and apparatus. This care and caution is proportionate to the danger involved. Reasonable or ordinary care and a high degree of diligence may be regarded as synonymous where the wires are charged with a dangerous current of electricity and the result of negligence may cause death or serious accident.⁹⁶ In this view it

⁹⁰ Van Siclen v. Jamaica &c. Light Co., 168 N. Y. 650; s. c. 61 N. E. Rep. 1135.

⁹¹ Royal Electric Co. v. Heve, Rap. Jud. Que. 11 B. R. 436.

⁹² Waller v. Leavenworth Light &c. Co., 9 Kan. App. 301; s. c. 61 Pac. Rep. 327.

⁹³ Smith v. Brooklyn Heights R. Co., 82 App. Div. (N. Y.) 531; s. c. 81 N. Y. Supp. 838.

⁹⁴ Denver &c. Electric Co. v. Lawrence, 31 Colo. 301; s. c. 73 Pac. Rep. 39.

⁹⁵ International Light &c. Co. v. Maxwell, 27 Tex. Civ. App. 294; s. c. 65 S. W. Rep. 78.

⁹⁶ See generally: Neal v. Wilmington &c. R. Co., 3 Pen. (Del.) 467; s. c. 53 Atl. Rep. 338; Alton R. &c. Co. v. Foulds, 81 Ill. App. 322; Commonwealth Electric Co. v. Melville, 110 Ill. App. 242; s. c. aff'd, 210 Ill. 70; 70 N. E. Rep. 1052; Rowe v. Taylorville Electric Co., 114 Ill. App. 535; s. c. aff'd, 213 Ill. 318; 72 N. E. Rep. 711; Economy Light &c. Co. v. Stephen, 87 Ill. App. 220; s. c. aff'd 187 Ill. 137; 58 N. E. Rep. 359; Knowlton v. Des Moines Edison Light Co., 117 Iowa 451; s. c. 90 N. W. Rep. 818; Illingsworth v. Boston Electric Light Co., 161 Mass. 583; s. c. 37 N. E. Rep. 778; Gilbert v. Du-

luth General Electric Co., 93 Minn. 99; s. c. 100 N. W. Rep. 653; Kennealy v. Westchester Electric R. Co., 181 N. Y. 582; s. c. 74 N. E. Rep. 1119; aff'g s. c. 86 App. Div. (N. Y.) 293; 83 N. Y. Supp. 823; Geismann v. Missouri Edison Electric Co., 173 Mo. 654; s. c. 73 S. W. 654; Wagner v. Brooklyn Heights R. Co., 69 App. Div. (N. Y.) 349; s. c. 74 N. Y. Supp. 809; s. c. aff'd, 174 N. Y. 520; 66 N. E. Rep. 1117; Citizens' Electric R. &c. Co. v. Bell, 26 Ohio Cir. Ct. R. 691; s. c. aff'd, 70 Ohio St. 482; 72 N. E. Rep. 1155; Barto v. Iowa Tel. Co., 126 Iowa 241; s. c. 101 N. W. Rep. 876. A private corporation, which maintains for its own use electric wires over a public bridge, is bound to use a high degree of care to prevent injury to persons using the bridge, taking into consideration all the uses to which it is put: Nelson v. Branford Lighting &c. Co., 75 Conn. 548; s. c. 54 Atl. Rep. 303. An instruction that the company was charged with the duty of introducing the agency by the best known means and appliances for so doing was not erroneous, as it imposed only the duty of inquiring for and selecting the means of safely using the dangerous current of electricity which are

is not improper to say that the care demanded is the highest degree of care practicable to avoid injury.⁹⁷ The corporation is not generally regarded as an insurer under any of these rules,⁹⁸ although there are cases that go to this extreme.⁹⁹ This duty of care extends to the matter of inspection and investigation¹⁰⁰ and makes the company liable where it fails to exercise due care to remedy defects within a reasonable time after actual or constructive notice of their existence.¹⁰¹ Ordinary care should be exercised so to construct lines that they will withstand such storms as are likely to occur in the vicinity.¹⁰² Whether the degree of care required by the rules has been exercised in a particular instance is generally regarded by the courts as a question of fact for the determination of the jury.¹⁰³

§ 799a. **Electrolysis.**—The doctrine making a person collecting dangerous substances on his premises liable for their negligent escape

best known for the purpose: *Brooks v. Consolidated Gas Co.*, 70 N. J. L. 211; s. c. 57 Atl. Rep. 396.

⁹⁷ *Daltry v. Media Electric Light & Co.*, 208 Pa. 403; s. c. 57 Atl. Rep. 833; *Harter v. Colfax Electric Light & Co.*, 124 Iowa 500; s. c. 100 N. W. Rep. 508; *Metropolitan St. R. Co. v. Gilbert*, 70 Kan. 261; s. c. 78 Pac. Rep. 807; *Macon v. Paducah R. Co.*, 110 Ky. 680; s. c. 23 Ky. L. Rep. 46; 62 S. W. Rep. 496.

⁹⁸ *Denver & C. Electric Co. v. Lawrence*, 31 Col. 301; s. c. 73 Pac. Rep. 39; *New Omaha & C. Elec. Light Co. v. Anderson*, — Neb. —; s. c. 102 N. W. Rep. 89; *Citizens' R. Co. v. Gifford*, 19 Tex. Civ. App. 631; s. c. 47 S. W. Rep. 1041; *Norfolk R. & C. Co. v. Spratley*, 103 Va. 379; s. c. 49 S. E. Rep. 502.

⁹⁹ One court has held that it is not sufficient to relieve a corporation from liability that it has exercised "the highest degree of care and skill usually exercised by prudent persons engaged in the same or similar business to keep its wires so insulated as to be reasonably safe and free from danger" and makes the corporation practically an insurer: *Overall v. Louisville & C. Light Co.*, 47 S. W. Rep. 442; s. c. 20 Ky. L. Rep. 759.

¹⁰⁰ *Denver v. Sherret*, 88 Fed. Rep. 226; s. c. 31 C. C. A. 499; *Paine v. Electric Illuminating & Co.*, 64 App. Div. (N. Y.) 477; s. c. 72 N. Y. Supp. 279; *Emporia v. Burns*, 67 Kan. 523; s. c. 73 Pac. Rep. 94; *Bru-*

nelle v. Lowell Electric Light Co., 188 Mass. 493; s. c. 74 N. E. Rep. 676 (electric light company liable to injured person and not owner of premises where former had agreed to inspect and keep in repair). Where an electric company sold an arc light to a church under a contract by which the company was bound to furnish electricity and keep the light in repair, and by reason of its negligence in failing to properly repair the light, after notice, it fell and injured plaintiff while attending services, defendant was liable for such injury: *Fish v. Kirlin-Gray Electric Co.*, 18 S. D. 122; s. c. 99 N. W. Rep. 1092.

¹⁰¹ *Ludwig v. Metropolitan St. R. Co.*, 71 App. Div. (N. Y.) 210; s. c. 75 N. Y. Supp. 667. Due diligence in caring for a dangerous defect is displayed where after its discovery with reasonable promptness steps are immediately taken to remedy the defect: *Read v. City & C. R. Co.*, 115 Ga. 366; s. c. 41 S. E. Rep. 629.

¹⁰² *Quincy Gas & C. Co. v. Bauman*, 104 Ill. App. 600; *Wolpers v. New York & C. Light & C. Co.*, 91 App. Div. (N. Y.) 424; s. c. 86 N. Y. Supp. 845; *Smith v. Missouri & C. Tel. Co.*, 113 Mo. App. 429; s. c. 87 S. W. Rep. 71. ¹⁰³ *Wolpers v. New York & C. Light & C. Co.*, 91 App. Div. (N. Y.) 424; s. c. 86 N. Y. Supp. 845; *Wagner v. Brooklyn Heights R. Co.*, 69 App. Div. 349 (N. Y.); s. c. 74 N. Y. Supp. 809.

to the damage of others is readily applicable to this form of injury. By electrolysis in this connection is meant the decomposition of underground metal pipes at the point where a return current of electricity traversing the pipes quits the surface of the metal in moist earth. Damages are certainly recoverable on the principle of negligence and the negligent operation of the plant may be enjoined where it results in continual damage of this character.¹⁰⁴

§ 800. **Negligence in Failing to Insulate Electric Wires.**—It is the duty of an electrical corporation operating highly charged wires to use the utmost care to insulate its wires at places where persons may reasonably be anticipated to go for work, pleasure or business,¹⁰⁵ and to preserve such insulation from impairment.¹⁰⁶ A failure in the per-

¹⁰⁴ *Dayton v. City R. Co.*, 26 Ohio Cir. Ct. R. 736.

¹⁰⁵ See generally: *Walters v. Denver & Light Co.*, 17 Colo. App. 192; s. c. 68 Pac. Rep. 117; *Rowe v. Taylorville Electric Co.*, 114 Ill. App. 535; s. c. aff'd, 213 Ill. 318; 72 N. E. Rep. 711; *Commonwealth Electric Co. v. Melville*, 210 Ill. 70; s. c. 70 N. E. Rep. 1052; aff'g s. c. 110 Ill. App. 242; *Commonwealth Electric Co. v. Rose*, 114 Ill. App. 181; s. c. aff'd, 214 Ill. 545; 73 N. E. Rep. 780; *Gremnis v. Louisville Electric Light Co.*, 49 S. W. Rep. 184; s. c. 20 Ky. L. Rep. 1293; *Lewis v. Louisville & Light Co.*, 50 S. W. Rep. 992; s. c. 21 Ky. L. Rep. 34; *Lexington R. Co. v. Fain*, 24 Ky. L. Rep. 1443; s. c. 71 S. W. Rep. 628; *Hebert v. Lake Charles Ice & Co.*, 111 La. 522; s. c. 35 South. Rep. 731; 64 L. R. A. 101; *Potts v. Shreveport Belt R. Co.*, 110 La. 1; s. c. 34 South. Rep. 103; *Brown v. Edison Electric Illuminating Co.*, 90 Md. 400; s. c. 45 Atl. Rep. 182; 46 L. R. A. 745; *Illingsworth v. Boston Electric Co.*, 161 Mass. 583; s. c. 37 N. E. Rep. 778; *Geismann v. Missouri Edison Electric Co.*, 173 Mo. 654; s. c. 73 S. W. Rep. 654; *Winkelman v. Kansas City & Light Co.*, 110 Mo. App. 184; s. c. 85 S. W. Rep. 99; *Wagner v. Brooklyn Heights R. Co.*, 69 App. Div. (N. Y.) 349; s. c. 74 N. Y. Supp. 809; s. c. aff'd, 174 N. Y. 520; 66 N. E. 1117 (lineman of telephone company rightfully at work on elevated railroad structure carrying wires of the telephone company under a contract could recover for injuries from shock caused by electricity escaping from feed wire of elevated railroad

company). In an action for injuries caused by an electric light wire, evidence that the company protected the wires by insulation commonly used when a converter is installed at the top of a pole did not require a nonsuit, where the evidence discloses that more effective insulation could have been employed, or other protection furnished: *Brooks v. Consolidated Gas Co.*, 70 N. J. L. 211; s. c. 57 Atl. Rep. 396.

¹⁰⁶ *Wagner v. Brooklyn Heights R. Co.*, 69 App. Div. (N. Y.) 349; s. c. 74 N. Y. Supp. 809; *Schweitzer v. Citizens' General Electric Co.*, 52 S. W. Rep. 830; s. c. 21 Ky. L. Rep. 608; *Potts v. Shreveport Belt R. Co.*, 110 La. 1; s. c. 34 South. Rep. 103; *Wagner v. Brooklyn Heights R. Co.*, 69 App. Div. (N. Y.) 349; s. c. 74 N. Y. Supp. 809; s. c. aff'd, 174 N. Y. 520; 66 N. E. Rep. 117; *Thomas v. Wheeling Electric Co.*, 54 W. Va. 395; s. c. 46 S. E. Rep. 217; *Commonwealth Electric Co. v. Melville*, 210 Ill. 70; s. c. 70 N. E. Rep. 1052; aff'g s. c. 110 Ill. App. 242; *Lexington R. Co. v. Fain*, 71 S. W. Rep. 628; s. c. 24 Ky. L. Rep. 1443. In a case where the plaintiff was shocked by electricity coming from the ground after it escaped thereto from one of defendant's electric wires after it fell, it was held that the jury was justified in holding that the automatic device used by the defendant was not properly adjusted or was not in proper working order where there was evidence that if it was in proper working order it would throw the current off the wire the moment it came in contact with the ground: *O'Flaherty v. Nassau*

formance of this duty raises a presumption of negligence,¹⁰⁷ particularly where it is enjoined by law or ordinance.¹⁰⁸ But it is essential to liability in these cases that the lack of insulation should have been the proximate cause of the injury,¹⁰⁹ and this is a question of fact for the jury.¹¹⁰ In determining whether insulation was necessary at a particular place the surroundings are to be considered;¹¹¹ and if the in-

&c. R. Co., 34 App. Div. (N. Y.) 74; s. c. 54 N. Y. Supp. 96; s. c. aff'd, 165 N. Y. 624; 59 N. E. Rep. 1128.

¹⁰⁷ *Winkelman v. Kansas City & Light Co.*, 110 Mo. App. 184; s. c. 85 S. W. Rep. 99; *Brush Electric Light & Co. v. Lefevre* (Tex. Civ. App.), 55 S. W. Rep. 396; *Thomas v. Wheeling Electrical Co.*, 54 W. Va. 395; s. c. 46 S. E. Rep. 217.

¹⁰⁸ *Wales v. Pacific & Motor Co.*, 130 Cal. 521; s. c. 62 Pac. Rep. 932; *Knowlton v. Des Moines Edison Light Co.*, 117 Iowa 451; s. c. 90 N. W. Rep. 818; *Clements v. Louisiana & Light Co.*, 44 La. Ann. 692; s. c. 11 South. Rep. 51; 16 L. R. A. 43; *Mitchell v. Raleigh Electric Co.*, 129 N. C. 166; s. c. 39 S. E. Rep. 801; 55 L. R. A. 398; *Thomas v. Wheeling Electrical Co.*, 54 W. Va. 395; s. c. 46 S. E. Rep. 217. Where an electric company has accepted without qualification an ordinance authorizing it to use the streets of the city, and availed itself of the benefits of the ordinance, it cannot thereafter repudiate a condition of the ordinance requiring wires to be insulated and the conductors to be protected: *Commonwealth Electric Co. v. Rose*, 214 Ill. 545; s. c. 73 N. E. Rep. 780; aff'g s. c. 114 Ill. App. 181. Where in an action for injuries to a person by coming in contact with a defectively insulated electric light wire the petition alleged a sufficient cause of action at common law, independent of a city ordinance pleaded, the petition was sufficient to support the action as developed by the evidence, regardless of the ordinance: *Winkelman v. Kansas City Elec. Light Co.*, 110 Mo. App. 184; s. c. 85 S. W. Rep. 99.

¹⁰⁹ *Heidt v. Southern Tel. & Co.*, 122 Ga. 474; s. c. 50 S. E. Rep. 361; *Hebert v. Lake Charles Ice & Co.*, 111 La. 522; s. c. 35 South. Rep. 731; 64 L. R. A. 101; *Standard Light & Co. v. Muncey*, 33 Tex. Civ. App. 416, s. c. 76 S. W. Rep. 931. Where the plaintiff, in taking down a dead

wire belonging to a company other than the defendant, is injured by the wire breaking, and coming in contact with an improperly insulated live wire of the defendant, the defendant's negligence in not having its wire insulated is a concurrent cause of the accident, rendering it liable, though, but for a defect in the wire which broke, the accident would not have happened: *San Antonio Gas & Co. v. Speegle* (Tex. Civ. App.), 60 S. W. Rep. 884. The proximate cause of an injury resulting from contact with an uninsulated electric wire is the condition of the wire, and not the act of the injured person in coming in contact with it: *Walters v. Denver Consol. Elec. Light Co.*, 12 Colo. App. 145; s. c. 54 Pac. Rep. 960. The fall from a ladder and not the uninsulated wire is the proximate cause of injury to a person falling from the ladder and injured by clutching a live wire to break his fall: *Elliott v. Allegheny Co. Light Co.*, 204 Pa. 568; s. c. 54 Atl. Rep. 278.

¹¹⁰ *Walters v. Denver & Light Co.*, 12 Colo. App. 145; s. c. 54 Pac. Rep. 960; *Knowlton v. Des Moines Edison Light Co.*, 117 Iowa 451; s. c. 90 N. W. Rep. 818; *Economy Light & Co. v. Hiller*, 203 Ill. 518; s. c. 68 N. E. Rep. 72; aff'g s. c. 106 Ill. App. 306; *Illingsworth v. Boston & Light Co.*, 161 Mass. 583; s. c. 37 N. E. Rep. 778; *Burton Tel. Co. v. Gordon*, 25 Ohio Cir. Ct. R. 641.

¹¹¹ *Walters v. Denver & Light Co.*, 17 Colo. App. 192; s. c. 68 Pac. Rep. 117. While the duty of an electric company to maintain perfect insulation does not extend to its entire system, it extends to wires strung twenty-five feet above ground in a street where telephone employes are likely to come in contact with them while attending to their duties: *Rowe v. Taylorville Electric Co.*, 213 Ill. 318; s. c. 72 N. E. Rep. 711; aff'g s. c. 114 Ill. App. 535.

sulation is defective it is not a defense that it conforms to methods in use by other companies.¹¹² The fact that a wire causing the injury was partially insulated has been held to show a recognition of its necessity.¹¹³ Insulation against electricity having its origin in the clouds or atmosphere is not required.¹¹⁴ Constructive knowledge of defective insulation will be charged to the company where it has existed for such a length of time that it could have been discovered and remedied by the exercise of reasonable care.¹¹⁵

§ 800a. Duty to Insulate as Between Different Electrical Companies.—Strong authority imposes upon the vendor of electricity the duty to see that its customers' wires are properly insulated before charging them with a deadly current. Electricity, unlike other commodities, is not delivered and placed under the control of the purchaser. The control is at the plant.¹¹⁶ Where different electrical companies contract for the joint use of poles, it is the duty of each one of them to keep its wires so insulated as to avoid injury to the servants of the other users at work on the poles.¹¹⁷ The rule does not require

¹¹² *Dechert v. Municipal Electric Light Co.*, 39 App. Div. (N. Y.) 490; s. c. 57 N. Y. Supp. 225.

¹¹³ *Wagner v. Brooklyn & C. R. Co.*, 69 App. Div. (N. Y.) 349; s. c. 74 N. Y. Supp. 809; s. c. aff'd, 174 N. Y. 520; s. c. 66 N. E. Rep. 1117.

¹¹⁴ *Phoenix Light & C. Co. v. Bennett*, — Ariz. —; s. c. 74 Pac. Rep. 48; 63 L. R. A. 219. In a case where death was caused by lightning, which came over defendant's wire while deceased was sitting in his library, under a telephone which he had rented of defendant, the questions whether there were known appliances by which the danger from such lightning as killed deceased could be averted, and whether defendant was negligent in failing to supply and use such appliances, were for the jury: *Griffith v. New England Tel. & C. Co.*, 72 Vt. 441; s. c. 48 Atl. Rep. 643; 52 L. R. A. 919.

¹¹⁵ *Kansas City v. File*, 60 Kan. 157; s. c. 55 Pac. Rep. 877; *Mitchell v. Raleigh Electric Co.*, 129 N. C. 166; s. c. 39 S. E. Rep. 801; 55 L. R. A. 398. For the purpose of showing that an electric company ought to have known of a defective insulation in one of its wires near a building, evidence is admissible that for several weeks before the accident caused thereby it would "spit

fire" when blown against the corner of the roof: *Will v. Edison Electric & C. Co.*, 200 Pa. 540; s. c. 50 Atl. Rep. 161. A complaint sufficiently alleged notice to defendant of the condition of the wire by stating that it permitted the line to become out of repair and in a dangerous condition, and remain in that condition for several months: *Central Union Tel. Co. v. Sokola*, 34 Ind. App. 429; s. c. 73 N. E. Rep. 143. But an electric light company will not be charged with negligence by evidence that a person was killed by coming in contact with one of its wires on a house, at a point where the insulation was defective, where there is no evidence of actual notice to it, nor how long the defect had existed: *Smith v. East End Electric Light Co.*, 198 Pa. St. 19; s. c. 47 Atl. Rep. 1123.

¹¹⁶ *Thomas v. Maysville Gas Co.*, 108 Ky. 224; s. c. 56 S. W. Rep. 153; *Hoboken Land & C. Co. v. United Electric Co.*, 71 N. J. L. 430; s. c. 58 Atl. Rep. 1082. But see *contra*, *Keefe v. Narragansett & C. Lighting Co.*, 21 R. I. 575; s. c. 43 Atl. Rep. 542.

¹¹⁷ *Dallas Electric Co. v. Mitchell*, 33 Tex. Civ. App. 424; s. c. 76 S. W. Rep. 935; *Standard Light & C. Co. v. Muncey*, 33 Tex. Civ. App. 416; s. c. 76 S. W. Rep. 931.

insulation at places where the presence of persons is not reasonably to be anticipated.¹¹⁸ In a case where the wires of an electric company were not properly insulated, and an employé of a telephone company on a pole jointly used by both companies was killed by the turning on of the current without the warning which the electric company was accustomed to give its own employés at work about its wires, the electric company was held not liable, in the absence of evidence of an agreement between the companies as to signals, or any knowledge on the part of the electric company that the telephone men were relying on the signals.¹¹⁹

§ 801. To Whom the Duty of Insulating such Wires Extends.—

The duty to insulate extends to employés;¹²⁰ persons rightfully on the premises under an implied license,¹²¹ such as the servants of independent contractors,¹²² and all other persons whose presence at the point in question is reasonably to be anticipated.¹²³ There is no obligation to insulate at places where the presence of persons is not reasonably to be anticipated;¹²⁴ and at places from which the public is ex-

¹¹⁸ *Brush Electric Light & Co. v. Lefevre*, 93 Tex. 604; s. c. 57 S. W. Rep. 640; 49 L. R. A. 771; *Cumberland Tel. Co. v. Martin*, 116 Ky. 554; s. c. 76 S. W. Rep. 394; 63 L. R. A. 469; 77 S. W. Rep. 718; 25 Ky. L. Rep. 787, 1298 (telephone company not liable for injury to bare licensee by lightning which struck pole and was conducted over a wire negligently maintained over a metal roof to the place where the injured person stood).

¹¹⁹ *Rowe v. Taylorville Elec. Co.*, 213 Ill. 318; s. c. 72 N. E. Rep. 711; aff'g s. c. 114 Ill. App. 535.

¹²⁰ *Anderson v. Jersey City & Light Co.*, 63 N. J. L. 387; s. c. 43 Atl. Rep. 654; *Kennerly v. Westchester & C. R. Co.*, 86 App. Div. (N. Y.) 293; s. c. 83 N. Y. Supp. 823; *Wagner v. Brooklyn Heights R. Co.*, 69 App. Div. (N. Y.) 349; s. c. 74 N. Y. Supp. 809.

¹²¹ *Wittleder v. Citizens' & C. Illum. Co.*, 50 App. Div. (N. Y.) 478; s. c. 64 N. Y. Supp. 114.

¹²² *Stevens v. United Gas & C. Co.*, 73 N. H. 159; s. c. 60 Atl. Rep. 848.

¹²³ *Nelson v. Bradford Lighting & C. Co.*, 75 Conn. 548; s. c. 54 Atl. Rep. 303 (uninsulated wires over a public bridge at a point where boys were in the habit of climbing); *Commonwealth Electric Co. v. Melville*, 210 Ill. 70; s. c. 70 N. E. Rep.

1052; aff'g s. c. 110 Ill. App. 242 (uninsulated wire near sidewalk at place where children were in the habit of playing); *Central Union Tel. Co. v. Sokola*, 34 Ind. App. 429; s. c. 73 N. E. Rep. 143; *Consolidated & C. Light & C. Co. v. Healy*, 65 Kan. 798; s. c. 70 Pac. Rep. 884 (wires laid on a viaduct near a balustrade over which boys were in the habit of climbing); *Daltry v. Media Electric Light & C. Co.*, 208 Pa. 403, 414; s. c. 57 Atl. Rep. 833, 1134 (dangling wire suspended over lawn upon which children were accustomed to play). An electric lighting company which places a live electric wire in such proximity to a stairway leading to an elevated railroad station as to menace the safety of a person who inadvertently throws his arm over the rail of the stairway is guilty of active and not merely passive negligence. The creation of such a condition is the creation of a nuisance: *Wittleder v. Citizens' & C. Illum. Co.*, 50 App. Div. (N. Y.) 478; s. c. 64 N. Y. Supp. 114.

¹²⁴ *Hector v. Boston & C. Light Co.*, 174 Mass. 212; s. c. 54 N. E. Rep. 539 (wires carried over the roof of buildings); *Freeman v. Brooklyn Heights R. Co.*, 54 App. Div. (N. Y.) 596; s. c. 66 N. Y. Supp. 1052 (wires were placed close to the top of

cluded by sufficient warnings of danger.¹²⁵ Where an electric light company maintains its wires on a structure belonging to another corporation not shown to be with such corporation's consent, it cannot set up that the person injured by contact with the wires was a trespasser on the property of the corporation, and this more especially where the evidence leaves it doubtful whether the electric light company is not itself a trespasser.¹²⁶ It cannot be claimed that a person, coming in contact with a live wire which he caught hold of when he accidentally slipped from a safe position, thereby became a trespasser on the property of the electrical company.¹²⁷

§ 802. **Injuries From Broken Wires.**—A *prima facie* case of negligence is made out by proof that an electrical corporation allowed a broken wire charged with electricity to hang suspended over or trail along a street or highway without guard or warning,¹²⁸ and this,

arched girders supporting a bridge about fifteen feet above the floor of the bridge). An owner of a building has the lawful right to place live electric wires on the roof to conduct electricity to an adjoining building for ordinary business purposes, and is not liable for the death of a boy, permitted without objection to go on the roof to get a ball, caused by his coming in contact with the wires, as in such case he is a mere licensee: *Sullivan v. Boston & C. R. Co.*, 156 Mass. 378; s. c. 31 N. E. Rep. 128. A company, owning and maintaining an elevated railroad structure upon which a live rail is used, is not guilty of a want of ordinary care in failing to construct means to prevent persons from climbing upon such structure at a point where there was no temptation so to climb, notwithstanding such company did, at and near stations, construct means to prevent persons climbing upon such structure: *McAllister v. Jung*, 112 Ill. App. 138. A member of a fire truck company who assists to hoist a ladder with metallic corners against an electric light wire cannot, in the absence of invitation or permission of the owner to go on the premises, complain that he was injured because the wires were not properly insulated: *New Omaha & C. Elec. Light Co. v. Anderson*, — Neb. —; s. c. 102 N. W. Rep. 89.

¹²⁵ *McCaughna v. Owosso & C. Elec. Co.*, 129 Mich. 407; s. c. 89 N. W. Rep. 73; 8 Det. Leg. N. 1000. It is

not negligence for a company owning and maintaining an elevated railroad structure upon which a live wire rail is used, not to place warning signs thereon notifying the public of the danger from such rail: *McAllister v. Jung*, 112 Ill. App. 138.

¹²⁶ *Wittleder v. Citizens' & C. Illum. Co.*, 47 App. Div. (N. Y.) 410; s. c. 62 N. Y. Supp. 297.

¹²⁷ *Commonwealth Electric Co. v. Melville*, 210 Ill. 70; s. c. 70 N. E. Rep. 1052; aff'g s. c. 110 Ill. App. 242.

¹²⁸ *Central Union Tel. Co. v. Sokola*, 34 Ind. App. 429; s. c. 73 N. E. Rep. 143; *Hebert v. Lake Charles Ice & C. Co.* 111 La. 522; s. c. 35 South. Rep. 731; 64 L. R. A. 101; *Uggla v. West End St. R. Co.*, 160 Mass. 351; s. c. 35 N. E. 1126; *Cleary v. St. Louis Transit Co.*, 108 Mo. App. 433; s. c. 83 S. W. Rep. 1029; *Ruddy v. Newark Electric Light & C. Co.*, 63 N. J. L. 357; s. c. 46 Atl. Rep. 1100; aff'g s. c. 62 N. J. L. 505; 41 Atl. Rep. 712; *Boyd v. Portland & C. Elec. Co.*, 41 Or. 336; s. c. 68 Pac. Rep. 810; *Chapeton v. Portland & C. Elec. Co.*, 41 Or. 39; s. c. 67 Pac. Rep. 928; *Devin v. Beacon Light Co.*, 192 Pa. St. 188; s. c. 43 Atl. Rep. 962; 44 W. N. C. 340; *Wehner v. Lagerfelt*, 27 Tex. Civ. App. 520; s. c. 66 S. W. Rep. 221. The question whether an electric company was guilty of gross negligence justifying the award of exemplary damages was held one for the jury where the evidence showed that the wire had been hanging for two or three weeks,

though it did not own the wire, if it is connected with its system and was charged by it.¹²⁹ The company owes no duty to one breaking down its wires and exposing them in an uninsulated condition except to refrain from the infliction of willful injury.¹³⁰ Where wires are broken in a storm of extraordinary severity such as could not have been reasonably expected the company is liable only where it allows the wires to remain an unreasonable time in this condition, but otherwise if the storm is one which could have been expected at any time.¹³¹ The fact that the wire was thrown down unintentionally by a third person, an act which could have been anticipated,¹³² or that a general strike of street railway employes prevailed,¹³³ will not relieve the company from liability for injuries occasioned by broken wires. In the latter case the negligence is greater because of there being no necessity for charging the wires if cars could not be operated. The fact that a person, going on premises to put out a fire started by electricity and killed by contact with the wire causing the fire, may be a trespasser on the premises will not excuse the negligence of the company in causing his death, since, as to it he was not a trespasser.¹³⁴ Evidence that the breaking of wires was caused by the trolley pole slipping and striking against cross wires, and that the slipping of the poles was a matter of hourly occurrence in the operation of street cars, does not relieve the company from the imputation of negligence, but rather establishes that fact more clearly.¹³⁵ It is not material that the person injured by contact with a broken wire was at the time violating a speed ordinance, unless it is shown that this violation of the ordinance contributed to the injury.¹³⁶

and there was some evidence tending to show that an agent of the servant of the company had actual notice of the fact: *Macon v. Paducah R. Co.*, 23 Ky. L. Rep. 46; s. c. 62 S. W. Rep. 496. Negligence in leaving a telephone wire where it is touched accidentally by a traveller on a sidewalk is the proximate cause of an injury to him from an electric shock, although this was occasioned by accidental contact of the wire with wires of an electric light company,—at least where it does not appear that these were out of their proper positions: *Ahern v. Oregon Teleg. & Co.*, 24 Or. 276; s. c. 33 Pac. Rep. 403. The presumption of negligence in cases of contact with broken electric wires is not overcome by testimony of employes of the company that the line was properly constructed and the wires had been inspected the morning of the accident: *Norfolk R. &*

Co. v. Spratley, 103 Va. 379; s. c. 49 S. E. Rep. 502.

¹²⁹ *Daltry v. Media & Co. Light & Co.*, 208 Pa. 403, 414; s. c. 57 Atl. Rep. 833, 1134.

¹³⁰ *Newark & Co. Light & Co. v. McGilvery*, 62 N. J. L. 451; s. c. 41 Atl. Rep. 955.

¹³¹ *Boyd v. Portland Electric Co.*, 40 Or. 126; s. c. 66 Pac. Rep. 576. See also, *Central Union Tel. Co. v. Sokola*, 34 Ind. App. 429; s. c. 73 N. E. Rep. 143.

¹³² *Ela v. Postal Tel. Cable Co.*, 71 N. H. 1; s. c. 51 Atl. Rep. 281.

¹³³ *Cleary v. St. Louis Transit Co.*, 108 Mo. App. 433; s. c. 83 S. W. Rep. 1029.

¹³⁴ *Caglione v. Mt. Morris & Co. Light Co.*, 56 App. Div. (N. Y.) 191; s. c. 67 N. Y. Supp. 660.

¹³⁵ *Clancy v. New York & Co. R. Co.*, 82 App. Div. (N. Y.) 563; s. c. 81 N. Y. Supp. 875.

¹³⁶ *Hovey v. Michigan Tel. Co.*, 124

§ 803. Injuries From Sagging Wires Suspended Too Low, etc.¹³⁷—

An electric company is charged with negligence where it allows a wire to hang across a highway so low that travellers are likely to come in contact therewith;¹³⁸ and this particularly where the act is in violation of a statute fixing the height at which wires shall be strung.¹³⁹ It is the holding of one case that notice to a motorman or a conductor of a street railway company of the sagging of one of the trolley wires is not notice to the corporation, the reason being that neither the motorman nor the conductor has any authority over or duty to perform in regard to such wires.¹⁴⁰

§ 804. Injuries from Electric Wires Coming in Contact with Each Other.—An electric corporation, whose wires carry such a high voltage as to make them dangerous to life if touched, is negligent where it fails to string its wires at a height required by ordinary prudence to prevent contact with other wires less strongly charged.¹⁴¹ The duty to protect such wires from contact belongs to both companies, and the liability for injury to a third person caused by this contact is a joint liability.¹⁴² Where the high tension wire is not insulated the company

Mich 607; s. c. 83 N. W. Rep. 600; 7 Det. Leg. N. 353.

¹³⁷ See also, *post*, § 1238. In a case where a painter went upon a roof to work and found that in order to get at a cornice to paint it he must prop up a number of electric wires which were in his way and he did so, and while under the wires at his work the prop slipped and he was killed by contact with a defectively insulated wire, and it further appeared from the evidence that this insulation had been defective for several weeks and was caused by the sagging of the wire against the cornice, it was held that the questions of the negligence of the electric light company and the contributory negligence of the deceased were for the jury: *Fitzgerald v. Edison Electric & Co. Co.*, 207 Pa. 118; s. c. 56 Atl. Rep. 350.

¹³⁸ *Southwestern Tel. & Co. Co. v. Robinson*, 2 U. S. App. 205; s. c. 1 C. C. A. 84; 50 Fed. Rep. 810; 16 L. R. A. 545; 12 Rail. & Corp. L. J. 122.

¹³⁹ *Brush Electric Light & Co. Co. v. Lefevre* (Tex. Civ. App.), 55 S. W. Rep. 396.

¹⁴⁰ *Read v. City & C. R. Co.*, 115 Ga. 366; s. c. 41 S. E. Rep. 629.

¹⁴¹ See generally: *Kraatz v. Brush El. L. Co.*, 82 Mich. 457; s. c. 46 N.

W. Rep. 787; *Hamilton v. Borden-town Electric Light & Co. Co.*, 68 N. J. L. 85; s. c. 52 Atl. Rep. 290; *Paine v. Electric Illum. & Co. Co.*, 64 App. Div. (N. Y.) 477; s. c. 72 N. Y. Supp. 279; *Daltry v. Media & Co. Light Co.*, 208 Pa. 403, 414; s. c. 57 Atl. Rep. 833, 1134; *International Light & Co. Co. v. Maxwell*, 27 Tex. Civ. App. 294; s. c. 65 S. W. Rep. 78.

¹⁴² *Economy Light & Co. Co. v. Hiller*, 203 Ill. 518; s. c. 68 N. E. Rep. 72; *aff'g* s. c. 106 Ill. App. 306; *Neal v. Wilmington & Co. Elec. R. Co.*, 3 Pen. (Del.) 451; s. c. 53 Atl. Rep. 338; *Western Union Tel. Co. v. Griffith*, 111 Ga. 551; s. c. 36 S. E. Rep. 859; *Cumberland Tele. & Co. Co. v. Ware*, 115 Ky. 581; s. c. 74 S. W. 289; 24 Ky. L. Rep. 2519; *Macon v. Paducah R. Co.*, 110 Ky. 680; s. c. 23 Ky. L. Rep. 46; 62 S. W. Rep. 496; *Rowe v. New York & Co. Tel. Co.*, 66 N. J. L. 19; s. c. 48 Atl. Rep. 523; *United Electric R. Co. v. Shelton*, 89 Tenn. 423; s. c. 14 S. W. Rep. 863; 46 Am. & Eng. R. Cas. 206; *Richmond & Co. R. Co. v. Rubin*, 102 Va. 809; s. c. 47 S. E. Rep. 834. So an electric company, which permitted a pulley wire used in lowering and hoisting an arc lamp to remain without proper or any insulation, and to come in contact with the feed wires, and become so charged with

operating it will be held liable without regard to its actual knowledge of the fallen wire or its diligence in discovering it.¹⁴³ Where the wires are strung so that contact is likely from natural causes it is not a defense that the more immediate cause of the contact was a storm.¹⁴⁴ Laws commanding the adoption of methods designed to avoid the possibility of contact are binding on lines in operation at the time of the enactment of the statute since such a law provides a remedy for an existing evil.¹⁴⁵

§ 806a. Injuries to Employé of One of the Users of Pole by Contact with Wire Belonging to Other User.—It is the holding of a Massachusetts case that a street railway company, owning and maintaining poles supporting its wires, which has granted a telephone company for a consideration the right to use its poles for the support of its wires, is not liable for injuries to an employé of the telephone company occasioned by a shock received by him while attempting to tighten a slack span wire belonging to the street railway company. The only duty owed by the street railway company to a person at work on its wires without permission is not willfully or wantonly to injure him.¹⁴⁶

electricity that a boy passing along the sidewalk and taking hold of the wire where it passed around the reel on the pole at a point four and one-half feet above the ground was killed by the current, was guilty of negligence: *Lexington R. Co. v. Fain*, 71 S. W. Rep. 628; s. c. 24 Ky. L. Rep. 1443.

¹⁴³ *Parsons v. Charleston Consol. R. & C. Co.*, 69 S. C. 305; s. c. 48 S. E. Rep. 284. In a case where the evidence tended to show that the telephone company would probably know when its wires were burned out or its system interfered with, and after the wire was burned out in the night time, and was hanging in a dangerous condition in a public street, nothing was done to repair the damage or remove the danger at 8:30 o'clock the next morning, when the accident occurred, it was held that the court could not say, as matter of law, that proper inspection and diligence on the part of the telephone company did not require it to discover the dangerous condition and remove the danger to those using the street before that time: *Economy Light & C. Co. v. Hiller*, 203 Ill. 518; s. c. 68 N. E. Rep. 72; aff'g s. c. 106 Ill. App. 306. An allegation that a telephone company negligently suffered a feed

wire of a traction company "to be and remain for a long time" in contact with an iron spike driven into one of its poles for a step, and the insulation at the point of contact to be and remain worn, defective and imperfect, so that the metal of the wire was in contact with the metal of the spike, by reason of which the injured person on placing his foot on the step received a shock of electricity which caused his injuries has been held sufficient as against a demurrer to charge the company with negligence, although it does not allege actual knowledge of the dangerous condition: *Graves v. City & C. Tel. Assn.*, 132 Fed. Rep. 387.

¹⁴⁴ *Paine v. Electric Illum. & C. Co.*, 64 App. Div. (N. Y.) 477; s. c. 72 N. Y. Supp. 279. See also, *Heidt v. Southern Telephone & C. Co.*, 122 Ga. 474; s. c. 50 S. E. Rep. 361.

¹⁴⁵ *Wisconsin Tel. Co. v. Janesville St. R. Co.*, 87 Wis. 72; s. c. 57 N. W. Rep. 970; 22 L. R. A. 759. But see *contra*, *Heidt v. Southern Telephone & C. Co.*, 122 Ga. 474; s. c. 50 S. E. Rep. 361.

¹⁴⁶ *Sias v. Lowell & C. R. Co.*, 179 Mass. 343; s. c. 60 N. E. Rep. 974. See also *Rowe v. Taylorville Elec. Co.*, 213 Ill. 318; s. c. 72 N. E. Rep. 711.

§ 806b. **Rights as Between Different Companies Employing Currents of Different Intensity.**—A company operating a wire carrying a low current of electricity may have an injunction against another company, which, under a later franchise, erects poles and wires carrying a dangerous current so near its wires as to interfere with their safe use.¹⁴⁷ Where, however, the company operating the high tension wire is first in possession of the street, and the company operating a low tension wire obtains a franchise to use the street upon the express condition that it shall not obstruct or interfere with the enjoyment of the franchise of the former company, it cannot enjoin the use of a system installed by the former company on the ground that the electricity discharged therefrom interferes with the operation of its line when this would involve a complete change of the system and the use of appliances which would be more dangerous, more expensive and less useful and efficient.¹⁴⁸ But an electric railroad company using strong currents of electricity on wires which are not insulated, which directly cross telephone wires which are insulated, may be compelled to place guard wires where they will prevent the contact of the wires caused by storms or otherwise,—especially where there is an ordinance requiring such guard wires, which the telephone company has complied with.¹⁴⁹

§ 807. **Liability for Burning Buildings by Electricity Communicated by Wires.**—Generally an electric light company will not be held liable for fires caused by improper wiring where it had nothing to do with the placing of the wires.¹⁵⁰ Similarly a corporation furnishing electricity for the illumination of a sign in front of a building, but without interest in or control over the wires or appliances by which the electricity was conducted to the sign, was held not liable for injuries caused by electricity escaping from these wires through a defect in construction or imperfect insulation.¹⁵¹

§ 808. **Contributory Negligence in Coming in Contact with Electric Wires.**—Here as elsewhere there can be no recovery for injuries to which the negligence of the injured person has proximately contributed. The care demanded of him by the law is the care of a reason-

¹⁴⁷ Rutland Electric Light Co. v. Marble City &c. Light Co., 65 Vt. 377; s. c. 26 Atl. Rep. 635.

¹⁴⁸ Hudson R. Tel. Co. v. Water-vliet &c. R. Co., 135 N. Y. 393; s. c. 32 N. E. Rep. 148; 48 N. Y. St. Rep. 417; 17 L. R. A. 674; 46 Alb. L. J. 485; 31 Am. St. 838; 6 Am. Rail. & Corp. Rep. 619.

¹⁴⁹ Wisconsin Tele. Co. v. Janes-

ville St. R. Co., 87 Wis. 72; s. c. 57 N. W. Rep. 970; 22 L. R. A. 759.

¹⁵⁰ National Fire Ins. Co. v. Denver, 16 Colo. App. 86; s. c. 63 Pac. Rep. 949; Herzog v. Municipal Electric Light Co., 89 App. Div. (N. Y.) 569; s. c. 85 N. Y. Supp. 712.

¹⁵¹ Memphis Consol. Gas &c. Co. v. Speers, 113 Tenn. 83; s. c. 81 S. W. Rep. 595.

ably prudent man.¹⁵² This care is lacking in persons who touch live wires through idle curiosity,¹⁵³ or in disregard of warnings.¹⁵⁴ And so with a brakeman who knew that a trolley wire crossing the track sagged, making it necessary for brakemen to stoop, and he failed to do so.¹⁵⁵ Travellers on the highway¹⁵⁶ and persons whose occupation brings them in close proximity to wires, have a right to assume that wires have been insulated, as required by ordinance and prudent management.¹⁵⁷ Neither is a person using electricity whose contract calls for a harmless current required to anticipate the likelihood of the wire becoming charged with a deadly current.¹⁵⁸ The fact that one killed by an electric shock received while he was endeavoring to put out some incandescent lights, saw another person previously make the attempt and draw back on account of receiving a shock, which, however, was not serious, was held not to impute him with contributory negligence, as a matter of law, in making the attempt.¹⁵⁹ Persons at work on roofs and balconies over which electric wires are stretched are not charged with negligence, as a matter of law, in working amid these dangerous surroundings. They are only required to exercise care in proportion to the danger in passing under and around the wires.¹⁶⁰ Courts gen-

¹⁵² *Commonwealth Elec. Co. v. Rose*, 114 Ill. App. 181; s. c. aff'd, 214 Ill. 545; 73 N. E. Rep. 780; *Winkelman v. Kansas City Elec. Light Co.*, 110 Mo. App. 184; s. c. 85 S. W. Rep. 99; *Buckley v. Westchester Lighting Co.*, 93 App. Div. (N. Y.) 436; s. c. 87 N. Y. Supp. 763.

¹⁵³ *Anderson v. Jersey City Light Co.*, 64 N. J. L. 664; s. c. 46 Atl. Rep. 593 (touched wire to demonstrate correctness of judgment as to insulation).

¹⁵⁴ *Henning v. Western Union Tel. Co.*, 41 Fed. Rep. 864; *Lutolf v. United Electric Light Co.*, 184 Mass. 53; s. c. 67 N. E. Rep. 1025; *Katafiasz v. Toledo & C. Electric Co.*, 24 Ohio Cir. Ct. R. 127; *Brush Electric Light & C. Co. v. Lefevre* (Tex. Civ. App.), 55 S. W. Rep. 396. Where a mother, with her young child and others, went on the roof of the building in which she lived in the night time, to watch a play in a theater across the street, and placed the child so that he could get hold of an electric light wire, though she knew of its presence, and warned the others against it,—she could not recover for his injury from taking hold of it: *Cumberland v. Lotting*, 95 Md. 42; s. c. 51 Atl. Rep. 841.

¹⁵⁵ *Danville Street Car Co. v. Watkins*, 97 Va. 713; s. c. 34 S. E. Rep. 884.

¹⁵⁶ *Jones v. Finch*, 128 Ala. 217; s. c. 29 South. Rep. 182.

¹⁵⁷ *Knowlton v. Des Moines & C. Light Co.*, 117 Iowa 451; s. c. 90 N. W. Rep. 818; *Clements v. Louisiana & C. Light Co.*, 44 La. Ann. 692; s. c. 11 South. Rep. 51; 16 L. R. A. 43; *Mitchell v. Raleigh Electric Co.*, 129 N. C. 166; s. c. 39 S. E. Rep. 801; 55 L. R. A. 398; *Will v. Edison & C. Illum. Co.*, 200 Pa. 540; s. c. 50 Atl. Rep. 161; *Thomas v. Wheeling Electrical Co.*, 54 W. Va. 395; s. c. 46 S. E. Rep. 217.

¹⁵⁸ *McCabe v. Narragansett Elec. Lighting Co.*, 26 R. I. 427; s. c. 59 Atl. Rep. 112.

¹⁵⁹ *Predmore v. Consumers' Light & C. Co.*, 99 App. Div. (N. Y.) 551; s. c. 91 N. Y. Supp. 118.

¹⁶⁰ *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692; s. c. 11 South. Rep. 51; 16 L. R. A. 43; *Brush Electric Light & C. Co. v. Lefevre*, 93 Tex. 604; s. c. 57 S. W. Rep. 640; 49 L. R. A. 771. Contributory negligence not conclusively imputed by the fact that a person killed while at work on a roof was found with one of his hands clasp- ing a wire, as his hand might

erally refuse to impute contributory negligence to children and youths injured by coming in contact with dangling live wires.¹⁶¹ In Iowa, where the burden of proof of freedom from contributory negligence rests on the plaintiff, the courts do not require him to establish the fact by direct affirmative proof of particular acts. The circumstances surrounding the accident may be sufficient to justify the inference of due care.¹⁶² Whether the injured person exercised due care in a particular case is usually a question of fact for the determination of the jury.¹⁶³

§ 809. Injuries to the Servants of Electrical Companies through their Contributory Negligence.—Courts generally refuse to impute contributory negligence to linemen, as a matter of law, because of a failure to test the wires, or wear rubber gloves and use other safety devices, unless there is evidence that this is the usual practice under the particular circumstances, or that the injured employé knew, or, by the exercise of due care, could have known, of the danger from contact with the wires without taking these precautions. The question is one of fact for the jury.¹⁶⁴ So it has been held that if a lineman of

have been accidentally brought in contact with the wire and made to grasp it convulsively by reason of the strong current passing through it: *Brooks v. Consolidated Gas Co.*, 70 N. J. L. 211; s. c. 57 Atl. Rep. 396.

¹⁶¹ *South Omaha Waterworks Co. v. Vocasek*, 62 Neb. 710; s. c. 87 N. W. Rep. 536 (boy of 17 years injured by contact with heavily charged guy wire); *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; s. c. 19 S. E. Rep. 344.

¹⁶² *Knowlton v. Des Moines & C. Light Co.*, 117 Iowa 451; s. c. 90 N. W. Rep. 818.

¹⁶³ See generally: *Walters v. Denver & C. Electric Light Co.*, 17 Colo. App. 192; s. c. 68 Pac. Rep. 117; *Lloyd v. City & C. R. Co.*, 110 Ga. 165; s. c. 35 S. E. 170; *Central Union Tel. Co. v. Sokola*, 34 Ind. App. 429; s. c. 73 N. E. Rep. 143; *Knowlton v. Des Moines & C. Light Co.*, 117 Iowa 451; s. c. 90 N. W. Rep. 818; *Lexington R. Co. v. Fain*, 24 Ky. L. Rep. 1443; s. c. 71 S. W. Rep. 628; *Macon v. Paducah R. Co.*, 110 Ky. 680; s. c. 23 Ky. L. Rep. 46; 62 S. W. Rep. 496; *Cleary v. St. Louis Transit Co.*, 108 Mo. App. 433; s. c. 83 S. W. Rep. 1029; *Rowe v. New York & C. Tel. Co.*, 66 N. J. L. 19; s. c. 48 Atl. Rep. 523.

¹⁶⁴ *Commonwealth Electric Co. v. Rose*, 114 Ill. App. 181; s. c. aff'd, 214 Ill. 545; 73 N. E. Rep. 780; *Paine v. Electric Illum. & C. Co.*, 64 App. Div. (N. Y.) 477; s. c. 72 N. Y. Supp. 279. Where an electric lineman, while working on a telephone pole, treated an electric light wire as charged, and the closing of the circuit by his body coming in contact with the wire was purely accidental and caused by the slipping of his foot, he was not guilty of contributory negligence in failing to test the light wire, or in failing to wear rubber gloves, it appearing that there was no danger in handling live wires when the body was not in a position to connect them with other charged wires or with the ground: *Smith v. Missouri & C. Tel. Co.*, 113 Mo. App. 429; s. c. 87 S. W. Rep. 71. In an action against an electric light company for the death of a workman on another line by coming in contact with its wires, it was proper to charge that the probability or possibility of there being a current on the wires at that time should be considered in determining whether the workman had used due care in allowing such contact without having first insulated himself: *Knowlton v. Des Moines & C. Light Co.*, 117

a telephone company in working under electric light wires was justified in believing that the current would not be turned on the wires while he was at work, he was not required to guard against this possibility.¹⁶⁵ In any event the negligence of the employé must have proximately contributed to cause his injury. Thus, where the shock received by an employé at work on a pole was sufficient to kill him, it was held immaterial that he was not equipped with straps to prevent the fall which followed, as this act of negligence on his part did not contribute to his death.¹⁶⁶ An experienced lineman will be imputed with negligence in touching highly charged and insufficiently insulated wires where he knows their condition, or could have known it by the exercise of due diligence.¹⁶⁷ He is not allowed to become preoccupied and forgetful.¹⁶⁸ A lineman cannot recover for injuries caused by falling from weak cross bars, as the sole object of cross bars is to carry the wires, and not to support linemen.¹⁶⁹

§ 813. Liability of Municipal Corporations for Failing to Protect their Streets from These Dangers.—In an action for injuries from contact with a police department telephone wire which had fallen and become charged from a feed wire of an electric railway company, the question of negligence was held one for the jury, where it was shown that the break was known to the police within an hour after it occurred and before the accident, and it was also known that the wire was in close proximity to other wires carrying dangerous currents of electricity.¹⁷⁰ Ordinances and rules of the police department as to the inspection of wires owned by the city are admissible on the question of negligence.¹⁷¹

§ 814a. Care as to Wires on Removal of Telephone Instrument.—A telephone company removing an instrument from a building is negligent where it leaves the wires attached thereto exposed in such a manner that electricity, though atmospheric, can be conducted into

Iowa 451; s. c. 90 N. W. Rep. 818. An instruction on the negligence of decedent in failing to wear a rubber coat, boots, or gloves was properly limited by a qualification as to their practicability in his situation as a sign hanger: *Geismann v. Missouri &c. Elec. Co.*, 173 Mo. 654; s. c. 73 S. W. Rep. 654.

¹⁶⁵ *Knowlton v. Des Moines &c. Light Co.*, 117 Iowa 451; s. c. 90 N. W. 818 (whether he was so justified a question of fact for the jury).

¹⁶⁶ *Rowe v. Taylorville Elec. Co.*,

213 Ill. 318; s. c. 72 N. E. Rep. 711; aff'g s. c. 114 Ill. App. 535.

¹⁶⁷ *Columbus R. Co. v. Dorsey*, 119 Ga. 363; s. c. 46 S. E. Rep. 635..

¹⁶⁸ *Buckley v. Westchester Lighting Co.*, 93 App. Div. (N. Y.) 436; s. c. 87 N. Y. Supp. 763.

¹⁶⁹ *Speicher v. New York &c. Tel. Co.*, 59 N. J. L. 23; s. c. 39 Atl. Rep. 661; s. c. aff'd, 60 N. J. L. 242; 41 Atl. Rep. 1116.

¹⁷⁰ *Herron v. Pittsburg*, 204 Pa. 509; s. c. 54 Atl. Rep. 311.

¹⁷¹ *Herron v. Pittsburg*, 204 Pa. 509; s. c. 54 Atl. Rep. 311.

the premises.¹⁷² In an action by a customer in a store, injured in this manner, it was held no defense that the store keeper had consented to leaving the wires in this condition.¹⁷³

§ 814b. Defective Interior Wiring.—Contractors installing wires are held only to the exercise of such ordinary care and prudence as that exercised by persons engaged in the same business according to the state of the art and methods generally used at the time the work was done, and not the standard at the time of the accident.¹⁷⁴ An electric lighting company is not responsible for accidents occurring from defects in the interior wiring of a building, if this wiring was done by persons over whom it had no control, unless it was negligent in the outside wiring, or in making its connection with the inside wiring.¹⁷⁵

§ 814c. Some Questions of Pleading and Variance.¹⁷⁶—A complaint in an action by the servant of one company against another company for injury, caused by contact with the latter's wires while climbing its electric poles in the prosecution of his employers' business, should allege permission from, or knowledge of his presence by the defendant company.¹⁷⁷ An allegation that permission to climb the pole belonging to the fire alarm system of a city was granted by the city council, or its duly authorized officers and agents, is sufficient without stating the name of any particular officer or agent granting the permit.¹⁷⁸ Where the negligence charged is that wires carrying different currents were crossed, the pleader should point out at what particular points the wires crossed each other.¹⁷⁹ An allegation that

¹⁷² *Southern &c. Tel. &c. Co. v. McTyer*, 137 Ala. 601; s. c. 34 South. Rep. 1020.

¹⁷³ *Southern &c. Tel. &c. Co. v. McTyer*, 137 Ala. 601; s. c. 34 South. Rep. 1020.

¹⁷⁴ *Herzog v. Municipal &c. Light Co.*, 89 App. Div. (N. Y.) 569; s. c. 85 N. Y. Supp. 712; s. c. aff'd, 180 N. Y. 518; 72 N. E. Rep. 1142.

¹⁷⁵ *Reynolds v. Naragansett &c. Lighting Co.*, 26 R. I. 457; s. c. 59 Atl. Rep. 393; *Harter v. Colfax Electric Light &c. Co.*, 124 Iowa 500; s. c. 100 N. W. Rep. 508.

¹⁷⁶ The complaints in these cases held to state a cause of action: *Denver Consol. &c. Co. v. Lawrence*, 31 Colo. 301; s. c. 73 Pac. Rep. 39 (injury caused by receiving a severe shock of electricity while attempting to turn on an electric light); *Miller v. Ouray Electric Light &c. Co.*, 18 Colo. App. 131; s. c. 70 Pac.

Rep. 447 (inmate of county jail burned to death by fire communicated from electric light wires); *Western Union Tel. Co. v. Griffith*, 111 Ga. 551; s. c. 36 S. E. Rep. 859 (contact with sagging telegraph wire heavily charged by a trolley wire crossing and touching same); *Geismann v. Missouri &c. Electric Co.*, 173 Mo. 654; s. c. 73 S. W. Rep. 654 (complaint charging failure to maintain insulation); *North Amherst Home Tel. Co. v. Jackson*, 26 Ohio Cir. Ct. R. 89 (charge as to improper insulation sufficiently alleged).

¹⁷⁷ *Augusta R. Co. v. Andrews*, 89 Ga. 653; s. c. 16 S. E. Rep. 203.

¹⁷⁸ *Augusta R. Co. v. Andrews*, 92 Ga. 706; s. c. 19 S. E. Rep. 713.

¹⁷⁹ *Western Union Tel. Co. v. Griffith*, 111 Ga. 551; s. c. 36 S. E. Rep. 859.

the defendant negligently permitted a wire to become, and remain broken, on the street, is not bad for failing to allege that the wire also struck the injured person or animal by reason of the defendant's negligence.¹⁸⁰ The question of insufficient inspection of wires is sufficiently raised by an allegation that the defendant "negligently and carelessly suffered and permitted its wires to be out of repair."¹⁸¹ It is elementary that the plaintiff cannot aver one kind of negligence and recover on another. The *allegata* and *probata* must correspond.¹⁸² It has been held that there was no variance between a declaration alleging that a part of one of the defendant telephone company's wires located along a certain street became detached, and was charged from the wires of an electric railway, and came in contact with the plaintiff, who was on the street, and evidence that the plaintiff, while on the street, was injured by reaching through a fence and coming in contact with the wire hanging down therein just outside the street.¹⁸³

§ 814d. **Some Questions of Evidence.**—A presumption of negligence is raised by proof of personal injury by contact with uninsulated wires at places where insulation is necessary,¹⁸⁴ with broken live wires,¹⁸⁵ and with wires charged with dangerous currents by contact with other wires carrying a heavier current.¹⁸⁶ So the fact of death from contact with electric wires at a place where the deceased had a right to be, and might be expected to be, has been held conclusive proof of defective insulation and of the negligence of the defendant.¹⁸⁷ And so it has been held that a presumption of negligence was raised by proof of the breaking of an electrical apparatus under the control of an electric light company resulting in an excessive current being sent

¹⁸⁰ *Chaperon v. Portland Gen. Electric Co.*, 41 Or. 39; s. c. 67 Pac. Rep. 928.

¹⁸¹ *Lutolf v. United Electric Light Co.*, 184 Mass. 53; s. c. 67 N. E. Rep. 1025.

¹⁸² *Barrett v. Independent Tel. Co.* (Tex. Civ. App.), 65 S. W. Rep. 1128.

¹⁸³ *Lynchburg Telephone Co. v. Bokker*, 103 Va. 594; s. c. 50 S. E. Rep. 148.

¹⁸⁴ *Walters v. Denver & C. Light Co.*, 17 Colo. App. 192; s. c. 68 Pac. Rep. 117.

¹⁸⁵ *Smith v. Brooklyn Heights R. Co.*, 82 App. Div. (N. Y.) 531; s. c. 81 N. Y. Supp. 838; *Wolpers v. New York & C. Light & C. Co.*, 91 App. Div. (N. Y.) 424; s. c. 86 N. Y. Supp. 845; *Boyd v. Portland Elec. Co.*, 40

Or. 126; s. c. 66 Pac. Rep. 576. The doctrine of *res ipsa loquitur* applied to a case where defendant's trolley wire fell into the street, injuring plaintiff; and this though plaintiff introduced evidence showing that the fall was caused by the trolley slipping off and striking some of the supporting wires: *Clancy v. New York & C. R. Co.*, 82 App. Div. (N. Y.) 563; s. c. 81 N. Y. Supp. 875.

¹⁸⁶ *Memphis & Gas & C. Co. v. Letson*, 135 Fed. Rep. 969; s. c. 68 C. C. A. 453; *Owensboro v. Knox*, 25 Ky. L. Rep. 680; s. c. 76 S. W. Rep. 191; *Crowe v. Nanticoke Light Co.*, 209 Pa. 580; s. c. 58 Atl. Rep. 1071.

¹⁸⁷ *Geismann v. Missouri & C. Elec. Co.*, 173 Mo. 654; s. c. 73 S. W. Rep. 654.

over the system into a building causing injuries.¹⁸⁸ Negligence¹⁸⁹ and contributory negligence¹⁹⁰ are provable by circumstantial evidence. Evidence as to the condition of the wires immediately after the accident is admissible,¹⁹¹ but not evidence as to defects at remote times and other places.¹⁹² The custom of an electric light company in regard to the inspection of its equipment may be shown.¹⁹³ The clothing worn by a person at the time of an injury by contact with a live wire is admissible.¹⁹⁴

§ 817. **Liability for Vending a Poisonous Drug in a Package Having on it a Harmless Label—Proximate and Remote Cause.**¹⁹⁵—In view of the consequences of this form of negligence it is not unreasonable to demand of the druggist the exercise of the highest degree of care for the safety of the public dealing with him, and to hold the customer only to the exercise of ordinary care for his own safety.¹⁹⁶ The

¹⁸⁸ *Reynolds v. Narragansett Elec. Lighting Co.*, 26 R. I. 457; s. c. 59 Atl. Rep. 393. The presumption of negligence raised by the breaking of an electrical transformer is not overcome by proof that it was made by a reputable manufacturer without a showing as to who purchased it, when it was purchased, how long it had been in service, its condition at installation and when it was inspected: *Reynolds v. Narragansett Elec. Lighting Co.*, 26 R. I. 457; s. c. 59 Atl. Rep. 393.

¹⁸⁹ *Consolidated Gas Co. v. Brooks* (N. J. L.), 53 Atl. Rep. 296; *Wolpers v. New York & Light & Co.*, 91 App. Div. (N. Y.) 424; s. c. 86 N. Y. Supp. 845. In an action for negligent death, resulting from contact with an electric wire, it was not necessary for plaintiff to prove, in order to recover, that at the exact point of contact the insulation was off the wire: *Geismann v. Missouri & C. Elec. Co.*, 173 Mo. 654; s. c. 73 S. W. Rep. 654.

¹⁹⁰ *Stevens v. United Gas & Electric Co.*, 73 N. H. 159; s. c. 60 Atl. Rep. 848.

¹⁹¹ *Smith v. Missouri & C. Tel. Co.*, 113 Mo. App. 429; s. c. 87 S. W. Rep. 71.

¹⁹² *United Electric Light & C. Co. v. State*, 100 Md. 634; s. c. 60 Atl. Rep. 248.

¹⁹³ *Quincy Gas & C. Co. v. Clark*, 109 Ill. App. 20.

¹⁹⁴ *Quincy Gas & C. Co. v. Baumann*, 203 Ill. 295; s. c. 67 N. E. Rep. 807; aff'g s. c. 104 Ill. App. 600.

¹⁹⁵ That one selling a poisonous drug by mistake for a harmless medicine is liable to a third person taking the same without negligence, see: *Huset v. J. I. Case Threshing Mach. Co.*, 120 Fed. Rep. 865; s. c. 57 C. C. A. 237; 61 L. R. A. 303; *Peters v. Johnson*, 50 W. Va. 644; s. c. 57 L. R. A. 428; 41 S. E. Rep. 190. In a case where vaccine virus to prevent stock from contracting anthrax was ordered, and the druggist, not having this preparation, furnished a virus for the prevention of blackleg, representing the two medicines to be the same, and the plaintiff, relying on this representation, vaccinated his mules and horses with the virus, which was dangerous to horses and mules and caused their death, the druggist was held liable for their value: *Mann-Tankersly Drug Co. v. Cheairs & Son*, — Ark. —; s. c. 88 S. W. Rep. 873.

¹⁹⁶ *Sutton v. Wood*, —Ky. —; s. c. 85 S. W. Rep. 201; 27 Ky. L. Rep. 412. A prescription given by a physician to his patient called for "Elixir Pinus Comp. cum Heroin—ounces 4." The druggist had a bottle of "Elixir Pinus Compositus" and a bottle of Heroin, and, on consulting a pamphlet issued by the maker of the Heroin and the Elixir Pinus Compositus, he found that such manufacturer also put up a compound known as "Elixir Pinus Compositus with Heroin," and the formula in the pamphlet showed that the proportion of Heroin in

rule does not require the druggist to analyze proprietary medicines bought from the manufacturer, but he may rely upon the label affixed to the package.¹⁹⁷ A violation of a statute regulating the sale of drugs establishes a *prima facie* case of negligence.¹⁹⁸ The druggist cannot urge as a defense to an action for a mistake in filling a prescription that it was compounded by a registered pharmacist in his employ,¹⁹⁹ or that the negligence of the nurse,²⁰⁰ or medical attendant²⁰¹ of the person taking the medicine, concurred with his negligence to cause the death or injury complained of. In a case where a drug clerk sold morphine for calomel, and labeled the package "Calomel One-quarter Grain," it was held that such gross negligence was displayed as to warrant a recovery of exemplary damages for the death of a child taking the medicine.²⁰² In another case where a druggist was given a bottle labeled "Carbolic Acid" and was asked for arnica, but filled it with carbolic acid and did not attach a new label, it was held that his negligence was the proximate cause of injury to one who used the carbolic acid supposing it to be arnica.²⁰³

§ 820. **Vending Defective Machines.**—Here it is the rule that a manufacturer or vendor of a machine or article known by him to be imminently dangerous to the life or limbs of any one who may use it for the purpose for which it was intended—and selling it without notice of this fact—will be liable to any one who sustains injury from its dangerous condition whether he has any contractual relations with him or not.²⁰⁴ And the case will be stronger against a manufacturer who places on the market an article which is dangerous under the name of one which is harmless.²⁰⁵ The seller of an article inherently dangerous to life must warn purchasers of these dangers.²⁰⁶ In cases

the Elixir Pinus Compositus with Heroin was 1-24 of a grain per drachm, whereupon, in filling the prescription, he added 1-24 of a grain of Heroin to each drachm of Elixir Pinus Compositus. The pharmacist was held not negligent in so compounding the prescription: *Laturen v. Bolton Drug Co.*, 93 N. Y. Supp. 1035.

¹⁹⁷ *West v. Emanuel*, 198 Pa. 180; s. c. 47 Atl. Rep. 965.

¹⁹⁸ *Sutton v. Wood*, — Ky. —; s. c. 85 S. W. Rep. 201; 27 Ky. L. Rep. 412.

¹⁹⁹ *Burgess v. Sims Drug Co.*, 114 Iowa 275; s. c. 86 N. W. Rep. 307; 54 L. R. A. 364.

²⁰⁰ *Sutton v. Wood*, — Ky. —; s. c. 85 S. W. Rep. 201; 27 Ky. L. Rep. 412.

²⁰¹ *Peterson v. Westmann*, 103 Mo. App. 672; s. c. 77 S. W. Rep. 1015.

²⁰² *Smith v. Middleton*, 112 Ky. 588; s. c. 66 S. W. Rep. 388; 23 Ky. L. Rep. 2010.

²⁰³ *Peterson v. Westmann*, 103 Mo. App. 672; s. c. 77 S. W. Rep. 1015.

²⁰⁴ *Huset v. J. I. Case Threshing Mach. Co.*, 120 Fed. Rep. 865; s. c. 57 C. C. A. 237; 61 L. R. A. 303. The vendor of champagne cider negligently charged without properly testing the bottle and without notice to the purchaser of its intrinsic dangerous character is liable to one injured by an explosion: *Weiser v. Holzman*, 33 Wash. 87; s. c. 73 Pac. Rep. 797.

²⁰⁵ *Riggs v. Standard Oil Co.*, 130 Fed. Rep. 199.

²⁰⁶ *Waters-Pierce Oil Co. v. Davis*,

where no contractual relation exists it must be shown that the vendor had knowledge of the danger.²⁰⁷ With respect to articles not of a dangerous character, the only liability of a vendor for negligence is to the party with whom he contracts.²⁰⁸ It seems a just rule which requires a vendor, who furnishes appliances for handling goods sold by him, knowing that they will be used for this purpose by the servants of his vendee, to use the same degree of care in providing safe appliances that he ought to use if they were furnished for the use of his own servants, and makes himself liable for injuries the result of a failure in this duty.²⁰⁹

§ 821. Illustrative Cases Showing Liability for Vending Dangerous Goods.²¹⁰

24 Tex. Civ. App. 508; s. c. 60 S. W. Rep. 453.

²⁰⁷ O'Neill v. James, 138 Mich. 242; s. c. 101 N. W. Rep. 828; 11 Det. Leg. N. 670; 68 L. R. A. 342.

²⁰⁸ Standard Oil Co. v. Murray, 119 Fed. Rep. 572; Kuelling v. Roderick Lean Mfg. Co., 88 App. Div. (N. Y.) 309; s. c. 84 N. Y. Supp. 622 (a road roller not considered an intrinsically dangerous apparatus).

²⁰⁹ Sweeney v. Rozell, 31 Misc. (N. Y.) 640; s. c. 64 N. Y. Supp. 721.

²¹⁰ A recovery against a manufacturer of kerosene oil for injuries to a purchaser of such oil from a retail dealer, which it was claimed was mixed with gasoline and thus reduced below the legal standard of safety, was refused where there was no direct evidence of the mixture, or whether, if there was such a mixture, it occurred before or after the delivery of the oil to the retail dealer: Riggs v. Standard Oil Co., 130 Fed. Rep. 199. Under a statute providing that no gasoline shall be sold unless the vessel containing it has been marked "gasoline" a seller's failure to label a jug containing gasoline in the manner required constitutes negligence *per se*, so as to render the seller liable for injuries sustained by a daughter of the purchaser, who used gasoline to start a fire under the belief that it was coal oil: Ives v. Welden, 114 Iowa 476; s. c. 87 N. W. Rep. 408; 54 L. R. A. 854. A druggist selling phosphorus was held not liable for injuries to the purchaser, who, unacquainted with its qualities, so handled one stick of the mixture that it ignited and caused an explosion of the re-

mainder, as the article was not such a new and unknown substance of dangerous qualities as to require the seller to warn the purchaser thereof: Gibson v. Torbert, 115 Iowa 163; s. c. 88 N. W. Rep. 443. Under a declaration alleging that kerosene sold by the defendant was "adulterated" it may be shown that the adulteration was the result of improper manufacture as well as by admixture after manufacture: Stowell v. Standard Oil Co., 139 Mich. 18; s. c. 102 N. W. Rep. 227; 11 Det. Leg. N. 725. The manufacturer or wholesaler of kerosene which is inferior to the test required by the Michigan statute is liable for resulting damages to a customer: Stowell v. Standard Oil Co., 139 Mich. 18; s. c. 102 N. W. Rep. 227; 11 Det. Leg. N. 725. The manufacturer of a gun suitable for the use of a certain kind of powder was held not liable because the gun was inadequate for a more explosive powder, where it appeared that the materials used by the gunmaker were purchased from a reputable manufacturer, who subjected them to proper tests before selling them, and the gun was skillfully put together and properly tested by the gunmaker: Favo v. Remington Arms Co., 67 App. Div. (N. Y.) 414; s. c. 73 N. Y. Supp. 788. A dealer selling a folding bed, which he is to put up in a safe condition, was held liable for injuries to the wife of the purchaser from his negligent failure to put the bed up properly: Cox v. Mason, 89 App. Div. (N. Y.) 219; s. c. 85 N. Y. Supp. 973. A manufacturer of a hook used for hauling weights was

§ 823. Liability for Vending Unwholesome Foods.²¹¹

§ 831. Liability for Letting or Lending Dangerous Machines.—

The lender of an appliance, without knowledge of a defect, therein is not generally liable to the borrower or his servant for injuries due to defects,²¹² certainly not where the borrower, skilled in such matters, tests the appliance before using it.²¹³ In one case a person employed at piece work on machines furnished by his employer was imputed with knowledge of defects in one of these machines, known to a person in his employ as an assistant, so as to prevent a recovery for his injuries caused by the defect.²¹⁴

§ 833. Liability of Carrier for Receiving and Shipping Dangerous Goods.²¹⁵—A railroad company may be charged with the creation of a nuisance in negligently allowing cars of explosives to be unnecessarily and unreasonably delayed at a station, without guard or care, and rendered liable on this principle for damages to adjacent property from an explosion thereof.²¹⁶

held not liable for negligence in its manufacture, where it did not appear that it was inherently dangerous, or that there was fraud or deceit, or implied invitation to use the appliance on the part of the manufacturer, or privity of contract between him and an employé of the purchaser: *McCaffrey v. Mossberg & Co. Mfg. Co.*, 23 R. I. 381; s. c. 50 Atl. Rep. 651; 55 L. R. A. 822. A manufacturer of soap was absolved from liability for injuries caused by an excess of alkali therein where it did not appear that he knew this fact: *Slattery v. Colgate*, 25 R. I. 220; s. c. 55 Atl. Rep. 639. A corporation, employing an agent to sell 87-degree gasoline without acquainting him with its explosive qualities, was held liable for injuries to a person ignorant of the dangerous qualities of the fluid, on account of an explosion caused by placing the gasoline in close proximity to a heated furnace: *Waters-Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 508; s. c. 60 S. W. Rep. 453. The manufacturers of a gasoline pear burner, which was not inherently dangerous, were not liable for injuries in connection with its use where full directions were given, and it was sufficiently strong when used in accordance with directions: *Talley v. Beever & Hindes*, 33 Tex. Civ. App. 675; s. c. 78 S. W. Rep. 23. A manu-

facturer of soda water was held not liable for injuries to the child of a purchaser from the explosion of the bottle, where a sufficient test of the bottle was made by the manufacturer before being used, and the explosion was either due to a sudden exposure of the bottle to a current of warm air or unavoidable accident: *Guinea v. Campbell*, Rap. Jud. Que. 22 C. S. 257.

²¹¹ The manufacturer of mince-meat is not liable for the death of a person poisoned by eating its meat purchased from a local dealer, there being no privity of contract between the parties: *Salmon v. Libby, McNeil & Libby*, 114 Ill. App. 258.

²¹² *McGregor v. Grand Trunk Elevator Co.*, 129 Mich. 469; s. c. 89 N. W. Rep. 332; 8 Det. Leg. N. 1039.

²¹³ *Larose v. Laforest*, 17 Rap. Jud. Que. C. S. 331 (ladder).

²¹⁴ *Koslovski v. International Heater Co.*, 75 App. Div. (N. Y.) 60; s. c. 77 N. Y. Supp. 794; s. c. aff'd, 178 N. Y. 631; 71 N. E. Rep. 1132.

²¹⁵ *Standard Oil Co. v. Wakefield*, 102 Va. 824; s. c. 47 S. E. Rep. 830 (carrier liable for injuries due to negligent manner in which the discharge pipe of gas naphtha tank was closed).

²¹⁶ *Ft. Worth & Co. R. Co. v. Beauchamp*, 95 Tex. 496; s. c. 68 S. W. Rep. 502.

TITLE SEVEN.

ANIMALS.

[§§ 841-939.]

§ 841. Liability of the Keeper of Wild and Vicious Animals.—

The tendency of the courts toward the more reasonable rule, that all that should be required of a keeper of a wild animal is that he should take superior precaution to prevent such an animal from doing mischief, is shown in a case where a muzzled bear, led through the streets of a city, caused the fright of a horse and injury to the driver resulted. In this case the rule that negligence of the owner of an animal *ferae naturae* is presumed in case of injuries¹ was distinguished from the case where the injury was not the result of the vicious propensity of the animal, but his appearance, and it was held that it is not negligence *per se* to lead a muzzled bear along a public street for a lawful purpose.²

§ 842. Necessity of Proving Scienter.—The rule under this head is that the owner of domestic and other animals not naturally inclined to commit mischief is not liable for an injury occasioned by them, unless it is shown that he previously had notice of the animal's mischievous propensity, or the injury is attributable to some other neglect on his part. The cases generally require allegation and proof of this knowledge.³

§ 843. Circumstances and Statutes under which Proof of Scienter Dispensed with.*

¹ Jackson v. Baker, 24 App. (D. C.) 100.

² Bostock-Ferari Amusement Co. v. Brocksmitth, 34 Ind. App. 566; s. c. 73 N. E. Rep. 281.

³ Harvey v. Buchannan, 121 Ga. 384; s. c. 49 S. E. Rep. 281; Feldman v. Sellig, 110 Ill. App. 130; Fritsche v. Clemow, 109 Ill. App. 355; Ward v. Danzeizen, 111 Ill. App. 163; Gladstone v. Brunkhurst, 70 N. J. L. 130; s. c. 56 Atl. Rep. 142; Strubing v. Mahar, 46 App. Div. (N. Y.) 409; s. c. 61 N. Y. Supp. 799; Fettman v. Hencken & Co., 91 N. Y. Supp. 773; Eddy v. Union R. Co., 25 R. I. 451; s. c. 56 Atl. Rep. 677.

*In a case where a person was kicked by a horse being led by a servant of the defendant on the sidewalk, it was held not necessary to a recovery to show the knowledge of the kicking propensity, as the use of the sidewalk by the horse was wrongful: Healey v. P. Ballantine & Sons, 66 N. J. L. 339; s. c. 49 Atl. Rep. 511. The complaint in an action under the Connecticut statute making the owner or keeper liable for damages done by a dog, need not allege *scienter*, or facts dispensing with the necessity of such an allegation: Leone v. Kelly, 77 Conn. 569; s. c. 60 Atl. Rep. 136.

§ 844. **Keeper of Animal Known to be Vicious, Liable as an Insurer.**—It is a common law doctrine, accepted by some courts, that a person keeping a vicious animal, with knowledge of his vicious propensity, is liable to one injured by an attack of such an animal without regard to his care in restraining the animal.⁵

§ 845. **Tendency of the Modern Law to Place the Liability on the Footing of Negligence.**—Under the modern doctrine the gist of the action to recover damages for an injury inflicted by a vicious animal is the keeping of the animal “in a negligent manner,” after knowledge of his propensity.⁶ A *prima facie* case of negligence is made by proof that the animal was kept by the defendant after acquiring knowledge of his dangerous character, or there is proof of circumstances from which the law would imply knowledge, and that an injury followed.⁷ The owner of an animal with knowledge of his having a vicious nature will be liable, though the particular manifestation of the propensity had never occurred before.⁸

§ 849. **Rule that Liability for Allowing Horses, Cattle, etc., to Escape upon the Public Streets Depends upon Negligence.**⁹

§ 850. **Liability for Allowing Domestic Animals Naturally Vicious or Dangerous to Escape upon the Public Streets.**—In a State where the law does not prohibit the running of hogs at large, one injured by reason of his horse shying at hogs wandering across a highway cannot recover. It is reasoned that the likelihood of a horse being frightened by hogs in the highway would not be lessened if they were in the care of the keeper.¹⁰ A Canadian case holds that the owner of a horse which gets into a highway through a defective fence, in violation of an ordinance making it unlawful to allow horses to run at large within the city limits, is liable for an injury to a person on the sidewalk who was knocked down by the horse, which had been frightened by a boy, as the injury was the natural result of, and probably attributable to, such negligence.¹¹

⁵ Ahlstrand v. Bishop, 88 Ill. App. 424; Speckmann v. Kreig, 79 Mo. App. 376; s. c. 2 Mo. App. Repr. 455; Zimett v. Hollenback, 9 Kulp (Pa.) 564; Triolo v. Foster (Tex. Civ. App.), 57 S. W. Rep. 698 (owner liable for exemplary damages).

⁶ Hayes v. Smith, 62 Ohio St. 161; s. c. 56 N. E. Rep. 879.

⁷ Hayes v. Smith, 62 Ohio St. 161; s. c. 56 N. E. Rep. 879.

⁸ O'Neill v. Blase, 94 Mo. App. 648; s. c. 68 S. W. Rep. 764.

⁹ In a case where a horse escaped

from an inclosed field into a highway and kicked a boy, who tried to catch him, the owner was held not liable, it appearing that he had no knowledge that the animal was accustomed to stray or had any vicious propensity and the injury was not the reasonable result of the animal escaping to the highway: Flett v. Coulter, 5 Ont. Law Rep. 375.

¹⁰ Heist v. Jacoby, — Neb. —; s. c. 98 N. W. Rep. 1058.

¹¹ Patterson v. Fanning, 2 Ont. Law Rep. 462.

§ 852. **Duty to Warn of Danger.**—One offering to sell a vicious animal placed in a stock pen is imputable with negligence when he fails to acquaint a prospective purchaser of this vice, and will be liable for injuries to such a person entering the pen to examine the animal with a view to buying it without notice of the propensity.¹²

§ 856. **Liability where Animals Injure each Other.**—A recovery was allowed for injuries inflicted on animals by other animals under these circumstances:—Where a vicious horse was wrongfully turned into a pasture with other horses and attacked and injured them;¹³ where a bull broke out of a feeding pen and injured cattle in another pen, and it appeared that the fence between the pens was sufficient to turn ordinary cattle, but the injury was caused by the breachy disposition of the bull;¹⁴ where, through the negligence of a bee keeper, bees attacked horses hitched in a highway and so frightened them that they crowded into the yard near the bee gums and were so severely stung that death resulted. In this case the first attack was held the proximate cause, and hence the liability of the owner of the bees did not depend upon his duty to the owner of the horse while on his premises as a licensee.¹⁵

§ 862. **Separate Owners not Liable Jointly but Severally.**¹⁶

§ 866. **Pleading in Actions for Injuries from Animals.**—A complaint in an action for injuries inflicted by the bite of a dog is sufficient which avers the dog's vicious disposition and the owner's knowledge, without also alleging that it was the dog's habit to bite mankind.¹⁷ It is not necessary to mention the statute under which the action is brought if the statute is purely remedial. It is enough if the averments are such as to show that the action is brought upon the statute and not otherwise.¹⁸ Nor is it necessary to negative the statutory exceptions, as these are matters of defense.¹⁹ An answer in an action for damages caused by sheep-killing dogs charging contributory negligence in that the owner of the sheep negligently allowed car-

¹² Brooks v. Brooks, 53 S. W. Rep. 645; s. c. 21 Ky. L. Rep. 71.

¹³ Martin v. Farrell, 66 App. Div. (N. Y.) 177; s. c. 72 N. Y. Supp. 934.

¹⁴ Trammell v. Turner, — Tex. Civ. App. —; s. c. 82 S. W. Rep. 325.

¹⁵ Parsons v. Manser, 119 Iowa 88; s. c. 93 N. W. Rep. 86.

¹⁶ Under the sheep-killing dog statute of Wisconsin each owner of a dog is liable for the whole amount of the damages sustained, it being

manifestly impossible to apportion the damages in cases where dogs belonging to numerous persons participate in the depredation: Nelson v. Nugent, 106 Wis. 477; s. c. 82 N. W. Rep. 287. See, also, Williams v. Woodworth, 32 N. S. 271.

¹⁷ Guenther v. Fohey, 26 Ind. App. 93; s. c. 59 N. E. Rep. 182.

¹⁸ Leone v. Kelly, 77 Conn. 569; s. c. 60 Atl. Rep. 136.

¹⁹ Wolff v. Lamann, 108 Ky. 343; s. c. 56 S. W. Rep. 408.

casses of sheep to remain on his premises, and thereby invited the incursion of the dogs, has been held demurrable on the ground that though the dogs may have been invited on the premises by these means it did not follow that the invitation extended to them the privilege of injuring the living sheep.²⁰

§ 867. **Burden of Proof in Such Actions.**²¹—In Massachusetts the plaintiff has the burden of showing that he exercised due care at the time he was bitten by a dog.²²

§ 868. **Points of Evidence in such Actions.**²³

§ 872. **Knowledge of the Vicious Nature of the Animal, How Proved.**—The reputation of the animal for the particular propensity displayed by him may be shown, as tending to convey notice thereof to the owner.²⁴ So the owner may be charged with notice of the vicious-

²⁰ Peeler v. McMillan, 91 Mo. App. 310.

²¹ The burden of proof that defendant was responsible for the acts of the dog is on plaintiff: Laguttuta v. Chisolm, 65 App. Div. (N. Y.) 326; s. c. 72 N. Y. Supp. 905. Under a complaint that the defendant kept a dog known by him to be accustomed to bite men, it is not enough for plaintiff to prove that the dog had a savage disposition and the defendant knew it, but he must also prove the allegation that the dog was accustomed to attack and bite men and that the owner knew this fact: Fritsche v. Clemow, 109 Ill. App. 355.

²² Spellman v. Dyer, 186 Mass. 176; s. c. 71 N. E. Rep. 295.

²³ In a case of the death of a person caused by defendant's horse running away, the verdict of the coroner's jury is not admissible where the cause of the death is admitted: Rowe v. Such, 134 Cal. 573; s. c. 66 Pac. Rep. 862. Although the Iowa statute makes the owner of a dog liable to the party injured for all damage done by the dog except when the injured party has committed an unlawful act which, of course, relieves the plaintiff from the necessity of proving *scienter*, yet the admission of evidence that the dog had previously bitten other persons is not prejudicial, as *scienter* is an element of the common law action: Sanders v. O'Callaghan, 111 Iowa 574; s. c. 82

N. W. Rep. 969. The mere fact that the owner of a dog accused of killing sheep, killed the dog shortly thereafter does not raise a presumption that the dog actually killed the sheep: Peeler v. McMillan, 91 Mo. App. 310. On the question of the identity of the animal responsible for the injuries, evidence is admissible to show that an animal of a similar description had inflicted like injuries on the witnesses under similar circumstances: Tolmie v. Standard Oil Co., 59 App. Div. (N. Y.) 332; s. c. 69 N. Y. Supp. 841. Where the question at issue is whether an animal was of a vicious disposition at the time of inflicting the injury, evidence of a vicious disposition several months thereafter is clearly inadmissible: Woodward v. Loomis, 64 App. Div. (N. Y.) 27; s. c. 71 N. Y. Supp. 690. In one case it was held that a verdict for the plaintiff whose sheep had been killed by dogs would not be reversed as not supported by evidence, where it was in evidence that the dogs were tracked in the snow to the home of the defendant and the next morning presented an incriminating appearance: Nelson v. Nugent, 106 Wis. 477; s. c. 82 N. W. Rep. 287.

²⁴ Fisher v. Weinholzer, 92 Minn. 347; s. c. 97 N. W. Rep. 426; Rowe v. Ehrmantraut, 92 Minn. 17; s. c. 99 N. W. Rep. 211; Triolo v. Foster (Tex. Civ. App.), 57 S. W. Rep. 698.

ness of the animal through his neglect to take notice of his vicious habits. It has been held proper for the plaintiff to show by a former owner that the animal was addicted to vicious acts when he owned him, though the defendant had no knowledge of this fact, if there is other evidence to show that he should have known that the animal was vicious.²⁵

§ 873. Knowledge of the Vicious Nature of the Animal Presumed and Proved by Circumstances.—The evidence is sufficient to charge the owner with knowledge where it is shown that he has seen or heard enough to convince a man of ordinary prudence of the animal's inclination to harm people.²⁶ But mere evidence that the owner kept a dog chained up does not justify the inference that he knew the dog to be dangerous, or that he was accustomed to attack and bite people;²⁷ nor is notice that a horse would kick while in his stall established by proof that the same horse balked and kicked while on the road.²⁸

§ 874. Evidential Facts Tending to Show such Knowledge.—There is a plain case of knowledge of a vicious propensity where the owner has himself witnessed an exhibition of it,²⁹ or was the subject of an attack.³⁰ He will be charged with knowledge generally where he has had notice of the fact that his dog has bitten persons on one³¹ or two³² former occasions. Again he may be put on notice of the propensity by knowledge of vicious attacks made on persons, though without actually harming them.³³ But he will not generally be charged with the knowledge of a vicious propensity where the attack was made under such circumstances as to afford no evidence of the particular propensity;³⁴ as where the animal was so ill treated as to excite his natural instinct of self-preservation.³⁵ So it has been held that knowledge of a propensity to kick was not proved where the only evidence on that issue showed that the horse had kicked but once in the one and

²⁵ Hayes v. Smith, 62 Ohio St. 161; s. c. 56 N. E. Rep. 879.

²⁶ Johnson v. Eckberg, 94 Ill. App. 634; Rowe v. Ehrmantraut, 92 Minn. 17; s. c. 99 N. W. Rep. 211.

²⁷ Fritsche v. Clemow, 109 Ill. App. 355.

²⁸ Bennett v. Mallard, 33 Misc. (N. Y.) 112; s. c. 67 N. Y. Supp. 159.

²⁹ Kippen v. Ollason, 136 Cal. 640; s. c. 69 Pac. Rep. 293.

³⁰ Talmage v. Mills, 80 App. Div. (N. Y.) 382; s. c. 80 N. Y. Supp. 637.

³¹ Laguttuta v. Chisolm, 65 App. Div. (N. Y.) 326; s. c. 72 N. Y. Supp. 905.

³² Duval v. Barnaby, 75 App. Div.

(N. Y.) 154; s. c. 77 N. Y. Supp. 337; 11 N. Y. Ann. Cas. 227.

³³ Johnson v. Eckberg, 94 Ill. App. 634. Where it is clearly shown that the owner of a dog had actual notice of his disposition to run out in the highway and attack horses, it is not improper to exclude testimony to show that such conduct was contrary to the dog's habits and disposition: Willet v. Goetz, 125 Mich. 581; s. c. 84 N. W. Rep. 1071; 7 Det. Leg. N. 624.

³⁴ Price v. Wright, 35 N. B. 26.

³⁵ Erickson v. Bronson, 81 Minn. 258; s. c. 83 N. W. Rep. 988.

a half months that the defendant had owned him, and this kick was given under circumstances not clearly showing that it was vicious.³⁶ The propensity to run away will not be established by mere evidence that the horse on a former occasion walked off when left unattended on the street.³⁷

§ 878. Knowledge of Agent or Servant of Vicious Propensities of Animal, When Knowledge of Principal or Master.³⁸

§ 879. When Knowledge of Wife of Vicious Propensities of Animal Imputable to Husband.—Knowledge by the owner's wife of at least one vicious attack has been held sufficient to charge the husband with knowledge of the propensity.³⁹

§ 881. Liability at Common Law for Keeping Vicious Dogs.⁴⁰

§ 882. Modern Tendency to Place the Liability on the Footing of Negligence.⁴¹—Under this view it is the duty of the owner of a dog with knowledge of his vicious propensity to keep him secure at his peril, and if the dog does mischief negligence will be presumed.⁴² But the owner of a vicious dog will not be liable where the dog, securely locked in a building, escapes by gnawing away the woodwork without the owner's knowledge.⁴³ Negligence of the owner may be shown by his failure to heed the warnings of other persons as to the dangerous disposition of the dog. He will be liable and charged with this knowledge in case the warnings were sufficient to put a reasonable man on inquiry as to whether the dog was dangerous as charged.⁴⁴

§ 884. Statutes Dispensing with Proof of Scienter in the Case of Dogs.—Under the statute of Maine, which makes the owner liable for the amount of damage done by a dog, an injury by a dog is a trespass by the owner of the dog, without regard either to his vicious propensity

³⁶ *Eastman v. Scott*, 182 Mass. 192; s. c. 64 N. E. Rep. 968.

³⁷ *Buckley v. Earle & Co. Exp. Co.*, 22 R. I. 358; s. c. 48 Atl. Rep. 7.

³⁸ Notice to the owner's foreman, who had charge of the dog during his absence, of the vicious character of the dog is sufficient to charge the owner with notice: *Niland v. Geer*, 46 App. Div. (N. Y.) 194; s. c. 61 N. Y. Supp. 696. The mere fact that one of the officers of a corporation said to a person visiting the premises of the corporation, "Look out for the dog, or he will bite you," was held not sufficient to charge the corporation with knowledge that the dog was vicious: *Bogodo-*

now v. New York Lumber & Storage Co., 46 Misc. (N. Y.) 120; s. c. 91 N. Y. Supp. 331.

³⁹ *Boler v. Sorgenfrei*, 86 N. Y. Supp. 180.

⁴⁰ See generally, *De Gray v. Murray*, 69 N. J. L. 458; s. c. 55 Atl. Rep. 237.

⁴¹ See generally, *Thomas v. Boyson*, 11 Ohio C. D. 773; s. c. 21 Ohio Cir. Ct. R. 302.

⁴² *Boler v. Sorgenfrei*, 86 N. Y. Supp. 180.

⁴³ *De Gray v. Murray*, 69 N. J. L. 458; s. c. 55 Atl. Rep. 237.

⁴⁴ *Nelson v. Barrett*, 89 App. Div. (N. Y.) 468; s. c. 85 N. Y. Supp. 817.

or the care exercised by his owner.⁴⁵ A dog in his owner's cart in the street is regarded as out of the owner's inclosure, under the Rhode Island statute, making the owner liable if his dog bites a person while out of the owner's inclosure;⁴⁶ and it is no defense to an action for injuries inflicted by the dog that the person attacked was committing a trespass by climbing on the cart, unless it is shown that he wilfully provoked the dog.⁴⁷ The Michigan statute, allowing a recovery of double damages by a person bitten or otherwise injured by a dog while traveling on the highway, covers a case of injuries sustained by a person travelling on the highway, by a dog attacking his horse, and the injuries are caused by the horse running away.⁴⁸ The Kentucky statute is construed to allow a recovery of punitive damages where it is shown that the dangerous character of the dog was known by the owner prior to the injury complained of.⁴⁹

§ 886. **Liability for Keeping Dogs under the Civil Code of Louisiana.**—The fact that a dog is large and has a vicious appearance is held by the Louisiana supreme court sufficient to put the owner on guard as to the dog's propensity to do harm;⁵⁰ but the owner of a gentle animal, which has always been of a kind temper, and has never attempted to bite any one, and has never given any occasion to suspect that he would bite, will not be liable in damages in that State by the mere fact that the animal bit the person for whose injuries the action is brought.⁵¹

§ 888. **Liability for Injuries Committed by Dogs While Trespassing.**—Under a statute making the owner of a sheep-killing dog liable "for all damages done by his dog," the owner of such a dog shown to have killed sheep is not liable for all the damages inflicted, if part of the damages was caused by other dogs.⁵²

§ 889. **Liability for Injuries to Trespassers Committed by Vicious Dogs.**⁵³—A person going on the premises of another without invita-

⁴⁵ Carroll v. Marcoux, 98 Me. 259; s. c. 56 Atl. Rep. 848.

⁴⁶ Peck v. Williams, 24 R. I. 583; s. c. 54 Atl. Rep. 381; 61 L. R. A. 351.

⁴⁷ Peck v. Williams, 24 R. I. 583; s. c. 54 Atl. Rep. 381; 61 L. R. A. 351.

⁴⁸ Jenkinson v. Coggins, 123 Mich. 7; s. c. 81 N. W. Rep. 974.

⁴⁹ Dillehay v. Hickey, 69 S. W. Rep. 1095; s. c. 24 Ky. L. Rep. 760; 71 S. W. Rep. 1.

⁵⁰ Delisle v. Bourriague, 105 La. 77; s. c. 29 South. Rep. 731; 54 L. R. A. 420.

⁵¹ Martinez v. Bernhard, 106 La.

368; s. c. 30 South. Rep. 901; 55 L. R. A. 671.

⁵² Anderson v. Halverson, 126 Iowa 125; s. c. 101 N. W. Rep. 781.

⁵³ That the owner of a vicious dog with knowledge of his propensity will be liable for injuries inflicted on a trespasser, see: Carroll v. Marcoux, 98 Me. 259; s. c. 56 Atl. Rep. 848; Leonorovitz v. Ott, 40 Misc. (N. Y.) 551; s. c. 82 N. Y. Supp. 880. A person bitten by a dog while going by a back way to the back door to visit the servants is not a trespasser: Riley v. Harris, 177 Mass. 163; s. c. 58 N. E. Rep. 584. A person going

tion is under no obligation to inquire and ascertain whether vicious dogs are kept on such premises, and hence a failure to make these inquiries will not impute him with contributory negligence so as to prevent a recovery in the event he is bitten by a vicious dog while on the premises.⁵⁴

§ 890. Rule of Liability where the Person Injured Comes upon the Premises of the Owner or Keeper of the Dog upon a Lawful Errand.—

It is the plain duty of the owner of a vicious dog inviting persons on his premises to protect them from attack by the animal.⁵⁵ In a case where a junk dealer was bitten by a dog while picking up rope on the premises of the dog's owner, it was held that an instruction that if the junk dealer did not take the rope with an intent to steal, and did not do anything but what an ordinary junk dealer would probably do, the jury could find that he was exercising due care, while, if he was not acting as an ordinary junk dealer, and took the rope intending to steal it, they might find he was not exercising due care, was as favorable to the plaintiff as he could demand.⁵⁶

§ 891. Status of Dogs as Property.⁵⁷—The owner of a dog, seeking a recovery on the ground that the dog was unlawfully killed, is not compelled to prove the market value of the animal. If the dog has no market value, he will be allowed to prove its special value to him by showing its pedigree, characteristics and qualities.⁵⁸

§ 892. Railroad Companies Liable for the Negligent Killing of Dogs.—It is now regarded as a fixed rule in Georgia that a suit cannot be maintained against a railroad company for the negligent killing of a dog. It is reasoned by the courts of the State that a decision to that effect, rendered in 1885,⁵⁹ has become binding by reason of the fact that the several legislatures of the State since that decision have failed to change the rule.⁶⁰

on premises to speak to the owner socially is not a trespasser, or engaged in an unlawful act, under the Kentucky statute, making the keeper of a dog liable for injuries, unless the person injured is at the time on the premises of the owner after night, or engaged in some unlawful act in the daytime: *Dillehay v. Hickey* (Ky.), 69 S. W. Rep. 1095; s. c. 71 S. W. Rep. 1; 24 Ky. L. Rep. 1220.

⁵⁴ *Sanders v. O'Callaghan*, 111 Iowa 574; s. c. 82 N. W. Rep. 969.

⁵⁵ *Delisle v. Bourriague*, 105 La. 77; s. c. 29 South. Rep. 731; 54 L. R. A. 420.

⁵⁶ *Spellman v. Dyer*, 186 Mass. 176; s. c. 71 N. E. Rep. 295.

⁵⁷ That dogs are property, see: *Smith v. St. Paul City R. Co.*, 79 Minn. 254; s. c. 82 N. W. Rep. 577; *Fenton v. Bisel*, 80 Mo. App. 135; s. c. 2 Mo. App. Repr. 536; *Moore v. Charlotte Electric R. & Co.*, 136 N. C. 554; s. c. 48 S. E. Rep. 822; 67 L. R. A. 470.

⁵⁸ *Hodges v. Causey*, 77 Miss. 353; s. c. 26 South. Rep. 945; 48 L. R. A. 95.

⁵⁹ *Jennison v. Southwestern R. Co.*, 75 Ga. 444.

⁶⁰ *Strong v. Georgia R. & Co.*, 118 Ga. 515; s. c. 45 S. E. Rep. 366.

§ 893. **What will Justify Killing the Dogs of Another.**—A person has a right to kill a dog that has broken into his premises and is found destroying his property.⁶¹ Under a statute authorizing the killing of a dog seen wrongfully chasing, worrying or wounding sheep, it is held that the owner of the sheep may kill the dog, though at the instant of the killing the dog had left the sheep and was seeking to escape.⁶² Elsewhere it is held that the owner of sheep seeing a known sheep-killing dog in his inclosure may shoot him without waiting for him to begin his depredations.⁶³ But another court has construed a similar statute more strictly and requires that the dog must be in the act of worrying or killing the animal, and the worrying and the shooting must be substantially at the same time.⁶⁴ One has a clear right to scatter poison on his premises for the purpose of protecting his property from depredating animals, and will not be liable for the death of a trespassing dog caused by eating the poison, unless it was put out with the purpose of killing him.⁶⁵

§ 894. **Who Deemed the "Keeper" or "Owner" of a Vicious Dog.**—The mere fact that a dog is kept by its owner on the premises of another with his knowledge and permission does not of itself make the latter a harbinger of the dog and liable for injuries caused by it.⁶⁶ A person not the owner of a dog will not be imputed with ownership by the mere fact that another person, without authority, has had a license issued in his name as owner.⁶⁷

§ 895. **Actual Custody not Necessary to Establish Liability.**—It seems well established that one may negligently keep and harbor a vicious dog, known by him to be such without being the owner of the animal, or owning or controlling the premises on which he may be kept.⁶⁸ Under the common law a property owner will not be liable

⁶¹ *Nesbett v. Wilbur*, 177 Mass. 200; s. c. 58 N. E. Rep. 586 (killing poultry); *Fisher v. Badger*, 95 Mo. App. 289; s. c. 69 S. W. Rep. 26 (dog found stealing milk). Whether emergency calls for this extreme measure a question for the jury: *McChesney v. Wilson*, 132 Mich. 252; s. c. 93 N. W. Rep. 627; 9 Det. Leg. N. 591; *Hodges v. Causey*, 77 Miss. 353; s. c. 26 South. Rep. 945; 48 L. R. A. 95.

⁶² *Smith v. Wetherill*, 78 App. Div. (N. Y.) 49; s. c. 79 N. Y. Supp. 782.

⁶³ *Throne v. Mead*, 122 Mich. 273; s. c. 80 N. W. Rep. 1080.

⁶⁴ *Chapman v. Decrow*, 93 Me. 378; s. c. 45 Atl. Rep. 295.

⁶⁵ *Cobb v. Cater*, 59 S. C. 462; s. c. 38 S. E. Rep. 114.

⁶⁶ *McCosker v. Weatherbee*, 100 Me. 25; s. c. 59 Atl. Rep. 1019; *Laguttuta v. Chisolm*, 65 App. Div. (N. Y.) 326; s. c. 72 N. Y. Supp. 905. In one case, however, it was held that a mother, the head of a family, was the keeper of a dog owned by her son twenty-eight years old who lived with her and worked under her direction for a share of the crops: *Jenkinson v. Coggins*, 123 Mich. 7; s. c. 81 N. W. Rep. 974.

⁶⁷ *Jordan v. Carberry*, 185 Mass. 181; s. c. 69 N. E. Rep. 1062.

⁶⁸ *Hayes v. Smith*, 62 Ohio St. 161; s. c. 56 N. E. Rep. 879; *Duval v. Barnaby*, 75 App. Div. (N. Y.) 154; s. c. 77 N. Y. Supp. 337; 11 N. Y. Ann. Cas. 227.

for damages to a person bitten by a dog belonging to another while on his premises, unless the dog is on such premises with the knowledge of the owner that he is a vicious dog.⁶⁹

§ 897. **Liability of Corporations Keeping Dogs.**⁷⁰

§ 898. **Liability How Affected by the Relation of Husband and Wife.**⁷¹

§ 901. **Injury Caused by Playfulness**—The liability of owners of dogs for damages is not limited solely to the case where the damages are inflicted through a vicious propensity. The law allows a recovery for damages the result of a dog's mischievous or playful disposition. Where the injuries are actually suffered it makes no difference whether they proceed from the good nature or the ill nature of the animal.⁷²

§ 906. **Distinctions Between the Common-Law Rule and the "American Rule."**⁷³—Under the American rule, making the cattle owner liable for trespass only where his cattle have broken through a sufficient fence, he will be liable where a field thus enclosed is entered, though he is ignorant of their breachy disposition.⁷⁴

§ 907. **Removing Trespassing Animals.**—The owner or occupant of lands in driving or keeping off trespassing animals is allowed only to resort to ordinary and reasonable means to accomplish this purpose, and he will be liable in damages if he wantonly or purposely injures or damages such stock.⁷⁵

§ 908. **Distraining and Impounding Trespassing Animals.**—Coming to proceedings on distraint it may be observed that statutes, providing for arbitration where the parties interested are unable to agree as to the damages inflicted by the trespassing stock, are enacted with the purpose of affording a speedy and inexpensive mode of ascertaining these damages, and courts generally construe these proceedings with great liberality in all matters except as to jurisdiction.⁷⁶

⁶⁹ Trumble v. Happy, 114 Iowa 624; s. c. 87 N. W. Rep. 678.

⁷⁰ A railroad company will be liable for damages resulting from the bite of a dog kept on its premises by a person in charge of its yards with the knowledge and consent of the corporation for the purpose of protecting the yard against tramps and to prevent thefts: Chicago & C. R. Co. v. Kuckkuck, 98 Ill. App. 252; s. c. aff'd, 197 Ill. 304; 64 N. E. Rep. 358.

⁷¹ Where the evidence in an action against a husband and wife as owners of a vicious dog fails to connect her with the ownership of the ani-

mal, the proper procedure is to move a dismissal of the complaint as against the wife: Boler v. Sorgenfrei, 86 N. Y. Supp. 180.

⁷² Crowley v. Groonell, 73 Vt. 45; s. c. 50 Atl. Rep. 546; 55 L. R. A. 876.

⁷³ Muir v. Thixton & Co., 78 S. W. Rep. 466; s. c. 25 Ky. L. Rep. 1688 (American rule).

⁷⁴ Perry v. Cobb, 4 Ind. Terr. 717; s. c. 76 S. W. Rep. 289.

⁷⁵ Addington v. Canfield, 11 Okl. 204; s. c. 66 Pac. Rep. 355.

⁷⁶ Randall v. Gross, 67 Neb. 255; s. c. 93 N. W. Rep. 223.

The damages are limited strictly to those occurring at the time of the distraint,⁷⁷ and both parties are entitled to be heard on this question.⁷⁸ In a case where an impounder was unable to comply with the requirement that the damages should be assessed by the town trustees because there were no such trustees, it was held that he would not lose his rights by reason of a defective political organization for which he could not be blamed, but the amount of the damage could be determined in proper court proceedings.⁷⁹ The sale of animals by the public impounder should be advertised for a reasonable time. A two days' advertisement is unreasonably short.⁸⁰ Under an ordinance requiring advertisements of impounded animals to be made "immediately," a delay of five days, in the hope of discovering the owner of the animal, was held not so unreasonable as to invalidate the sale made under the advertisement.⁸¹ The notice must strictly comply with the statute in the matter of the description of the animal⁸² and the time of the sale,⁸³ otherwise the purchaser will acquire no title. A proceeding for the sale of impounded animals being a proceeding *in rem*, the owner is entitled to no other notice than the advertisement.⁸⁴

§ 909. Liability for Erecting Unlawful Fences.⁸⁵

§ 910. Liability for Unlawfully Destroying Fences.⁸⁶

§ 911. Liability where Animals Break through Partition Fences.

—A land-owner may impound an animal escaping onto his lands on

⁷⁷ *Holaman v. Marsh*, 116 Iowa 483; s. c. 90 N. W. Rep. 82.

⁷⁸ *Miller v. Hoffman*, 135 Mich. 319; s. c. 97 N. W. Rep. 759; 10 Det. Leg. N. 786.

⁷⁹ *Robinson v. Halley*, 124 Iowa 443; s. c. 100 N. W. Rep. 328.

⁸⁰ *Mincey v. Bradburn*, 103 Tenn. 407; s. c. 56 S. W. Rep. 273.

⁸¹ *Mincey v. Bradburn*, 103 Tenn. 407; s. c. 56 S. W. Rep. 273.

⁸² No title was taken under a notice of sale which described the stock as "one brown steer calf, marked smooth crop in each ear," and the steer was in fact "smooth crop, split and an underbit in each ear." *Ryall v. Smith*, 138 Ala. 145; s. c. 34 South. Rep. 1009.

⁸³ *Ryall v. Smith*, 138 Ala. 145; s. c. 34 South. Rep. 1009.

⁸⁴ *Hogan v. Brown*, 125 N. C. 251; s. c. 34 S. E. Rep. 411.

⁸⁵ The question whether the law governing the character of the fence has been complied with should be submitted to the jury for their de-

termination, where there is testimony on behalf of the land-owner that it was a legal fence, although this evidence was to some extent contradicted by witnesses called by the land-owner: *Peterson v. Lacey*, — Iowa —; s. c. 102 N. W. Rep. 153.

⁸⁶ A complaint was held not demurrable for want of facts which alleged that the plaintiff was in peaceable possession of land under a lease from the owner, which was inclosed with a good and sufficient fence, and was well covered with crops; that the defendant's cattle to the number of three hundred, which were "fence-breaks," and could not be kept out by an ordinary fence, broke through the plaintiff's fence and destroyed his crops and grass, that the defendant willfully and maliciously tore down the fence for some one hundred fifty feet, thereby permitting ingress to his cattle: *Burch v. Samples* (Tex. Civ. App.), 74 S. W. Rep. 81.

account of the insufficiency of a division fence which the owner of the animal was bound to keep in repair,⁸⁷ but not where the defective fence was one that the land-owner was himself bound to maintain.⁸⁸ Where there has been no legal division of a partition fence, then the owner of the trespassing animals will be liable for the damages without regard to the place of entry.⁸⁹ In Wisconsin it is a condition precedent to the right to recover damages for trespass by an adjoining owner's cattle in cases where the division line is a river, that proceedings for the location of the fence should have been held before the proper fence viewers to determine on which bank the fence should be erected.⁹⁰ In one case the owner of land allowing another to stack hay thereon was held liable for its destruction by cattle turned in the inclosure by the land-owner, and it appeared that the owner of the hay surrounded it with a fence such as the land-owner deemed sufficient to protect it from destruction.⁹¹

§ 913. Measure of Damages for Injuries Committed by Trespassing Animals.—The measure of damages in the case of trespass on pasture is the reasonable value to the owner of the pasturage eaten or destroyed, together with the injury, if any, to the land.⁹² On this inquiry the owner of the depastured land may show the number of live stock he has depending on the pasture,⁹³ and the expense of subsequently feeding hay to his stock because of this trespass.⁹⁴ In one case, where the owner of trespassing animals agreed to submit to arbitrators the determination of the amount of the damages, and agreed that certain of the animals should be kept by the injured party as a pledge for the payment of the damage, and thereafter refused to submit the matter to arbitration, it was held proper to allow the injured person the expense incurred for feeding the animals retained as a pledge as part of his damages.⁹⁵ In Missouri it is held that a person who fails to inclose his fields with a lawful fence to prevent animals running on the common range from entering the same is guilty of negligence *per se*, and is liable in double damages for injury to animals in driving them from his fields, and this without regard to the care used by him in doing so.⁹⁶

⁸⁷ Walker v. Robertson, 107 Mo. App. 571; s. c. 81 S. W. Rep. 1183.

⁸⁸ Cotton v. Huston, 110 Mo. App. 70; s. c. 84 S. W. Rep. 97; Collins v. Cochran, 121 Ga. 785; s. c. 49 S. E. Rep. 771.

⁸⁹ De Mers v. Rohan, 126 Iowa 488; s. c. 102 N. W. Rep. 413.

⁹⁰ Walls v. Cunningham, 123 Wis. 346; s. c. 101 N. W. Rep. 696.

⁹¹ Spaulding v. Nesbitt, 87 Mo. App. 90.

⁹² Pacific Live Stock Co. v. Murray, 45 Or. 103; s. c. 76 Pac. Rep. 1079; Oliver v. Hutchinson, 41 Or. 443; s. c. 69 Pac. Rep. 139, 1024.

⁹³ Sweet v. Ballentine, 8 Idaho 431; s. c. 69 Pac. Rep. 995.

⁹⁴ Cosgriff v. Miller, 10 Wyo. 190; s. c. 68 Pac. Rep. 206.

⁹⁵ Collins v. Cochran, 121 Ga. 785; s. c. 49 S. E. Rep. 771.

⁹⁶ Woods v. Carty, 110 Mo. App. 416; s. c. 85 S. W. Rep. 124.

§ 914. **Liability for Trespasses by Domestic Animals under Various Statutes.**—*Colorado.* The fence law merely prevents a recovery from the owners of animals lawfully running at large and injuring lands not inclosed by fence, and does not prevent a recovery where the animals are willfully and knowingly driven by their owners on the land of one not having erected a fence as required by the law.⁹⁷ *Georgia.* The obligation of adjoining land-owners to maintain a fence against their stock does not rest on the question whether the fence is a lawful fence under the State statute, since the owners of adjoining premises can by agreement take their fence as to each other outside the operation of the statute.⁹⁸ *Idaho.* The law of this State prohibiting grazing and herding of sheep within two miles of inhabited dwellings is upheld as a valid exercise of the State's police power,⁹⁹ though covering public lands of the United States.¹⁰⁰ Driving sheep from one range to another is not regarded as herding.¹⁰¹ The owner or herder is liable only for damages committed by his own sheep.¹⁰² *Iowa.* In this State as in all other States, the right to recover for injury to crops by trespassing cattle is not affected by the smallness of the injury inflicted.¹⁰³ *Mississippi.* The partial stock law of this State, requiring the confinement of hogs, sheep and goats, does not apply to cattle.¹⁰⁴ *Missouri.* The common law as to adjoining proprietors is in force in this State and each party must fence his own stock.¹⁰⁵ And where the owner of lands trespassed upon proceeds under the statute making it unlawful to permit cattle to run at large outside the inclosure of the owner, he will not be allowed to show that the trespass was the result of the failure of the defendant to erect a partition fence between their lands in pursuance to an agreement, as the statute in question only applies to outside fences.¹⁰⁶ *Montana.* Here it is held that the fence law does not make it the duty of the land-owner to keep cattle lawfully at large from coming on his land, and hence, he will not be liable for injuries to trespassing animals by reason of the existence of dangerous agencies on the land but not wantonly or intentionally caused.¹⁰⁷ It is not the purpose of the law to authorize a willful and knowing ap-

⁹⁷ Sweetman v. Cooper & Mulvane, 20 Colo. App. 5; s. c. 76 Pac. Rep. 925.

⁹⁸ Collins v. Cochran, 121 Ga. 785; s. c. 49 S. E. Rep. 771.

⁹⁹ Sweet v. Ballentine, 8 Idaho 431; s. c. 69 Pac. Rep. 995.

¹⁰⁰ Spencer v. Morgan, 10 Idaho 542; s. c. 79 Pac. Rep. 459.

¹⁰¹ Phipps v. Grover, 9 Idaho 415; s. c. 75 Pac. Rep. 64.

¹⁰² Sweet v. Ballentine, 8 Idaho 431; s. c. 69 Pac. Rep. 995.

¹⁰³ Peterson v. Lacey, — Iowa —; s. c. 102 N. W. Rep. 153.

¹⁰⁴ Whitfield v. Tatum, 83 Miss. 153; s. c. 35 South. Rep. 447.

¹⁰⁵ Jackson v. Fulton, 87 Mo. App. 228; Gillespie v. Hendren, 98 Mo. App. 622; s. c. 73 S. W. Rep. 361.

¹⁰⁶ Jones v. Habberman, 94 Mo. App. 1; s. c. 67 S. W. Rep. 716.

¹⁰⁷ Beinhorn v. Griswold, 27 Mont. 79; s. c. 69 Pac. Rep. 557.

propriation of the use of another's land by deliberately driving and herding cattle thereon.¹⁰⁸ *Nebraska*. The herd law of this State was enacted to give one injured by animals trespassing on his cultivated land the right to take possession of such animals until the damages were adjusted, and was not intended to take away the common-law liability of the owners of stock for damages and trespassing committed by them.¹⁰⁹ *North Dakota*. In this State the common-law rule applicable to trespassing animals prevails.¹¹⁰ *Oklahoma*. The free range law of this State does not protect those who purposely drive or herd their stock on the lands of others.¹¹¹ The rule is recognized that the occupant of lands under the homestead laws of the United States may protect his land and crops from the ravages of trespassing animals, and may lawfully guard his premises, and may resort to such force as is reasonably necessary to drive off any such trespassing animals.¹¹² *Oregon*. A statute of this State requiring the owner of premises to inclose them with a lawful fence, failing in which there may be no recovery for damage done by certain enumerated animals not including sheep, is held to retain the common-law rule as to the sheep.¹¹³ Another statute providing that all fields and inclosures shall be fenced is held to apply to interior as well as exterior fences.¹¹⁴ *Texas*. The provision of the Penal Code of this State authorizing the imposition of a fine on any person who shall knowingly cause any cattle to go within the inclosure of another without the consent of the owner, was enacted to protect the possessory right to the land and not its title.¹¹⁵ A conviction was sustained where a tenant after breach of his rental contract and after his landlord had assumed control of the land, turned his cattle into the inclosure he had rented and they escaped therefrom upon the cultivated land of the landlord.¹¹⁶ Under the statute prohibiting certain animals from running at large, the owner is conclusively negligent if they get at large, and liable for damages caused by their breaking into premises sufficiently fenced to turn animals lawfully permitted to run at large.¹¹⁷ *Utah*. It is held that the Nevada law authorizing the attachment of the stock in the manner provided by the general laws of the State, as a security for the payment of a judgment

¹⁰⁸ *Monroe v. Cannon*, 24 Mont. 316; s. c. 61 Pac. Rep. 863.

¹⁰⁹ *Randall v. Gross*, 67 Neb. 255; s. c. 93 N. W. Rep. 223.

¹¹⁰ *Ely v. Rosholt*, 11 N. D. 559; s. c. 93 N. W. Rep. 864.

¹¹¹ *Addington v. Canfield*, 11 Okl. 204; s. c. 66 Pac. Rep. 355.

¹¹² *Addington v. Canfield*, 11 Okl. 204; s. c. 66 Pac. Rep. 355.

¹¹³ *Pacific Live Stock Co. v. Mur-*

ray, 45 Or. 103; s. c. 76 Pac. Rep. 1079.

¹¹⁴ *Oliver v. Hutchinson*, 41 Or. 443; s. c. 69 Pac. Rep. 139, 1024.

¹¹⁵ *Barber v. State*, 42 Tex. Cr. 626; s. c. 63 S. W. Rep. 323.

¹¹⁶ *Gartrell v. State* (Tex. Cr. App.), 61 S. W. Rep. 487.

¹¹⁷ *Frazer v. Bedford* (Tex. Civ. App.), 66 S. W. Rep. 573.

for the damages incurred, does not limit the attachment to the stock committing the damage, but embraces any property of the defendant not exempt.¹¹⁸ *Virginia*. The American and not the common-law rule is the rule in this State.¹¹⁹ The statute permitting the owner of land inclosed with a lawful fence to recover for the trespass of cattle is construed as a regulation of the use and enjoyment of private property, and not an appropriation of it for public use, or an interference with its enjoyment within the constitutional inhibition.¹²⁰ The statute was not intended to repeal the common-law rule with respect to willful or malicious trespasses, and hence does not prevent a recovery for damages by trespassing animals willfully turned by their owner on the uninclosed land of another.¹²¹ *Wyoming*. Here, as elsewhere, it is the rule that a person who drives or permits his stock to be driven intentionally and persistently upon the uninclosed land of another will be liable for damages the result of the trespass,¹²² but the mere fact that the owner of the animals knows that they are likely to stray on such lands does not make him guilty of willful trespass.¹²³

§ 920. **Liability for Selling Diseased Animals.**—A purchaser of infected hogs from a dealer having no knowledge of their condition may bring his action for the resulting damages directly against the person who sold them to the dealer.¹²⁴ In this action he may recover as damages both the value of the hogs purchased and the value of those belonging to him which contracted the disease and died.¹²⁵

§ 921. **Liability for Importation of Cattle Infected with Texas Fever.**—In the present state of knowledge on the subject, a railroad company transporting cattle is charged with notice that Texas or

¹¹⁸ *Smith v. Fisher*, 24 Utah 506; s. c. 68 Pac. Rep. 849.

¹¹⁹ *Poindexter v. May*, 98 Va. 143; s. c. 34 S. E. Rep. 971; 47 L. R. A. 588.

¹²⁰ *Poindexter v. May*, 98 Va. 143; s. c. 34 S. E. Rep. 971; 47 L. R. A. 588.

¹²¹ *Poindexter v. May*, 98 Va. 143; s. c. 34 S. E. Rep. 971; 47 L. R. A. 588.

¹²² *Cosgriff v. Miller*, 10 Wyo. 190; s. c. 68 Pac. Rep. 206; *Martin v. Platte Valley Sheep Co.*, 12 Wyo. 432; s. c. 76 Pac. Rep. 571; 78 Pac. Rep. 1093. A complaint was held sufficient which alleged that plaintiff had a legal estate in certain land, and that on a certain day defendant wrongfully caused a large band of sheep owned by him to be

driven on the land and depasture the same: *Minter v. Gose*, 13 Wyo. 178; s. c. 78 Pac. Rep. 948. An allegation that defendants unlawfully caused a large band of sheep owned by them to be taken on plaintiff's land and continue to feed them thereon until the lands were depastured, was held to state but a single cause of action against all the defendants jointly: *Minter v. Gose*, 13 Wyo. 178; s. c. 78 Pac. Rep. 948.

¹²³ *Martin v. Platte Valley Sheep Co.*, 12 Wyo. 432; s. c. 76 Pac. Rep. 571; 78 Pac. Rep. 1093.

¹²⁴ *Skinn v. Reutter*, 135 Mich. 57; s. c. 97 N. W. Rep. 152; 10 Det. Leg. N. 680; 63 L. R. A. 743.

¹²⁵ *Skinn v. Reutter*, 135 Mich. 57; s. c. 97 N. W. Rep. 152; 10 Det. Leg. N. 680; 63 L. R. A. 743.

splenitic fever is contagious.¹²⁶ Under a Kansas statute prohibiting the bringing of any cattle into the State carrying ticks, except for immediate slaughter, cattle of this description cannot be brought into the State for immediate slaughter, unless permitted by the rules and regulations of the live stock sanitary commission, as further provided by the statute. The failure of the commission to make rules and regulations is regarded as equivalent to a determination by it to exclude all cattle from infected districts.¹²⁷

§ 934. Application of the Rules of Contributory Negligence to this Subject.—Generally speaking a person with the knowledge of the evil propensity of an animal will be charged with contributory negligence defeating a recovery where he wantonly excites such animal, or voluntarily or unnecessarily puts himself in its way.¹²⁸ But this species of negligence will not be imputed to a cattle buyer in making a reasonable and prudent examination of cattle in a public stock pen offered for sale, so as to prevent a recovery by him for injuries inflicted by a vicious animal confined therein.¹²⁹

§ 936. Contributory Negligence in Teasing or Provoking Animals.—A person wantonly irritating and aggravating a dog while it is eating cannot recover for injuries by being bitten by the dog, but will be held to have brought the injury on himself, where the attack of the dog was not due to a vicious propensity, but rather to a desire to terminate molestation.¹³⁰ But the law requires that the teasing and the biting shall occur at the same time, and it will not avail the defendant that the person injured had teased the animal a long time before. As said by one court, "A dog has no right to brood over its wrongs and remember in malice."¹³¹

§ 937. Application of the Doctrine of Imputed Negligence in these Cases.—The Michigan statute allowing a recovery for injuries caused by being attacked by a dog does not admit of imputed negligence as a defense.¹³²

¹²⁶ *Dorr Cattle Co. v. Chicago & C. R. Co.*, 128 Iowa 359; s. c. 103 N. W. Rep. 1003.

¹²⁷ *State v. Missouri Pac. R. Co.*, — Kan. —; s. c. 81 Pac. Rep. 212.

¹²⁸ *Chicago & C. R. Co. v. Kuckkuck*, 98 Ill. App. 252; s. c. aff'd, 197 Ill. 304; s. c. 64 N. E. Rep. 358. In a case where a junk dealer entered premises and while in the act of picking up rope in the yard was bitten by a dog, and there was a sign in plain view warning persons of the dangerous character of the dog,

it was held that there was evidence to support a finding that plaintiff was not in the exercise of due care: *Spellman v. Dyer*, 186 Mass. 176; s. c. 71 N. E. Rep. 295.

¹²⁹ *Brooks v. Brooks (Ky.)*, 53 S. W. Rep. 645; s. c. 21 Ky. L. Rep. 940.

¹³⁰ *Feldman v. Sellig*, 110 Ill. App. 130.

¹³¹ *Van Bergen v. Eulberg*, 111 Iowa 139; s. c. 82 N. W. Rep. 483.

¹³² *Fye v. Chapin*, 121 Mich. 675; s. c. 80 N. W. Rep. 797. In this case

§ 938. **Contributory Negligence in Case of Injuries from Trespassing Animals.**—In a case where the trespass was occasioned by negligence of both the plaintiff and the defendant, and there was no evidence to show what part of the damages were the result of the negligence of either of the parties, it was very properly held that the jury could not determine the question of damages.¹³³

§ 939. **Contributory Negligence of Children in Such Cases.**—In determining the question of contributory negligence of children under this head, the inquiry is whether the child exercised that degree of care which, under the circumstances, would reasonably be expected of a child of his years, intelligence and capacity.¹³⁴ Applying the principle, a Canadian court has denied a recovery for injuries to a bright boy twelve years old from a kick while attempting to catch by a rope around its neck, a horse loose upon the highway.¹³⁵

the defendant's dog accompanied a servant to the home of another and while there attacked a child in the presence of its parents. It was held that the parents of the child were in no sense the keepers of the dog within a statute imposing liability on the owner of a dog for injuries inflicted by it when out of the inclosure of its owner or keeper: *Fye v. Chapin*, 121 Mich. 675; s. c. 80 N. W. Rep. 797.

¹³³ *Hightower v. Henry*, 85 Miss. 476; s. c. 37 South. Rep. 745.

¹³⁴ *Wolff v. Lamann*, 108 Ky. 343;

s. c. 56 S. W. Rep. 408; *Bernier v. Généreux*, Rap. Jud. Que. 12 B. R. 24. Where it appeared that a child did not have sufficient intelligence to understand that a dog would cherish a grudge, it was held proper to refuse evidence that the child had on previous occasions tantalized the dog when secured in its kennel: *Schilling v. Smith*, 76 App. Div. (N. Y.) 464; s. c. 78 N. Y. Supp. 586; 12 N. Y. Ann. Cas. 99.

¹³⁵ *Flett v. Coulter*, 5 Ont. Law Rep. 375.

TITLE EIGHT.

REAL PROPERTY.

[§§ 946-1182.]

§ 946. **No Obligation to Keep One's Premises Safe for the Benefit of Trespassers, Intruders, Idlers, Volunteers, or Bare Licensees.**¹

§ 947. **Cases in which this Rule has been Applied.**—The rule that the owner of private grounds is under no obligation to keep them in safe condition for trespassers, intruders, bare licensees, or others who may come upon them without invitation for their own purposes, has been applied and the occupier of the premises held not liable under these circumstances:—Where a person permitted to sleep in the boiler room of a mill arose during the night, left the room by a dark way and went through an inclosure containing an unguarded well, into which he fell and was injured;² where a person in the prosecution of his own business went on premises where blasting was being done, with knowledge of that fact, and was injured by an explosion;³ where the occupant of an upper floor was furnished a new porch at the rear of his own apartments, and without permission of his landlord went on to an adjoining porch belonging to the landlord and suffered injuries owing to the defective condition of this porch;⁴ where a person, without in-

¹The principle finds support and illustration in these cases: *Berlin Mills Co. v. Croteau*, 88 Fed. Rep. 860; s. c. 32 C. C. A. 126; *Rome Furnace Co. v. Patterson*, 120 Ga. 521; s. c. 48 S. E. Rep. 166; *Bentley v. Loverock*, 102 Ill. App. 166; *Northwestern Elevated R. Co. v. O' Malley*, 107 Ill. App. 599; *Lake Erie &c. R. Co. v. Maus*, 22 Ind. App. 36; s. c. 51 N. E. Rep. 735; *St. Joseph Ice Co. v. Bertch*, 33 Ind. App. 491; s. c. 71 N. E. Rep. 56; *Flaherty v. Nieman*, 125 Iowa 546; s. c. 101 N. W. Rep. 280; *Illinois Cent. R. Co. v. Waldrop* (Ky.), 72 S. W. Rep. 1116; s. c. 24 Ky. L. Rep. 2127; *Dixon v. Swift*, 98 Me. 207; s. c. 56 Atl. Rep. 761; *Fredenburg v. Bear*, 89 Minn. 241; s. c. 94 N. W. Rep. 683; *Taylor v. Haddonfield & C. Turnpike Co.*, 65 N. J. L. 102; s. c. 46 Atl. Rep. 707; *McCann v. Thilemann*, 36 Misc. (N. Y.) 145; s. c. 72 N. Y. Supp. 1076; rev'g s. c.

35 Misc. (N. Y.) 855; 72 N. Y. Supp. 1117; *Ritz v. Wheeling*, 45 W. Va. 262; s. c. 31 S. E. Rep. 993; 43 L. R. A. 148; *Clapp v. La Grill*, 103 Tenn. 164; s. c. 52 S. W. Rep. 134. A railroad company is not, as to one going on its premises at the instance of a third person to look after private property stored without the company's permission in an abandoned warehouse, under any duty to keep the building and its approaches in a safe condition: *Chattanooga Southern R. Co. v. Wheeler*, 123 Ga. 41; s. c. 50 S. E. Rep. 987.

²*Slough v. W. G. Ragley Lumber Co.* (Tex. Civ. App.), 76 S. W. Rep. 779.

³*Smith v. Day*, 100 Fed. Rep. 244; s. c. 40 C. C. A. 366; 49 L. R. A. 108; rev'g s. c. 86 Fed. Rep. 62.

⁴*Flaherty v. Nieman*, 125 Iowa 546; s. c. 101 N. W. Rep. 280.

visitation of the land-owner used a path across his land, and wandered out of the beaten path and fell into a pit on the land;⁵ where a college student on a holiday left the portion of the campus reserved for the use of students, and, without invitation, watched men dismantling a building on another part of the grounds, and was injured by the fall of a chimney;⁶ where a person lawfully in a building in process of repair made his exit from a window and was injured in the attempt, and it did not appear that the owner in any way induced him to put the window to such use;⁷ where a boy witnessing a game of ball on premises to which persons were allowed to resort to play baseball, and he was injured by the caving in of an embankment on which he had taken a position;⁸ where a person went on the premises merely to deliver a gratuitous message to an employé having no relation to the business conducted, and was injured by falling into a tank while indulging his curiosity to look over the place.⁹

§ 948. The Rule Re-stated as to Trespassers.—It is another statement of the principle here noted to say that negligence, so gross as to evidence willfulness, will entitle the injured person to recover, though he was a trespasser at the time of receiving the injuries.¹⁰ As a matter of pleading it is to be noted that, though ordinarily an allegation of negligence will support a recovery on proof of gross negligence, it does not follow by any means that under such an allegation a recovery can be had by a trespasser, though gross negligence is shown.¹¹

§ 949. Who are Trespassers or Bare Licensees within this Rule—Who not.—One entering on the premises of another with his consent, but without his invitation, and not in the discharge of any public or private duty, is a bare licensee within the rules governing this branch of the law of negligence.¹² In the following instances the injured person was held to be a licensee or trespasser within the rules: A person on the premises of another for a business purpose, who wandered about the premises in the dark while awaiting audience, and fell into

⁵ *Louisville &c. R. Co. v. Sides*, 129 Ala. 399; s. c. 29 South. Rep. 798.

⁶ *Currier v. Dartmouth College*, 117 Fed. Rep. 44; aff'g s. c. 105 Fed. Rep. 886.

⁷ *Seward v. Draper*, 112 Ga. 673; s. c. 37 S. E. Rep. 978.

⁸ *Ann Arbor R. Co. v. Kinz*, 68 Ohio St. 210; s. c. 67 N. E. Rep. 479.

⁹ *Dixon v. Swift*, 98 Me. 207; s. c. 56 Atl. Rep. 761.

¹⁰ *Chicago Terminal Transfer Co.*

v. Kotoski, 199 Ill. 383; s. c. 65 N. E. Rep. 350; aff'g s. c. 101 Ill. App. 300.

¹¹ *Belt R. Co. v. Banicki*, 102 Ill. App. 642.

¹² *Chesley v. Rocheford & Gould*, — Neb. —; s. c. 96 N. W. Rep. 241; *Forbrick v. General Electric Co.*, 45 Misc. (N. Y.) 452; s. c. 92 N. Y. Supp. 36 (a person, entering the cellar of another with the permission of his servant to use a grindstone and injured by a defective floor, held a licensee).

an elevator pit;¹³ a person allowed to enter a tenement hallway by permission of a tenant to find out whether a person of his acquaintance lived therein;¹⁴ a person occupying a room on the invitation of a licensee of the room;¹⁵ a person, not in the employ of the owners of telegraph poles, and injured while making an alteration in the position of wires on such a pole;¹⁶ the holder of a card of admission to a cemetery, who, instead of following the road leading to his destination, started across the grounds and stepped into a hole concealed by grass;¹⁷ a teamster employed at work in a particular portion of the yard of a manufactory, who left his team and went to another portion of the yard for a purpose foreign to his duties, and was hurt by a falling gate;¹⁸ a person who entered upon an unfinished part of a park around which notices were posted warning the public to stay out;¹⁹ an employé of a building in course of construction who left his place of work and went to another portion of the building without necessity therefor, and was injured by the fall of a piece of machinery while at such other place;²⁰ a person attempting to use a roadway over a railroad company's right of way after permission for its use by the public had been withdrawn, and barricades had been erected and stood in position for several months, notifying the public of the revocation of the license;²¹ a person on premises to transact private business with employés of the owner, and injured in an elevator accident, though he was directed to use the elevator by the owner;²² children playing on a part of the premises not intended for the use of tenants,²³ and children on a sidewalk adjoining a factory annoying employés working therein.²⁴ But the wife of a person, visiting a lumber yard to buy lumber, and accompanying her husband at his request, to pass upon the fitness of the material to be selected, is properly on the

¹³ *Glaser v. Rothschild*, 106 Mo. App. 418; s. c. 80 S. W. Rep. 332.

¹⁴ *McCarvel v. Sawyer*, 173 Mass. 540; s. c. 54 N. E. Rep. 259.

¹⁵ *Brehmer v. Lyman*, 71 Vt. 98; s. c. 42 Atl. Rep. 613.

¹⁶ *Quill v. Empire State Telephone &c. Co.*, 159 N. Y. 1; s. c. 53 N. E. Rep. 679; rev'g s. c. 92 Hun (N. Y.) 539; 37 N. Y. Supp. 1149.

¹⁷ *Barry v. Calvary Cemetery Ass'n*, 106 Mo. App. 358; s. c. 80 S. W. Rep. 709.

¹⁸ *Flanagan v. Atlantic Alcatraz Asphalt Co.*, 37 App. Div. (N. Y.) 476; s. c. 56 N. Y. Supp. 18.

¹⁹ *Albert v. New York*, 75 App. Div. (N. Y.) 553; s. c. 78 N. Y. Supp. 355.

²⁰ *Chesley v. Rocheford & Gould*, — Neb. —; s. c. 96 N. W. Rep. 241.

²¹ *Illinois Cent. R. Co. v. Waldrop* (Ky.), 72 S. W. Rep. 1116; s. c. 24 Ky. L. Rep. 2127.

²² *Muench v. Heinemann*, 119 Wis. 441; s. c. 96 N. W. Rep. 800.

²³ The fact that a fence, separating a portion of the premises intended for the use of tenants from another portion not so intended, is removed, does not constitute an invitation or permission to the tenants to use the space thus left open outside of the original enclosure: *Dalin v. Worcester &c. R. Co.*, 188 Mass. 344; s. c. 74 N. E. Rep. 597.

²⁴ *Benton v. James Hill Mfg. Co.*, 26 R. I. 192; s. c. 58 Atl. Rep. 664.

premises and not to be regarded as a trespasser;²⁵ so one is not a trespasser who comes on the premises of another to seek employment at the invitation of a foreman, in accordance with a recognized custom acquiesced in by the owner.²⁶ Nor will the rule be held to apply to one remaining in an establishment after the transaction of his business for a reasonable time, where that is one of the incidents of the particular kind of business;²⁷ and the case is the same with a person delivering goods to a subtenant.²⁸ And so a prospective tenant of a building, directed by a sign to inquire of the engineer with reference to the property, is not a trespasser in passing through the building to seek the engineer, and falling into an unguarded opening, though a sign, reading "No admittance," was posted at a place passed by him before reaching the opening.²⁹ In another case a like conclusion was reached where a farmer on the premises of a distilling company for the purpose of buying slops for his cattle, ascended a platform around a vat to stir the slop and was scalded by the bursting of a vat. In this case it appeared that the injured person had been repeatedly allowed to do this work, and the court reasoned that he did not occupy the relation of mere licensee, as the business he was engaged in at the time was for the mutual benefit of both parties.³⁰

§ 952. Injuries to Trespassers, Licensees, etc., upon Vessels.³¹

§ 955. No Obligation to Keep One's Premises Safe for the Benefit of the Owner of Domestic Animals.³²

²⁵ *Davis v. Ferris*, 53 N. Y. Supp. 571.

²⁶ *McDonough v. James Reilly Repair &c. Co.*, 45 Misc. (N. Y.) 334; s. c. 90 N. Y. Supp. 358. Nor will the character of bare licensee be ascribed to one injured while being shown through a factory by the owner with the intention of hiring him: *Warner v. Mier Carriage &c. Co.*, 26 Ind. App. 350; s. c. 58 N. E. Rep. 554; 59 N. E. Rep. 873.

²⁷ *True v. Meredith Creamery*, 72 N. H. 154; s. c. 55 Atl. Rep. 893.

²⁸ *Wright v. Perry*, 188 Mass. 268; s. c. 74 N. E. Rep. 328.

²⁹ *Withers v. Brooklyn Real Estate Exch.*, 106 App. Div. (N. Y.) 255; s. c. 94 N. Y. Supp. 328.

³⁰ *Hupfer v. National Distilling Co.*, 114 Wis. 279; s. c. 90 N. W. Rep. 191.

³¹ The owner of a barge, containing a load to be transferred to a steamer and sufficiently equipped with men to put the barge in place, does not owe any duty to an em-

ployé of the steamer ordered by his boss to go on to the barge and assist in hauling it into position, and hence he is not liable for his injuries occasioned by falling into an open hole in the deck: *Huebner v. Hammond*, 80 App. Div. (N. Y.) 122; s. c. 80 N. Y. Supp. 295; s. c. aff'd, 177 N. Y. 537; 69 N. E. Rep. 1124.

³² *Brown v. Missouri &c. R. Co.* (Tex. Civ. App.), 69 S. W. Rep. 178 (railroad company not liable for cattle killed by eating poisonous grass on right of way, the company not being negligent as to the fence through which the cattle entered); *Tennessee Chemical Co. v. Henry*, 114 Tenn. 152; s. c. 85 S. W. Rep. 401 (owner of shed not liable for death of trespassing animals killed through eating nitrate of soda stored in the shed). An owner of unclosed lands is not liable for injuries to animals straying upon the land from a highway, unless he maintains, or permits to remain

§ 962. **Injuries to Animals from Barbed Wire Partition Fences.**—It is held that an action for injuries to an animal by becoming entangled in a partition fence will not lie where the owner of the animal had knowledge of the condition of the fence at the time he turned it into the pasture, and had made complaints to the owner of the fence, since his own negligence contributed to bring about the injury complained of.³³

§ 964. **Spring-guns and other Instruments of Destruction for the Defense of Property.**—Here it is the generally accepted rule that one who sets a spring-gun on his premises for the defense of his property will be liable to a trespasser coming thereon without notice of the gun and injured by its discharge. This rule is an exception to the doctrine that the owner of private grounds is under no obligation to keep them in safe condition for the benefit of trespassers.³⁴ It is held that a section of the Texas Criminal Code providing that homicide at night is justifiable if it reasonably appears by the acts or words of the person killed that he intended to commit theft, and the killing occurred while the person was in the act of committing the offense, or while the offender was within gunshot of the place where the theft was committed, cannot be urged as a defense to an action for injuries inflicted on one by a spring-gun while he was walking in the edge of a field in which the gun was set and had no intention to commit theft.³⁵

§ 968. **Duty to Use Reasonable Care to Keep One's Premises Safe for the Benefit of Persons Expressly or Impliedly Invited Thereon.**³⁶

thereon, a nuisance liable to attract such animals to their injury: *Muir v. Thixton, Millett & Co.*, 78 S. W. Rep. 466; 25 Ky. L. Rep. 1688. In Texas it is held that an owner of land maintaining an open well on his premises is only liable for gross negligence in cases where animals trespass on his land in violation of a city ordinance prohibiting animals running at large: *McCutchen v. Gorsline*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 1044.

³³ *Ray v. Stuckey*, 113 Wis. 77; s. c. 88 N. W. Rep. 900.

³⁴ *Northwestern & C. R. Co. v. O'Malley*, 107 Ill. App. 599; *Grant v. Hass*, 31 Tex. Civ. App. 688; s. c. 75 S. W. Rep. 342.

³⁵ *Grant v. Hass*, 31 Tex. Civ. App. 688; s. c. 75 S. W. Rep. 342.

³⁶ See generally on the question that the owner or occupier of premises must use reasonable care to keep them in a safe condition for

persons expressly or impliedly invited thereon: *Washington Market Co. v. Clagett*, 19 App. (D. C.) 12 (market house company liable to woman for injuries in slipping on a pile of fish allowed to obstruct passageway); *Horton & Smith v. Harvey*, 119 Ga. 219; s. c. 46 S. E. Rep. 70; *McIntyre v. Pfaudler & C. Fermentation Co.*, 133 Mich. 552; s. c. 95 N. W. Rep. 527; 10 Det. Leg. N. 266 (person inviting another to use his scales liable for injuries by a breakdown without reference to his ownership of the scales); *Corrigan v. Elsinger*, 81 Minn. 42; s. c. 83 N. W. Rep. 492 (the owner is liable for the negligence of an independent contractor employed by him on the premises in making repairs or alterations); *Marsh v. Minneapolis Brewing Co.*, 92 Minn. 182; s. c. 99 N. W. Rep. 630; *Tucker v. Draper*, 62 Neb. 66; s. c. 86 N. W. Rep. 917; 54 L. R. A. 321; *True v. Meredith*

—The invitation to come on the premises is generally regarded as extended, where some benefit accrues or is supposed to accrue to the one deemed to have extended the invitation;³⁷ and one court has held that the owner of premises will be subject to this duty, where he knowingly leaves his property open in a manner calculated to lead others to think that they are invited to enter.³⁸ Where, however, a dangerous state of affairs on property is created by a third person without the owner's knowledge, he will not be responsible to a person injured thereby, though the injured person was rightfully on the premises at the time.³⁹ The fact that the accident was one not likely to occur will not relieve the owner of the premises from the duty of guarding against such an accident, if it is one he knew might occur.⁴⁰

§ 970. Degree of Care Required of Property Owner in Keeping his Premises Safe.—All that the law demands of the owner or occupier is the exercise of reasonable care to keep his premises in a safe condition; absolute safety is not exacted.⁴¹ It is required, however, that the

Creamery, 72 N. H. 154; s. c. 55 Atl. Rep. 893; *Furey v. New York Cent. & C. R. Co.*, 67 N. J. L. 270; 51 Atl. Rep. 505; *Smith v. Jackson*, 70 N. J. L. 183; s. c. 56 Atl. Rep. 118; *Klapproth v. Baltic Tier & Co.*, (N. J. L.) 43 Atl. Rep. 981; *Dutton v. Greenwood Cemetery Co.*, 80 App. Div. (N. Y.) 352; s. c. 80 N. Y. Supp. 780 (cemetery company liable for injuries by the fall of a grave stone on a person visiting adjoining grave); *Fitzgerald v. New York Cent. & C. R. Co.*, 84 App. Div. (N. Y.) 59; s. c. 81 N. Y. Supp. 1109; *Flanagan v. Atlantic & C. Asphalt Co.*, 37 App. Div. (N. Y.) 476; s. c. 56 N. Y. Supp. 18; *Withers v. Brooklyn Real Estate Exch.*, 106 App. Div. (N. Y.) 255; s. c. 94 N. Y. Supp. 328 (unguarded opening in basement); *Marshall v. Industrial Exhibition Ass'n*, 1 Ont. L. Rep. 319 (exhibition association liable to holder of privilege injured by falling into a hole in a platform); *Wright v. Lefever*, 51 Wkly. Rep. 149; *Marney v. Scott* [1899], 1 Q. B. 986; s. c. 68 Law J. Q. B. 736; 47 Wkly. Rep. 666. In one case plaintiff, injured by falling through a hatchway, occupied rooms in a building adjoining the one occupied by defendant and had used the hall-way in the rear of defendant's buildings as a means of reaching his rooms. The defendant had a hatch-way in the floor of this hall and

loaned the injured person the use of his hoisting apparatus when he moved in, and directed him where to place his sign in the hall doorway. It was held that this evidence sufficiently supported a contention that the injured person was on the premises through the invitation of defendant: *McCormick v. Anistaki*, 66 N. J. L. 211; s. c. 49 Atl. Rep. 505.

³⁷ *Northwestern Elev. R. Co. v. O'Malley*, 107 Ill. App. 599; *Dixon v. Swift*, 98 Me. 207; s. c. 56 Atl. Rep. 761.

³⁸ *Lawson v. Shreveport Waterworks Co.*, 111 La. 73; s. c. 35 South. Rep. 390.

³⁹ *Clapp v. La Grill*, 103 Tenn. 164; s. c. 52 S. W. Rep. 134.

⁴⁰ *Fallis v. Gartshore-Thompson Pipe & C. Co. (C. A.)*, 4 Ont. L. Rep. 176.

⁴¹ *Meyers v. Chicago & C. R. Co.*, 103 Mo. App. 268; s. c. 77 S. W. Rep. 149; *Land v. Fitzgerald*, 68 N. J. L. 28; s. c. 52 Atl. Rep. 229. Thus the owner of an apartment house was held not liable for injuries caused by an uneven deposit of ice and snow on steps, where it was shown that there was no weather permitting the removal of the ice and snow, and that the unevenness was caused by ashes put on the steps to render them more safe: *Laufers-Weiler v. Borchardt*, 88 N. Y. Supp. 985.

owner must use diligence to acquaint himself with the condition of his premises. If he has the means of knowledge and negligently remains ignorant of the dangerous conditions therein, he will be charged with actual knowledge.⁴²

§ 972. What Defects have been Ascribed to Negligence.—In these cases the act or omission named was imputed to the proprietor or occupier as negligence:—The failure to safeguard a cellar way, whereby a person on the premises to make inquiry about renting a portion thereof was injured, though a sign directed these inquiries to be made elsewhere;⁴³ where the owner of a building, having a gallery running along the rear, retained control over the passageway, and knowingly permitted young children belonging to occupants of an adjoining building to use the passageway, and left a rail on the passageway in a defective condition, by reason of which a child fell off;⁴⁴ where the owner of platform scales failed to remove a rotten timber supporting the scales, and the driver of a wagon on the scales was injured by the platform giving way;⁴⁵ where a mining corporation, owning a village inhabited by miners in its employ, failed to lay out streets, and required the miners to cross the tract at any point most convenient, and a miner was injured by falling into an unguarded shaft alongside one of the paths;⁴⁶ where the owners of a foundry in which metal was chipped by workmen, failed to put up a guard or screen, and by reason of this neglect a person rightfully on the premises was struck in the eye by one of these chips;⁴⁷ where the owner of a building alongside a railroad track maintained a projection so close to the track that it struck and killed a brakeman who was riding on a ladder on the side of a passing freight car, and this though no contractual relation existed between the defendant and the deceased.⁴⁸

§ 973. What Defects have not been Ascribed to Negligence.—Under these circumstances the defects were not deemed of such a character as to impute actionable negligence to the owner or occupier of the premises:—Where a person, directed merely to deposit an article through a door, which he understood to be a closet, and stepping inside, was precipitated into a cellar,—here the recovery was defeated

⁴² *Washington Market Co. v. Claggett*, 19 App. (D. C.) 12.

⁴³ *Fogarty v. Bogert*, 59 App. Div. (N. Y.) 114; s. c. 69 N. Y. Supp. 47.

⁴⁴ *Toledo Real Estate & Co. v. Putney*, 10 Ohio C. D. 698; s. c. 44 Ohio Cir. Ct. R. 486.

⁴⁵ *McIntyre v. Detroit Safe Co.*, 129 Mich. 385; s. c. 89 N. W. Rep. 39; 8 Det. Leg. N. 1019.

⁴⁶ *Foster v. Portland Gold Min. Co.*, 114 Fed. Rep. 613; s. c. 52 C. C. A. 393.

⁴⁷ *Fallis v. Gartshore-Thompson Pipe & Co. (C. A.)*, 4 Ont. Law Rep. 176.

⁴⁸ *Young v. Waters-Pierce Oil Co.*, 185 Mo. 634; s. c. 84 S. W. Rep. 929.

because the invitation did not extend to an entry into the supposed closet, but merely to the privilege of opening the door sufficiently to put the article inside;⁴⁹ where a person, leaving a store, caught his foot in a doormat, and fell, and there was evidence that no one had ever caught his foot in the mat before, though it had been in the same place for several years;⁵⁰ where the defect complained of was the construction of the floor of a room in an office building four and seven-eighths inches above the floor of the hallway into which it entered, and the plaintiff was injured by stepping forward out of the room without taking this fact into consideration.⁵¹

§ 976. Pleading. Averment that Plaintiff was upon the Premises by Invitation.—The complaint should set out the fact that the plaintiff was on the premises by the invitation, express or implied, of the proprietor or occupier; a general allegation is not sufficient.⁵²

§ 977. Evidence in these Cases.⁵³

§ 978. Proprietor Owes this Duty to Servant of Customer.⁵⁴

§ 979. Proprietor Owes this Duty to Independent Contractor or his Servants.—Here it is the rule that the owner of property owes to an independent contractor and his servants at work thereon the duty of exercising reasonable care to have the premises in a safe condition for the work, unless the defects responsible for the injury were known to the contractor.⁵⁵ It is to be observed that the owner is not charged with the absolute duty of having the premises safe; his duty is discharged by the exercise of reasonable care.⁵⁶ The rule is the same be-

⁴⁹ Ryerson v. Bathgate, 67 N. J. L. 337; s. c. 51 Atl. Rep. 708; 57 L. R. A. 307.

⁵⁰ Dwyer v. Hills Bros. Co., 79 App. Div. (N. Y.) 45; s. c. 79 N. Y. Supp. 785.

⁵¹ Ware v. Evangelical &c. Missionary Soc., 181 Mass. 285; s. c. 63 N. E. Rep. 885.

⁵² Land v. Fitzgerald, 68 N. J. L. 28; s. c. 52 Atl. Rep. 229; Western Wheel Works v. Stachnick, 102 Ill. App. 420.

⁵³ The plaintiff has the burden of showing the fact that he was on the premises by the invitation of the defendant: Sloss Iron & Steel Co. v. Tilson, 141 Ala. 152; s. c. 37 South. Rep. 427.

⁵⁴ Chesapeake &c. R. Co. v. Wilder (Ky.), 72 S. W. Rep. 353; s. c. 24 Ky. L. Rep. 1821 (employé of shipper injured while unloading goods on defective platform).

⁵⁵ John Spry Lumber Co. v. Dugan, 80 Ill. App. 394; Sesler v. Rolfe Coal &c. Co., 51 W. Va. 318; s. c. 41 S. E. Rep. 216; Hoadley v. International Paper Co., 72 Vt. 79; s. c. 47 Atl. Rep. 169 (repairer of apparatus in paper mill steamed to death owing to negligence of defendant in not properly protecting him while at work); Barowski v. Schultz, 112 Wis. 415; s. c. 88 N. W. Rep. 236. The owner of premises upon which there is a private railroad track owes to one employed by a contractor on his premises near the track the duty to exercise ordinary care to avoid injury to him from cars passing on the track: Sack v. St. Louis Car Co., 112 Mo. App. 476; s. c. 87 S. W. Rep. 79.

⁵⁶ McKeon v. Louis Weber Bldg. Co., 84 N. Y. Supp. 913.

tween the contractor and his subcontractor, and such contractor will be liable to the servant of a subcontractor for injuries due to a failure to exercise this degree of care as to the condition of the premises upon which he is employed;⁵⁷ and the contractor, on his part, having possession of the premises, is required to exercise a like degree of care with reference to the employés of the owner of the premises engaged in necessary work thereon.⁵⁸ Applying the rules, it has been held that a person, at work on an elevated railroad structure as an employé of a subcontractor thereon, was a licensee to whom the elevated railroad company owed the duty of using reasonable care to prevent his being injured from exposure to unusual dangers not known to him that might be caused by the negligent running of the defendant's surface cars beneath the platform upon which he was at work.⁵⁹

§ 982. The Same Protection Extended to Custom Officers, Water Inspectors, Letter Carriers, etc.⁶⁰

§ 983. Protection Held not to Extend to Firemen and Fire Patrols.—In the absence of statute or ordinance changing the rule, a fireman, who enters premises without any special authority or invitation of the owner, is a bare licensee, and takes the risk of the condition of the premises as he finds them.⁶¹

§ 985. Liability for Injuries from Dangerous Places in Business Houses or Grounds.⁶²—The rule has been applied in a case where a department store maintained a reception room for female patrons who were accompanied by their children, with the conclusion that it was the duty of the proprietor of the store to keep this room in such a condition as would make it reasonably free from danger to children.⁶³ In another case it was held that a storekeeper was not to be charged with negligence by the mere fact that he maintained a stair-

⁵⁷ *Norman v. Dowd*, 86 App. Div. (N. Y.) 243; s. c. 83 N. Y. Supp. 693.

⁵⁸ *Kitchen v. Riter-Conley Mfg. Co.*, 207 Pa. 558; s. c. 56 Atl. Rep. 1083; *Gile v. J. W. Bishop Co.*, 184 Mass. 413; s. c. 68 N. E. Rep. 837.

⁵⁹ *Wagner v. Boston Elevated R. Co.*, 188 Mass. 437; s. c. 74 N. E. Rep. 919.

⁶⁰ An electric traction company, carrying mail on its cars which is removed therefrom at the barn of the car company by a postal carrier, is bound to provide the carrier with safe access to such cars: *Young v. People's Gas & Co.*, 128 Iowa 290; s. c. 103 N. W. Rep. 788.

⁶¹ *New Omaha & Light Co. v. An-*

derson, — Neb. —; s. c. 102 N. W. Rep. 89; *Eckes v. Stetler*, 98 App. Div. (N. Y.) 76; s. c. 90 N. Y. Supp. 473.

⁶² That the owner or occupier of a business building is under the obligation to use reasonable care to make the premises safe for persons transacting business thereon see: *Commonwealth Electric Co. v. Melville*, 110 Ill. App. 242; s. c. aff'd, 210 Ill. 70; 70 N. E. Rep. 1052; *Graham v. Joseph H. Bauland Co.*, 97 App. Div. (N. Y.) 141; s. c. 89 N. Y. Supp. 595 (stairways).

⁶³ *Miller v. Geo. B. Peck Dry Goods Co.*, 104 Mo. App. 609; s. c. 78 S. W. Rep. 682.

way leading from the main floor of the store into the basement, where it also appeared that he kept the place properly lighted so that it could be seen by customers exercising ordinary care.⁶⁴

§ 986. **Cases Illustrating this Liability.**⁶⁵—The duty in all cases is that of reasonable or ordinary care, and where this has been exercised the proprietor will not be liable. In one case it was the holding of the court that a person injured by the closing of swinging doors could not recover, where the evidence showed that swinging doors with stronger springs were in use in other like establishments in the same city, and it was not shown that there was anything in their construction or operation to make them dangerous, provided they were used with ordinary care.⁶⁶

§ 988. **No Liability for Unsafe Condition of those Parts of Premises not Intended for Visitors or Customers.**—But this is not the rule where the visitor or customer is invited to these parts of the premises by the proprietor or his clerks for a business purpose, as, for example, to examine goods.⁶⁷ One court has broadly held that a merchant owes to a customer the duty of protecting him from danger in a storeroom, though the customer entered by an alley door, which customers were not expressly or impliedly invited to use, and by reason of so entering he encountered an open elevator shaft and was injured by falling therein.⁶⁸

§ 993. **Duty to Give Warning of Danger.**—A merchant has the duty of clearly warning a patron of dangerous conditions in the premises, where such a person by reason of defective eyesight, or intoxication, is not in the full possession of his faculties.⁶⁹ This duty of warning is not generally regarded as imperative where the defective conditions are obvious to persons in possession of their faculties,

⁶⁴ *Accousi v. G. A. Stowers Furniture Co.*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 861.

⁶⁵ The owners of stores have been held liable in these cases:—Where a patron of a store was injured by falling over strips nailed along a floor used as covering for soda water pipes (*Polenske v. Lit Bros.*, 18 Pa. Super. Ct. 474); where a customer by the invitation of a merchant, placed packages behind a counter, and going to get them afterwards, fell through a trapdoor that was shut at the time he deposited the packages (*League v. Stradley*, 68 S. C. 515; s. c. 47 S. E. Rep. 975); where a customer in a

department store stepped on a feather duster lying on a stairway and was thrown down and injured (*Graham v. Joseph H. Bauland Co.*, 97 App. Div. (N. Y.) 141; s. c. 89 N. Y. Supp. 595).

⁶⁶ *Pardington v. Abraham*, 93 App. Div. (N. Y.) 359; s. c. 87 N. Y. Supp. 670.

⁶⁷ *Smith v. Parkersburg Co-op. Ass'n*, 48 W. Va. 232; s. c. 37 S. E. Rep. 645.

⁶⁸ *Burk v. Walsh*, 118 Iowa 397; s. c. 92 N. W. Rep. 65.

⁶⁹ *Brown v. Stevens*, 136 Mich. 311; s. c. 99 N. W. Rep. 12; 11 Det. Leg. N. 27.

and it would seem a correct rule that a person on premises by mere sufferance has sufficient notice of the defective condition of premises where he can see that such premises are undergoing repairs.⁷⁰

§ 994. Injuries to Persons Visiting Public Houses, Public Exhibitions, etc.⁷¹

§ 996. Degree of Care Required of the Owners of Public Resorts.

A high degree of care is imposed by the New York courts on persons engaged in this business. There the owner of a structure intended for public exhibitions and entertainments, to which an admission fee is charged, is liable for defects in the original construction of the building, though he had no actual knowledge of the defect, and though he employed a contractor for the construction and a competent architect to oversee it.⁷² The owner of the hall is liable though the exhibitions therein are given by a lessee;⁷³ and the lessee will be charged with knowledge of all defects in the premises that a proper inspection would have disclosed.⁷⁴ The owner of a private park will not be relieved from liability for the safety of his guests on the ground that the exhibitions therein are given by an independent contractor. It is the duty of the owner of the park to use reasonable care to provide patrons a safe place from which to view the exhibition, and it is his duty in making the contract with the persons furnishing the entertainment to use care to select skillful and competent persons for this purpose.⁷⁵ An amusement association was held liable for injuries to a person by the fall of a beer bottle from an elevated band stand. Ordinary care in such a case would seem to require the

⁷⁰ *Downes v. Elmira Bridge Co.*, 41 App. Div. (N. Y.) 339; s. c. 58 N. Y. Supp. 628.

⁷¹ The keeper of a public bathing house is clearly wanting in the exercise of due care, where he fails to remove a timber concealed under the surface of the water at a place where diving is indulged in, and he will be liable for injuries received as a result of his total want of care: *Bass v. Reitdorf*, 25 Ind. App. 650; s. c. 58 N. E. Rep. 95. A nail projecting three-sixteenths of an inch above a worn stair step has been held not a defect rendering the owner of a theater liable for injuries sustained by a patron catching his heel on the nail and falling: *Jennings v. Tompkins*, 180 Mass. 302; 62 N. E. Rep. 265. But the fact of the presence of a pond in a

park used for picnic purposes, does not operate as an invitation to use the pond for bathing purposes, so as to impose on the proprietor the obligation to inform visitors by notice that they shall not bathe therein: *Le Grand v. Wilkes Barre &c. Traction Co.*, 10 Pa. Super. Ct. 12.

⁷² *Fox v. Buffalo Park*, 21 App. Div. (N. Y.) 321; s. c. 47 N. Y. Supp. 788; s. c. aff'd, 163 N. Y. 559; 57 N. E. Rep. 1109.

⁷³ *Fox v. Buffalo Park*, 21 App. Div. (N. Y.) 321; s. c. 47 N. Y. Supp. 788; s. c. aff'd, 163 N. Y. 559; 57 N. E. Rep. 1109.

⁷⁴ *Eckman v. Atlantic Lodge*, 68 N. J. L. 10; s. c. 52 Atl. Rep. 293.

⁷⁵ *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. L. 624; s. c. 46 Atl. 631; 50 L. R. A. 199.

placing of a netting or other barrier around the stand to prevent the happening of this species of injury by the band.⁷⁶

§ 1009. Liability for Failing to Provide Fire Escapes.⁷⁷

§ 1012. Land-owner Liable for Endangering Passage over Private Roads or Ways.—The owner of premises, permitting the public without objection to use a pathway over his premises, the use having no connection with his business, cannot be said to invite such use of his premises, and the only obligation resting on him is not to make changes or create conditions of a dangerous character in or near the pathway without exercising ordinary care to give notice of such dangers to the persons using the walk by the erection of barriers or otherwise.⁷⁸ But he is not required to keep his entire premises in a safe condition for pedestrians. His obligation only extends to the path and the land immediately adjacent thereto.⁷⁹ Where the path is used without the owner's permission, though without objection from him, the pedestrian is entitled to be protected only from wanton and willful injury.⁸⁰ The owner of premises, constructing streets or sidewalks over them and holding them out to the public as thoroughfares, is clearly liable for injuries occasioned by negligent defects therein.⁸¹

§ 1015. Decisions Exonerating the Owner of Private Way from Liability.⁸²

⁷⁶ *Williams v. Mineral City Park Ass'n*, 128 Iowa 32; s. c. 102 N. W. Rep. 783.

⁷⁷ Under the Illinois statute it is held that a building is used for "manufacturing purposes" where tenants therein, with their employés, are engaged in making garters and other articles of wearing apparel, in which business electric power is used to drive the machines: *Landgraf v. Kuh*, 188 Ill. 484; s. c. 59 N. E. Rep. 501; rev'g s. c. 90 Ill. App. 134. This statute does not relieve the owner from the duty of placing the fire-escapes merely because part of the structure is in possession and control of tenants: *Landgraf v. Kuh*, 188 Ill. 484; s. c. 59 N. E. Rep. 501; rev'g s. c. 90 Ill. App. 134.

⁷⁸ *Rooney v. Woolworth*, 78 Conn. 167; s. c. 61 Atl. Rep. 366; *De Tarr v. Ferd. Heim Brewing Co.*, 62 Kan. 188; s. c. 61 Pac. Rep. 689; *McCann v. Thilemann*, 36 Misc. (N. Y.) 145; s. c. 72 N. Y. Supp. 1076; rev'g s. c. 35 Misc. (N. Y.) 855; 72 N. Y. Supp. 1117; *Buchtel College v. Martin*, 25 Ohio Cir. Ct. R. 494. In line with

this view is a holding that, where the premises of a wharf company occupied by its railroad tracks are also used by the public as a street under an implied license, the law requires that the company shall exercise reasonable care in the operation of its trains to protect licensees from injury: *De Boer v. Brooklyn Wharf & Co.*, 51 App. Div. (N. Y.) 289; s. c. 64 N. Y. Supp. 925. There was a case of heedless disregard of rights in a private lane where the owner of the premises propelled an automobile through the same in such a way as to frighten a horse and cause a runaway: *Knight v. Lanier*, 69 App. Div. (N. Y.) 454; s. c. 74 N. Y. Supp. 999.

⁷⁹ *Etheredge v. Central of Georgia R. Co.*, 122 Ga. 853; s. c. 50 S. E. Rep. 1003.

⁸⁰ *McCann v. Thilemann*, 36 Misc. (N. Y.) 145; s. c. 72 N. Y. Supp. 1076; rev'g s. c. 35 Misc. (N. Y.) 855; 72 N. Y. Supp. 1117.

⁸¹ *Marsh v. Minneapolis Brewing Co.*, 92 Minn. 182; s. c. 99 N. W. Rep. 630.

⁸² The owner of premises was held

§ 1016. **Duty to Warn the Public of Revocation of License to Come upon One's Premises.**—The owner will not be liable after he has fully and completely abandoned a way originally opened by him and notified the public of this fact.⁸³ Thus, a railroad company which erected steps over a right of way fence onto property owned by third parties, at a point which before that time had been used as a bypath, was held not liable for injuries due to the steps being out of repair, where it was conclusively shown that the railroad company afterwards abandoned care of the steps and they had since that time been repaired by private parties for their own use.⁸⁴

§ 1019. **Acts Imputing Contributory Negligence to the Person Injured.**—In these cases the contributory negligence of the person injured has been held a defense:—Where a customer in a dry goods store was injured by falling down well-lighted steps in the store, and the evidence showed that she was able to look beyond the steps at goods on a table, though wearing dark glasses at the time of the fall;⁸⁵ where a brakeman on a car, pushed onto a spur track through a factory gate, was struck by the gate swinging against the car, and it was the duty of the injured person to open and close the gate and see that it was kept open while cars were passing in;⁸⁶ where an experienced brakeman was crushed between the side of a passing car and lumber piled near the track, the dangers of the situation being obvious to an experienced brakeman;⁸⁷ where a pedestrian fell into an excavation while crossing private premises, and it was proved that the path used by the public had been torn up, and to reach the excavation it was necessary for him to climb over obstructions sufficient to give a person of ordinary care notice of the change of conditions;⁸⁸ where a berry seller in search of the proprietor of a hotel declined the proffer of a person acquainted with the premises to show him the way to the kitchen, where the proprietor was supposed to be, and going forward unattended, fell down a stairway on a dark veranda over which it was necessary for him to pass to reach the kitchen;⁸⁹ where a person un-

not liable for injuries caused by a fall into an excavation along the line of a path formerly used by the public, where he had torn up the path and obstructed its course by debris and building material: *Buchtel College v. Martin*, 25 Ohio Cir. Ct. R. 494.

⁸³ *Harobine v. Abbott*, 177 Mass. 59; s. c. 58 N. E. Rep. 284.

⁸⁴ *St. Louis &c. R. Co. v. Dooley*, 70 Ark. 389; s. c. 67 S. W. Rep. 1012.

⁸⁵ *Dunn v. Kemp & Hebert*, 36 Wash. 183; 78 Pac. Rep. 782.

⁸⁶ *Read v. Warwick Mills*, 25 R. I. 476; s. c. 56 Atl. Rep. 679.

⁸⁷ *Ramsay v. C. K. Eddy & Sons*, 123 Mich. 158; s. c. 82 N. W. Rep. 127.

⁸⁸ *Buchtel College v. Martin*, 25 Ohio Cir. Ct. R. 494.

⁸⁹ *Bridger v. Gresham*, 111 Ga. 814; s. c. 35 S. E. Rep. 677.

acquainted with premises, and searching for the apartments of a friend therein, proceeded through a darkened hallway without first knocking or carrying a light and fell down a flight of stairs in the hall and was injured.⁹⁰

§ 1021. Circumstances under which Contributory Negligence not Imputed as Matter of Law.—Contributory negligence as a matter of law was not imputed to the injured persons under these circumstances:—Where a customer in a store was told that he could find what he wanted in the back part of the store, and while walking toward that portion of the store fell into an open trapdoor around which other persons were standing, though he might have seen the opening had he looked. In this case it was held that the person had a right to rely on the safety of the floor;⁹¹ where an employé without knowledge that a panel in a cement floor had been taken out and replaced without proper bracing, and that it was unsafe to walk on such panel, stepped thereon and was injured by falling through the floor when it gave way;⁹² where a customer passing down the corridor of a department store fell over a skid placed on steps in the aisle, and the presence of such skid was not brought to her attention by any warning, and at the time of the accident her attention was directed to goods displayed on counters at the sides of the aisle.⁹³

§ 1025. General Rule which Exonerates the Land-owner.—The generally accepted rule does not impose upon the owner or occupier of premises the duty to exercise a greater degree of care in anticipation of their invasion by trespassing children. No distinction is made between trespassers as to their age. Both children and adults take the premises as they find them.⁹⁴ The mere fact that the owner of prem-

⁹⁰ *Campbell v. Abbott*, 176 Mass. 246; s. c. 57 N. E. Rep. 462. See also *Brugher v. Buchtenkirch*, 167 N. Y. 153; s. c. 60 N. E. Rep. 420; rev'g s. c. 57 N. Y. Supp. 314.

⁹¹ *Brown v. Stevens*, 136 Mich. 311; s. c. 99 N. W. Rep. 12; 11 Det. Leg. N. 27.

⁹² *St. Louis Expanded Metal Fire-Proofing Co. v. Dawson*, 30 Tex. Civ. App. 261; s. c. 70 S. W. Rep. 450.

⁹³ *Quirk v. Siegel-Cooper Co.*, 26 Misc. (N. Y.) 244; s. c. 56 N. Y. Supp. 49.

⁹⁴ *Brinkley Car Works &c. Co. v. Cooper*, 70 Ark. 331; s. c. 67 S. W. Rep. 752; 57 L. R. A. 724 (child having sufficient intelligence to appreciate the danger fell in unconcealed pool of hot water); *O'Connor v. Brucker*, 117 Ga. 451; s. c. 43 S.

E. Rep. 731 (child injured in vacant house through negligence of companion—owner not liable); *Norman v. Bartholomew*, 104 Ill. App. 667; *Donk Bros. Coal &c. Co. v. Leavitt*, 109 Ill. App. 385 (unguarded cistern—owner liable); *Putney v. Keith*, 98 Ill. App. 285; *Ball v. Middleboro Town &c. Co.* (Ky.), 63 S. W. Rep. 6; s. c. 24 Ky. L. Rep. 114 (boy injured by explosion of dynamite cap in an unoccupied building that he had broken into, and owner of building did not know the explosive was kept therein); *Coleman v. Robert Graves Co.*, 39 Misc. (N. Y.) 85; s. c. 78 N. Y. Supp. 893 (clothing of nine-year-old child set on fire while poking in hot ashes—owner of premises not liable); *Dwyer v. McLoughlin*, 31 Misc. (N.

ises tacitly acquiesces in the use of premises by children does not constitute a license or invitation imposing on him a higher degree of care than is required toward ordinary trespassers.⁹⁵

§ 1026. Liability Extends only to Wanton Injuries.—Cases are not wanting which uphold the doctrine—characterized as inhuman in the principle section—that a child who is injured while trespassing on unsafe premises cannot recover damages of the owner of the premises by reason of the unsafe condition of such premises, unless the land-owner is guilty of such negligence as to amount to wanton injury.⁹⁶

§ 1027. Although the Child is Attracted on the Premises by Some Object Attractive to Children.—It follows from the harsh rule announced in the preceding section that the owner of premises will not be liable for an injury to a child intruding thereon, though the child was induced to enter the premises and encounter the danger by reason of its attractiveness to his immature mind.⁹⁷

Y.) 510; s. c. 64 N. Y. Supp. 380; rev'g s. c. 27 Misc. (N. Y.) 187; 57 N. Y. Supp. 220 (child injured by falling into excavation adjoining highway safeguarded by planks placed across the tops of barrels around excavation—defendant liable); Toledo Real Estate &c. Co. v. Putney, 10 Ohio C. D. 698; s. c. 44 Ohio Cir. Ct. R. 486; Feehan v. Dobson, 10 Pa. Super. Ct. 6; s. c. 44 W. N. C. (Pa.) 65; Cooper v. Overton, 102 Tenn. 211; s. c. 52 S. W. Rep. 183; 45 L. R. A. 591 (child drowned in pool formed from recent rains, the existence of which was unknown to owner and was located fifty feet from highway); Uthermohlen v. Bogg's Run Min. &c. Co., 50 W. Va. 457; s. c. 40 S. E. Rep. 410; 55 L. R. A. 911.

⁹⁵ Formall v. Standard Oil Co., 127 Mich. 496; s. c. 86 N. W. Rep. 96; 8 Det. Leg. N. 453; Ryan v. Towar, 128 Mich. 463; s. c. 87 N. W. Rep. 644; 8 Det. Leg. N. 727; 55 L. R. A. 310; Clark v. Northern Pac. R. Co., 29 Wash. 139; s. c. 69 Pac. Rep. 636 (the fact that a railroad company allowed a circus to exhibit on its vacant land adjoining a switch yard held not an invitation to persons, including children, to cross the yard to reach the show grounds). In a case where a child was injured while meddling with a wagon left in a court yard by its owner, it was

the holding of the court that the owner was not obliged to fasten his wagon more securely than was necessary to keep it in place when not meddled with: Groarke v. Laemmle, 56 App. Div. (N. Y.) 61; s. c. 67 N. Y. Supp. 409. The doctrine of the turn-table cases has been held inapplicable to a case of injuries to a child by being caught in a revolving door, where there was no allegation in the complaint that the owner of the premises was at any time under any relation of duty to the child other than the duty he owed to an ordinary trespasser, or, at most, to a licensee, and it was not alleged that the door was not safely constructed for its purpose when used for that purpose only: Harris v. Cowles, 38 Wash. 331; s. c. 80 Pac. Rep. 537.

⁹⁶ Uthermohlen v. Bogg's Run Min. &c. Co., 50 W. Va. 457; s. c. 40 S. E. Rep. 410; 55 L. R. A. 911. In a case where a child was scalded by water spilled on a stove to frighten him away without intending to scald him, it was held a question for the jury whether the danger to the child was sufficiently obvious: Palmer v. Gordon, 173 Mass. 410; s. c. 53 N. E. Rep. 909.

⁹⁷ Loftus v. Dehail, 133 Cal. 214; s. c. 65 Pac. Rep. 379 (child injured by fall into an open cellar into which he was pushed by another

§ 1032. **True Ground of Liability: Erecting a Nuisance Attractive to Children.**—The better rule—and the one most strongly supported by authority—does not regard a child of tender years, lured upon the premises by reason of the existence thereon of something that appeals to his childish curiosity and instincts, as a trespasser.⁹⁸ The law regards the existence of such an object or condition as an implied invitation to the child to enter the premises. "What an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years."⁹⁹ Under this rule a person who maintains on his premises a dangerous instrumentality, though not in itself attractive, but placed so near an attractive situation on the premises as to form with it a dangerous condition, may be liable for injuries to a child resulting therefrom, notwithstanding the attractive situation is not in itself dangerous.¹⁰⁰ Whether the premises in a given case are sufficiently attractive to entice a child into danger and suggest to the owner the probability of accident, are questions of fact for the determination of the jury.¹⁰¹

child); *Savannah &c. R. Co. v. Beavers*, 113 Ga. 398; s. c. 39 S. E. Rep. 82; 54 L. R. A. 314 (child injured by fall into an alluring excavation on defendant's land); *Ryan v. Towar*, 128 Mich. 463; s. c. 87 N. W. Rep. 644; 8 Det. Leg. N. 727; 55 L. R. A. 310 (child injured in water-wheel on premises that children were in habit of crossing without objection from owner); *Erickson v. Great Northern R. Co.*, 82 Minn. 60; s. c. 84 N. W. Rep. 462; 51 L. R. A. 645 (child injured by rubbish fire on railroad right of way); *Smith v. Jacob Dold Packing Co.*, 82 Mo. App. 9 (child injured by running through a pile of hot ashes dumped on premises close to a pond used by neighborhood boys for fishing and swimming); *Hughes v. Boston &c. R. R.*, 71 N. H. 279; s. c. 51 Atl. Rep. 1070 (child exploded a torpedo found on a railroad track a quarter of a mile from the railroad station); *Saverio-Cella v. Brooklyn Union El. R. Co.*, 55 App. Div. (N. Y.) 98; s. c. 66 N. Y. Supp. 1021 (child injured while playing with a windlass left unattended on the sidewalk. In this case, however, the owner had the machine tied and the rope was afterward cut by other children); *Feehan v. Dobson*, 10 Pa. Super. Ct. 6;

s. c. 44 W. N. C. (Pa.) 65 (trespassing child injured by treading on hot cinders placed on lot by owner); *Paolino v. McKendall*, 24 R. I. 432; s. c. 60 L. R. A. 133; 53 Atl. Rep. 268 (child injured by fire set out on premises on which children were accustomed to play); *Uthermohlen v. Bogg's Run Min. & Mfg. Co.*, 50 W. Va. 457; s. c. 40 S. E. Rep. 410; 55 L. R. A. 911 (trespassing child injured by contact with cables used to haul coal cars from a mine); *Williamson v. Gulf &c. R. Co.*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 279 (evidence held insufficient to show an invitation to the public or a child to use the abutment of a bridge as a passway).

⁹⁸ *American Advertising &c. Co. v. Flannigan*, 100 Ill. App. 452; *Donk Bros. Coal &c. Co. v. Leavitt*, 109 Ill. App. 385; *McAllister v. Jung*, 112 Ill. App. 138; *Biggs v. Consolidated Barb-Wire Co.*, 60 Kan. 217; s. c. 56 Pac. Rep. 4; *Northwestern &c. R. Co. v. O'Malley*, 107 Ill. App. 599.

⁹⁹ *Northwestern El. R. Co. v. O'Malley*, 107 Ill. App. 599.

¹⁰⁰ *Consolidated Electric Light &c. Co. v. Healy*, 65 Kan. 798; s. c. 70 Pac. Rep. 884.

¹⁰¹ *Donk Bros. Coal &c. Co. v. Leavitt*, 109 Ill. App. 385.

§ 1033. Cases Supporting and Illustrating the "Attractive Nuisance" Doctrine.¹⁰²

§ 1035. Other Cases Dealing with the Doctrine of "Attractive Nuisances," Denying and Affirming it.—Courts have held that these objects or conditions were not so strongly attractive as to amount to an implied invitation so as to render the owner thereof liable for the injuries caused thereby:—The maintenance of precipitous banks along a canal running through a thickly settled portion of a town;¹⁰³ the maintenance of a city water reservoir so constructed that its top was twenty-five feet above the street, with a sloping surrounding surface, though there was a hole under the surrounding fence which allowed children to enter the grounds;¹⁰⁴ a properly constructed drain four feet wide and two feet deep, made for the purpose of carrying off surface water;¹⁰⁵ the presence of hot cinders beneath burned paper on a city lot on which there was nothing attractive to children;¹⁰⁶ an unattended winch left at a place where a sewer was in course of excavation, and the injuries were received while the child was playing around the machine after working hours;¹⁰⁷ a hole in a platform at a quarry power house through which a child slipped and injured his foot by contact with cog wheels beneath the platform;¹⁰⁸ spikes driven into electric light poles for the use of workmen in ascending the poles for placing and repairing wires.¹⁰⁹ It certainly cannot be

¹⁰² Under the following circumstances it was held that the rule of attractive nuisance applied and the owner of the premises was liable:—Where the owner of a slate factory allowed slabs of slate to remain on the sidewalk leaning against the factory, and a small boy leaned against one of the slabs which toppled over upon him (*Rachmel v. Clark*, 205 Pa. 314; s. c. 54 Atl. Rep. 1027); where a railroad company allowed wood to be piled alongside its track, and children attracted to the place climbed on the wood and were shaken over onto the track by the jar of a passing train and injured (*Kansas City & C. R. Co. v. Matson*, 68 Kan. 815; s. c. 75 Pac. Rep. 503); where a child was injured by the fall of a pile of lumber placed on a sidewalk with knowledge that children were in the habit of congregating there and climbing on the lumber while at play (*True & C. Co. v. Woods*, 201 Ill. 315; s. c. 66 N. E. Rep. 369); where a railroad company in moving earth from its grounds, left on one side of the ex-

cavation a steep embankment which overhung the excavation, and children playing thereupon with the knowledge of the railroad company were injured by the fall of the bank (*Ann Arbor R. Co. v. Kinz*, 12 Ohio C. D. 379).

¹⁰³ *McCabe v. American Woolen Co.*, 132 Fed. Rep. 1006; s. c. 65 C. C. A. 59; aff'g s. c. 124 Fed. Rep. 283.

¹⁰⁴ *Peninsular Trust Co. v. Grand Rapids*, 131 Mich. 571; s. c. 92 N. W. Rep. 38; 9 Det. Leg. N. 446.

¹⁰⁵ *Rome v. Cheney*, 114 Ga. 194; s. c. 55 L. R. A. 221; 39 S. E. Rep. 933.

¹⁰⁶ *American Advertising & C. Co. v. Flannigan*, 100 Ill. App. 452.

¹⁰⁷ *Fitzgerald v. Rodgers*, 58 App. Div. (N. Y.) 298; s. c. 68 N. Y. Supp. 946.

¹⁰⁸ *Curtis v. Tenino Stone Quarries*, 37 Wash. 355; s. c. 79 Pac. Rep. 955.

¹⁰⁹ *Simonton v. Citizens' Electric Light & C. Co.*, 28 Tex. Civ. App. 374; s. c. 67 S. W. Rep. 530.

claimed that children were invited upon the premises where the evidence shows that the owner or his servants had repeatedly driven them away.¹¹⁰

§ 1036. **Liability of Railway Companies for Injuries to Children by Unguarded and Unfastened Turn-tables.**—The attractive nuisance doctrine finds its most frequent application in the “turn-table cases,” and it is the rule in jurisdictions recognizing the attractive nuisance doctrine that a railroad company, negligent in leaving a turn-table unsecured so that children may put it in motion, is liable for injuries to children playing about it while in this condition.¹¹¹ A railroad company, with knowledge that children are in the habit of playing in the vicinity of its turn-table, is negligent, where it fails to use reasonable care in guarding and fastening the turn-table, so as to prevent injury to children tempted to play upon it.¹¹² On the question of implied invitation to children to play with the turn-table, evidence of the custom of children to use the turn-table for amusement is admissible.¹¹³

§ 1042. **Owners of Property Leaving Dangerous Objects Unguarded Liable to Trespassing Children.**¹¹⁴

§ 1049. **Theory that a Child of Tender Years cannot be a “Trespasser” for the Purpose of Exonerating the Proprietor.**¹¹⁵

§ 1050. **Invitation to Children to Come upon the Premises.**—The owners of premises have been held liable for injuries to children on the ground that they were at the time on the premises by invitation, express or implied, under such circumstances as these:—Where a dull

¹¹⁰ Powers v. Owego Bridge Co., 97 App. Div. (N. Y.) 477; s. c. 89 N. Y. Supp. 1030; J. I. Case Threshing Mach. Co. v. Burns, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 65.

¹¹¹ Thomason v. Southern R. Co., 113 Fed. Rep. 80; Alabama &c. R. Co. v. Crocker, 131 Ala. 584; s. c. 31 South. Rep. 561; Chicago &c. R. Co. v. Fox, — Ind. —; s. c. 70 N. E. Rep. 81; East Tennessee &c. R. Co. v. Cargille, 105 Tenn. 628; s. c. 59 S. W. Rep. 141; San Antonio &c. R. Co. v. Skidmore, 27 Tex. Civ. App. 329; s. c. 65 S. W. Rep. 215.

¹¹² Edgington v. Burlington &c. R. Co., 116 Iowa 410; s. c. 90 N. W. Rep. 95; 57 L. R. A. 561; Chicago &c. R. Co. v. Kravenbuhl, 65 Neb. 889; s. c. 91 N. W. Rep. 880; 59 L. R. A. 920.

¹¹³ San Antonio &c. R. Co. v. Morgan, 24 Tex. Civ. App. 58; s. c. 58 S. W. Rep. 544.

¹¹⁴ Kopplekom v. Colorado Cement-Pipe Co., 16 Colo. App. 274; s. c. 64 Pac. Rep. 1047; 54 L. R. A. 284 (a heavy piece of cement tubing left on land adjacent to a street, easily rolled even by children); Kelley v. Parker-Washington Co., 107 Mo. App. 490; s. c. 81 S. W. Rep. 631 (a wheel scraper left by a paving contractor without fastening the lever so as to prevent the pan from falling).

¹¹⁵ An electric company cannot claim that an eight-year-old boy was a trespasser because while on a street car he reached through a fence and so came in contact with a charged wire belonging to the company which had been broken for three days to its knowledge and was dangling inside the fence: Lynchburg Telephone Co. v. Bokker, 103 Va. 594; s. c. 50 S. E. Rep. 148.

boy thirteen years of age was permitted to lounge around a railroad pumping station by employes in charge thereof, and while returning to the station from an errand, on which he had been sent by an employé, was scalded by hot water and steam negligently blown off from the station engine;¹¹⁶ where a child of eight years was permitted to enter a factory by the foreman after the owner of the factory, at the request of the child's father, had prohibited the entry of all persons excepting those having business and especially this particular child.¹¹⁷ In another case the owner was exonerated where his engineer had driven the child away, and he was recalled by another employé who asked him to remain.¹¹⁸ The doctrine that the child will not be regarded as a voluntary trespasser where he is attracted to the premises by a dangerous nuisance thereon is without application where the child is not thus enticed but enters the premises solely through the invitation of another person, who is himself on the premises for an unlawful purpose.¹¹⁹

§ 1058. Duty of Owners or Lessees of Buildings having Defective Walls.—Generally speaking, the owner of a wall left standing after the destruction of the building by fire, which cannot be utilized in rebuilding, will be liable for an injury caused by its fall after the expiration of a reasonable time for investigation and removal.¹²⁰ In case the walls are in a dangerous condition but can be utilized in rebuilding, it is the duty of the owner to take such measures as will prevent the walls from falling under ordinary circumstances, or such extraordinary causes as past experience has shown to occur in the locality,¹²¹ and he will not be relieved from liability, where he has failed to take these precautions, by showing that he instructed competent architects and builders to take proper precautionary measures and the fall of the wall resulted from their negligence.¹²² Nor will the owner of such a wall be allowed to postpone measures for the protection of the building by the fact that salvage operations are being conducted in the ruins.¹²³ The owner of a wall will be charged with knowledge of a defect which a reasonable inspection would have revealed.¹²⁴ Reasonable diligence on the part of the owner in acquaint-

¹¹⁶ *Houston &c. R. Co. v. Bulger*, 35 Tex. Civ. App. 478; s. c. 80 S. W. Rep. 557.

¹¹⁷ *Delage v. Delisle*, Rap. Jud. Que. 10 B. R. 481.

¹¹⁸ *Curtis v. Tenino Stone Quarries*, 37 Wash. 355; s. c. 79 Pac. Rep. 955.

¹¹⁹ *Union Stock Yard &c. Co. v. Butler*, 92 Ill. App. 166.

¹²⁰ *Ainsworth v. Lakin*, 180 Mass. 397; s. c. 62 N. E. Rep. 746.

¹²¹ *Reynolds v. Starin*, 50 App. Div. (N. Y.) 535; s. c. 64 N. Y. Supp. 141.

¹²² *Lauer v. Palms*, 129 Mich. 671; s. c. 89 N. W. Rep. 694; 9 Det. Leg. N. 61.

¹²³ *Lauer v. Palms*, 129 Mich. 671; s. c. 89 N. W. Rep. 694; 9 Det. Leg. N. 61.

¹²⁴ *Patterson v. Jos. Schlitz Brewing Co.*, 16 S. D. 33; s. c. 91 N. W. Rep. 336.

ing himself with the condition of his premises is shown where he promptly submits the question of the safety of the wall to experts competent to pass upon the question.¹²⁵

§ 1060. Injuries Caused by Walls Falling upon Adjacent Premises.¹²⁶

§ 1063. Contributory Negligence in Case of Injuries from Falling Walls.—A person will be charged with contributory negligence where he goes upon premises destroyed by fire in search of articles in the ruins, when the risk of falling walls is obvious to a reasonably intelligent person.¹²⁷ An adjoining owner, who has notified the owner of a dangerous standing wall of its insecure condition, has a right to presume that the owner will act on the information, and will not be charged with contributory negligence in not taking means to prevent the wall from falling on his premises.¹²⁸

§ 1064. Liability of Owners of Party Walls.—In a case where a portion of a wall weakened by fire was covered by a party-wall agreement between the adjoining owners, and the injury to the adjoining premises was caused by the fall of a portion of the wall not covered by the agreement, it was the conclusion of the supreme court of Illinois that the adjoining owner was not to be charged with contributory negligence in not taking measures to protect this part of the wall, since he had no right to go on this wall, as he had no ownership in it.¹²⁹

§ 1072. When Municipal Corporation Liable—When not.¹³⁰

§ 1075. Injuries to Trespassers and Bare Licensees from Falling down Open and Unguarded Elevator Shafts.—Under the principle that a trespasser takes the premises as he finds them, the owner of a building is under no common-law obligation to maintain guards about an elevator shaft on his premises to save a trespasser from harm.¹³¹

¹²⁵ Freeman v. Carter, 28 Tex. Civ. App. 571; s. c. 67 S. W. Rep. 527.

¹²⁶ Beidler v. King, 209 Ill. 302; s. c. 70 N. E. Rep. 763; aff'g s. c. 108 Ill. App. 23.

¹²⁷ Haack v. Brooklyn Labor Lyceum Ass'n, 44 Misc. (N. Y.) 273; s. c. 89 N. Y. Supp. 888.

¹²⁸ Beidler v. King, 209 Ill. 302; s. c. 70 N. E. Rep. 763; aff'g s. c. 108 Ill. App. 23.

¹²⁹ Beidler v. King, 209 Ill. 302; s. c. 70 N. E. Rep. 763; aff'g s. c. 108 Ill. App. 23.

¹³⁰ In a case where a child was injured by falling over a sea wall erected by a city in one of its parks, and it appeared that the wall was

in course of construction, and that an iron railing to prevent accidents of the character described was to be erected upon the wall and that this fence was being put up as the condition of the work allowed, it was the conclusion of the court that since the city was not bound to have the railing put in position during the progress of the work, and since the danger was obvious, the city would not be held to have failed to exercise reasonable care in this regard, though the child was impliedly invited on the premises: Albert v. New York, 75 App. Div. (N. Y.) 553; s. c. 78 N. Y. Supp. 355.

¹³¹ Flanagan v. Sanders, 138 Mich.

Even a statute requiring the protection of elevator shafts in stores or buildings does not impose a higher duty in favor of a trespasser.¹³²

§ 1076. Whether Fire Patrols, Letter Carriers, etc., Excluded from Protection under this Rule.¹³³

§ 1077. Negligence in Maintaining Open, Unguarded, and Unlighted Elevator Shafts.—The plaintiff in an action for injuries due to negligence of this character must show that the location of the elevator and its surroundings were such as to make them dangerous, and that he was on the premises by the express or implied invitation of the owner.¹³⁴ There is a *prima facie* case of negligence where the owner of a building fails to comply with statutes requiring safeguards¹³⁵ and this failure is the proximate cause of the accident. In a case where a person fell down an elevator shaft during business hours because the guard chain of the shaft broke when he leaned against it, it was held that he could not recover on the ground that the owner had failed to install trapdoors as required by statute, as the statute in question also provided that the trapdoors need not be closed during business hours.¹³⁶ A provision of a California ordinance that "every opening in a shaft or hoist well within two and a half feet above the floor shall be protected by a rail, gate, door or drop door," is construed as intended for the benefit of any person who might suffer by its failure and not restricted to special classes of persons.¹³⁷ These laws apply to all buildings in which elevators are operated and are not restricted to buildings erected after their enactment.¹³⁸

§ 1078. Degree of Care Required in the Construction and Operation of Passenger Elevators.—The decided weight of modern author-

253; s. c. 101 N. W. Rep. 581; 11 Det. Leg. N. 555.

¹³² Flanagan v. Sanders, 138 Mich. 253; s. c. 101 N. W. Rep. 581; 11 Det. Leg. N. 555.

¹³³ A factory act requiring "all hoistways and elevators in factories to be protected" cannot be availed of by a fireman injured by falling into an unguarded elevator shaft in a factory, as the statute was enacted solely for the benefit of employes: Kelly v. Henry Muhs Co., 71 N. J. L. 358; s. c. 59 Atl. Rep. 23.

¹³⁴ Wilsey v. Jewett Bros. & Co., 122 Iowa 315; s. c. 98 N. W. Rep. 114; H. B. Philips Co. v. Pruitt, — Ky. —; s. c. 82 S. W. Rep. 628; 83 S. W. Rep. 114; 26 Ky. L. Rep. 831, 1105. On the ground of express invitation a recovery was sustained,

where the injured person fell into an elevator shaft in a portion of the premises to which she had been called by the clerk to display some merchandise, though the accident occurred in broad daylight, but in a portion of the store filled with piles of boxes and other merchandise: Smith v. Parkersburg Co-op. Ass'n, 48 W. Va. 232; s. c. 37 S. E. Rep. 645.

¹³⁵ Weiss v. Jenkins, 39 App. Div. (N. Y.) 567; s. c. 57 N. Y. Supp. 708.

¹³⁶ Weinberger v. Kratzenstein, 35 Misc. (N. Y.) 74; s. c. 71 N. Y. Supp. 244.

¹³⁷ Sheyer v. Lowell, 134 Cal. 357; s. c. 66 Pac. Rep. 307.

¹³⁸ Sheyer v. Lowell, 134 Cal. 357; s. c. 66 Pac. Rep. 307.

ity makes no distinction between the duties and liabilities of a carrier by elevator and one by railroad. Both are regarded as common carriers. In this view persons operating elevators for raising and lowering persons in buildings are required to use extraordinary care in and about the operation of such elevators so as to prevent injury to persons therein. This doctrine does not make a carrier by elevator an insurer. It does, however, require that he should use such care, prudence, and caution to prevent injury to passengers as a very careful and prudent person would use and exercise in a like business and under similar circumstances.¹³⁹ This degree of care is sometimes described as the highest degree of care and diligence for the safety of passengers, which is practically consistent with the efficient use and operation of this mode of transportation.¹⁴⁰ This doctrine makes the owner liable for the negligence of the operator without regard to the degree of care exercised in his employment.¹⁴¹ Other weighty authority, having in mind that the owner of the elevator is under no obligation to carry all passengers, refuses to regard the operator of an elevator as a common carrier, and holds him liable only where he fails to exercise ordinary care in its maintenance and operation.¹⁴²

§ 1079. What this Degree of Care Demands of the Proprietor.¹⁴³

¹³⁹ See generally, *Morgan v. Saks*, — Ala. —; s. c. 38 South. Rep. 848; *Chicago Exch. Bldg. Co. v. Nelson*, 197 Ill. 334; s. c. 64 N. E. Rep. 369; aff'g s. c. 98 Ill. App. 189; *Springer v. Ford*, 88 Ill. App. 529; *Springer v. Schultz*, 105 Ill. App. 544; s. c. aff'd, 205 Ill. 144; 68 N. E. Rep. 753; *Western Union Tel. Co. v. Woods*, 88 Ill. App. 375; *H. B. Philips v. Pruitt*, — Ky. —; s. c. 82 S. W. Rep. 628; 83 S. W. Rep. 114; 26 Ky. L. Rep. 831, 1105; *Becker v. Lincoln Real Estate & Co.*, 174 Mo. 246; s. c. 73 S. W. Rep. 581; *Hensler v. Stix*, 113 Mo. App. 162; s. c. 88 S. W. Rep. 108 (duty of court to charge that defendant liable for slight negligence); *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597; s. c. 81 S. W. Rep. 1112; *Edwards v. Burke*, 36 Wash. 107; s. c. 78 Pac. Rep. 610.

¹⁴⁰ *Chicago Exch. Bldg. Co. v. Nelson*, 98 Ill. App. 189; s. c. aff'd, 197 Ill. 334; 64 N. E. Rep. 369.

¹⁴¹ *Lee v. Knapp*, 155 Mo. 610; s. c. 56 S. W. Rep. 458.

¹⁴² *Seaver v. Bradley*, 179 Mass. 329; s. c. 60 N. E. Rep. 795; *Burgess v. Stowe*, 134 Mich. 204; s. c. 96 N. W. Rep. 29; 10 Det. Leg. N. 434;

Griffen v. Manice, 166 N. Y. 188; s. c. 59 N. E. Rep. 925; 52 L. R. A. 922; rev'g s. c. 62 N. Y. Supp. 364; *Griffen v. Manice*, 36 Misc. (N. Y.) 364; s. c. 73 N. Y. Supp. 559; *Huber v. Heide*, 62 App. Div. (N. Y.) 368; s. c. 70 N. Y. Supp. 1115.

¹⁴³ The operator of an elevator was held to have failed to inspect sufficiently, where it appeared that the city inspection occurred three months before the accident, and the inspection of the engineer of the owner of the building on the morning of the accident was superficial and did not include the defect which caused the accident: *Springer v. Ford*, 88 Ill. App. 529. The owner of a building with an elevator was absolved from liability, where the elevator was installed by a reputable firm, and had appliances known to stop the machinery when the car reached the bottom of the shaft, even if the operator of the elevator was remiss in his duties, and inspections were frequent, one having been made only a few hours before the happening of the accident, which was occasioned by an unexplained failure of the machinery to stop, though the car was prop-

§ 1080. Duty to Give Warning of Defects.¹⁴⁴

§ 1081. Injuries Received in Using Freight Elevators.—In jurisdictions holding closest to the theory that an elevator owner is a common carrier, and charged with the obligation to exercise an extraordinary degree of care, there seems no impropriety in a holding that the owner of the building in which a freight elevator is operated, who permits an employé of a tenant to ride thereon in the discharge of his duties, occupies toward such employé the relation of a common carrier of passengers for hire—the hire received being the rent of the building—and must exercise the highest degree of care to prevent injury to such employé.¹⁴⁵ On the question whether the injured employé was rightfully on the elevator at the time of receiving his injuries, it may be shown that it was his custom, as well as the custom of employés of other tenants, to accompany freight being raised or lowered on the elevator.¹⁴⁶ Generally speaking, a less degree of care is required in the maintenance, construction, and operation of freight elevators than is required with passenger elevators, and the owner will ordinarily be held to have discharged his duty where he has exercised ordinary care in the construction of the elevator, has been reasonably prudent and careful in its management, and has used reasonable care in its inspection.¹⁴⁷ Where the injured person is using the elevator for

erly operated: *Griffen v. Manice*, 74 App. Div. (N. Y.) 371; 77 N. Y. Supp. 626; s. c. aff'd, 174 N. Y. 505; 66 N. E. Rep. 1109. In another case the owner of a building was held to have exercised the proper degree of care, where it appeared that he furnished a competent engineer whose duty it was to inspect the elevator each morning, and that the engineer had inspected it the morning before the accident and found it in good condition; that the operator was competent; that during the three years the elevator was in use no accident had ever happened; and that it worked properly immediately after the accident without any repair: *Hubener v. Heide*, 72 App. Div. (N. Y.) 200; s. c. 76 N. Y. Supp. 758.

¹⁴⁴ It is an obvious dictate of prudence which imposes on the owner of premises, on which the unguarded elevator shaft exists, the duty to warn persons invited to enter such premises of the danger from such unguarded shaft: *Massey v. Seller*, 45 Or. 267; s. c. 77 Pac. Rep. 397.

¹⁴⁵ *Springer v. Ford*, 189 Ill. 430;

s. c. 59 N. E. Rep. 953; 52 L. R. A. 930; aff'g s. c. 88 Ill. App. 529.

¹⁴⁶ *Springer v. Ford*, 189 Ill. 430; 59 N. E. Rep. 953; 52 L. R. A. 930; aff'g s. c. 88 Ill. App. 529.

¹⁴⁷ *Springer v. Ford*, 88 Ill. App. 529; *Ford v. Crigler*, 74 S. W. Rep. 661; s. c. 25 Ky. L. Rep. 56; *Connor v. Koch*, 63 App. Div. (N. Y.) 257; s. c. 71 N. Y. Supp. 836 (elevator owner held not liable for injuries while in charge of person to whom he had loaned same). The owner was absolved from liability where the cause of the sudden starting of the elevator was not shown, and it was shown that no similar accident had occurred in four years: *Cleary v. Brooklyn Factory & Co.*, 79 App. Div. (N. Y.) 35; s. c. 79 N. Y. Supp. 1041. A finding that the disarrangement of the mechanism of a freight elevator, which caused the accident, was due to defective construction was justified where it was shown that the elevator was so constructed that it would not come to the top floor of the building in which it was located and that the act of loading freight on that floor caused jarring, which would tend to shift

his own purpose and not as an incident to his employment, he will be regarded as a trespasser when using a freight elevator intended for persons having business on the premises, and the owner will be held only to the duty of avoiding injury to him after his danger is obvious.¹⁴⁸ The mere fact that such a person was allowed to get on the elevator by the permission of the owner's foreman will not change the rule.¹⁴⁹ A printed notice warning persons not to use a freight elevator may be waived;¹⁵⁰ and where waived the owner of the elevator may not claim exemption from liability on the ground that the person injured by the negligent operation of the elevator was a trespasser.

§ 1082. Evidence of Negligence in the Construction, Repair, and Operation of Passenger Elevators.¹⁵¹

§ 1084. Facts to which Negligence has been Imputed.¹⁵²—It is the duty of the operator of an elevator to allow a reasonable time for

the gearing: *Grifhahn v. Kreizer*, 62 App. Div. (N. Y.) 413; s. c. 70 N. Y. Supp. 973; s. c. aff'd, 171 N. Y. 661; 64 N. E. Rep. 1121.

¹⁴⁸ *Kentucky Distilleries & Co. v. Leonard*, — Ky. —; s. c. 79 S. W. Rep. 281; 25 Ky. L. Rep. 2046; *Long v. Mutual Life Ins. Co.*, 66 App. Div. (N. Y.) 91; s. c. 72 N. Y. Supp. 665.

¹⁴⁹ *Kentucky Distilleries & Co. v. Leonard*, — Ky. —; s. c. 79 S. W. Rep. 281; 25 Ky. L. Rep. 2046.

¹⁵⁰ *Kentucky Distilleries & Co. v. Leonard*, — Ky. —; s. c. 79 S. W. Rep. 281; 25 Ky. L. Rep. 2046; *Ball v. Hauser*, 129 Mich. 397; s. c. 89 N. W. Rep. 49; 8 Det. Leg. N. 1014 (evidence held not to show the waiver of notice prohibiting employes from riding on elevator used for hoisting materials used in construction).

¹⁵¹ The doctrine of *res ipsa loquitur* applies to injuries the result of a fall of an elevator: *Winheim v. Field*, 107 Ill. App. 145. On the issue whether the owner of a building controlled an elevator therein, which contention he denied, evidence is admissible that shortly before the accident he had procured an indemnity insurance policy against accidents from the operation of the elevator, and that this insurance was in force at the time of the accident in question; *Perkins v. Rice*, 187 Mass. 28; s. c. 72 N. E. Rep. 323. The plaintiff has the burden of showing that his in-

jury occasioned by the defective working of an elevator resulted from the defendant's negligence: *Griffen v. Manice*, 74 App. Div. (N. Y.) 371; s. c. 77 N. Y. Supp. 626; s. c. aff'd, 174 N. Y. 505; 66 N. E. Rep. 1109.

¹⁵² The owners or keepers of elevators have been charged with negligence under these circumstances: —Where the superintendent of a building knew of the presence of a plasterer at work in an elevator shaft, and the plasterer was injured by running the elevator down upon him, and this though the superintendent had given directions to the operator not to run the elevator below the floor under which the plasterer was at work (*Siegel & Co. v. Norton*, 209 Ill. 201; s. c. 70 N. E. Rep. 636); where the owner suffered a metal projection to protrude from the floor directly in front of the open side of an elevator cage, and a passenger's dress was caught on the obstruction and she was injured (*Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597; s. c. 81 S. W. Rep. 1112); where a painter at work on the inside of an elevator shaft was struck by a descending counterweight, and the operator did not give the customary warnings (*Hanner v. Reed Apartment & Co.*, 68 N. J. L. 332; s. c. 53 Atl. Rep. 402); where a passenger was pinned in the elevator door and the elevator started, and the operator, on discovering the passenger's peril, lowered

passengers to enter and leave the car with safety, and he must use reasonable care to ascertain if there are persons in the act of getting off, before starting the car, after he has stopped to allow persons to alight.¹⁵³ It is not necessary for every passenger desiring to get off at a particular floor to announce that fact; it is sufficient if one person directs the operator to stop, and it is his duty then to stop long enough for the passenger giving the direction and any other person, who desires so to do, to alight.¹⁵⁴ The conclusion from these statements is that it is negligence for an operator to start an elevator before a passenger has a reasonable time to enter or to alight.¹⁵⁵

§ 1085. Facts not Regarded as Raising an Imputation of Negligence.—The mere fact that the operator opens the elevator door before reaching the floor at which a person desires to alight, does not constitute an invitation to such person to alight before the elevator had stopped.¹⁵⁶ Another court has held that the owner of an elevator was not to be charged with negligence by the mere fact that he permitted a movable stool to remain in the elevator for the convenience of the operator. In the case announcing this principle a passenger was injured by the premature starting of the elevator on account of the operator clutching the lever in an effort to regain his balance when falling, by reason of the seat having been removed without his knowledge. It was held that the injuries were caused by an accident for which no recovery could be had.¹⁵⁷

§ 1086. When Contributory Negligence Ascribed to the Person Injured.¹⁵⁸—Here as elsewhere an injured person may not recover

the car and crushed him between the floor and the roof of the car (Luckel v. Century Bldg. Co., 177 Mo. 608; s. c. 76 S. W. Rep. 1035); where the operator failed to close the elevator door and a boy five years old caught hold of the elevator as it arose and hung there while the elevator moved up and down until he fell into the elevator well and was killed (Hayes v. Pitts-Kimball Co., 183 Mass. 262; s. c. 67 N. E. Rep. 249).

¹⁵³ Becker v. Lincoln Real Estate &c. Co., 174 Mo. 246; s. c. 73 S. W. Rep. 581.

¹⁵⁴ Becker v. Lincoln Real Estate &c. Co., 174 Mo. 246; s. c. 73 S. W. Rep. 581; Roulo v. Minot, 132 Mich. 317; s. c. 93 N. W. Rep. 870; 9 Det. Leg. N. 619.

¹⁵⁵ Chicago Exch. Bldg. Co. v. Nelson, 197 Ill. 334; s. c. 64 N. E. Rep. 369; aff'g s. c. 98 Ill. App. 189; Ma-

sonic &c. Ass'n v. Collins, 210 Ill. 482; s. c. 71 N. E. Rep. 396; aff'g s. c. 110 Ill. App. 504; Blackwell v. O'Gorman Co., 22 R. I. 638; s. c. 49 Atl. Rep. 28.

¹⁵⁶ Bullock v. Butler Exch. Co., 24 R. I. 50; s. c. 46 Atl. Rep. 273.

¹⁵⁷ Gibson v. International Trust Co., 186 Mass. 454; s. c. 72 N. E. Rep. 70.

¹⁵⁸ Contributory negligence has been held a defense, where the plaintiff attempted to alight while an elevator was in motion and before it had reached the floor of his destination (Bullock v. Butler Exch. Co., 24 R. I. 50; s. c. 46 Atl. Rep. 273); where a licensee using a freight elevator stepped off a platform into an unguarded place between an elevator and the wall of the shaft without looking, the dangerous condition being perfectly apparent (Gray v. Siegel-Cooper Co.,

where his own negligence contributed directly or proximately to the injury complained of.¹⁵⁰

§ 1088. Facts to which Contributory Negligence has Not been Ascribed.—One entering or leaving an elevator is not required to stop, look or listen before passing through a door opened by the elevator operator.¹⁶⁰ So, the fact of entering an elevator, which is apparently at rest and with the door open, and which the passenger had no reason to suppose could be started until the door is closed, will not charge such a person with negligence, as a matter of law, though the elevator is slowly moving at the time.¹⁶¹ Where the portion of the building in which an elevator shaft is located is poorly lighted, a person injured by falling therein will not be charged with contributory negligence merely by reason of his failure to carry a light while crossing the floor.¹⁶²

§ 1089. Circumstances under which Contributory Negligence was for the Jury.¹⁶³

78 App. Div. (N. Y.) 118; s. c. 79 N. Y. Supp. 813); where a passenger on a combined freight and passenger elevator, with knowledge that the car passed within a short distance of a lintel and that the car was without guard or rail on that side, thoughtlessly stood in such a position that his heel was caught between a car and the lintel as the elevator passed that point (Beidler v. Branshaw, 200 Ill. 425; s. c. 65 N. E. Rep. 1086; rev'g s. c. 102 Ill. App. 187); where a person, intending to load goods on an elevator, asked the operator to lower the elevator to the level of the floor on which he stood and carelessly allowed his foot to get in the path of the descending elevator (Bromberg v. Friend, 72 App. Div. (N. Y.) 633; s. c. 76 N. Y. Supp. 1010; aff'g s. c. 67 N. Y. Supp. 698); where a licensee in poorly lighted premises with which he was unfamiliar, walked into an elevator shaft without taking note of the surroundings (Bentley v. Loverock, 102 Ill. App. 166; Daley v. Kinsman, 182 Mass. 306; s. c. 65 N. E. Rep. 385; McCarvel v. Sawyer, 173 Mass. 540; s. c. 54 N. E. Rep. 259; Massey v. Seller, 45 Or. 267; s. c. 77 Pac. Rep. 397); where a person on the premises of another and unfamiliar with his surroundings, heedlessly opened an elevator door

and stepped into an elevator shaft (Rhodius v. Johnson, 24 Ind. App. 401; s. c. 56 N. E. Rep. 942); where a person familiar with the method of operating a hotel elevator without looking opened an elevator door that was left partially open, and stepped into an open elevator shaft (Bremer v. Pleiss, 121 Wis. 61; s. c. 98 N. W. Rep. 945); where a person employed in the construction of a building and familiar with the location of a temporary elevator, entered the building after dark to get his pay, and returning through the building walked into the elevator shaft without looking to see whether the elevator was in position (Kennedy v. Friederich, 168 N. Y. 379; s. c. 61 N. E. Rep. 642; rev'g s. c. 61 N. Y. Supp. 1140).

¹⁵⁰ Becker v. Lincoln Real Estate & Co., 174 Mo. 246; s. c. 73 S. W. Rep. 581.

¹⁶⁰ Chicago Exch. Bldg. Co. v. Nelson, 98 Ill. App. 189; s. c. aff'd, 197 Ill. 334; 64 N. E. Rep. 369.

¹⁶¹ Blackwell v. O'Gorman, Co., 22 R. I. 638; s. c. 49 Atl. Rep. 28.

¹⁶² Glaser v. Rothschild, 106 Mo. App. 418; s. c. 80 S. W. Rep. 332.

¹⁶³ The courts of Canada regard it as a question for the jury whether a person riding in an elevator is guilty of negligence in attempting to alight after the operator has started to close the door and set

§ 1090. **Instructions to Juries in these Cases.**¹⁶⁴—A charge that the owner of an elevator is subject to the same rules and laws concerning negligence as are applicable to common carriers should state the particular rules referred to.¹⁶⁵ A charge on the effect of the violation of a statute requiring the maintenance of protecting appliances on an elevator was sustained, though the declaration did not refer to the statute in express language, but the manner in which the accident happened was clearly set out, and the thing alleged as the cause of the accident was that which a compliance with the statute would have prevented and this allegation was abundantly supported by the evidence.¹⁶⁶

§ 1095. **Constructor of Elevator not Liable to Customers of his Vendee, or to Third Persons, for Defects Therein.**—By reason of the lack of privity between the parties the courts generally hold that the contractor installing an elevator in a mercantile building for the accommodation of customers owes no duty to these customers; his obligation is solely to the person with whom he directly contracts.¹⁶⁷ It is certain that he cannot be held liable unless it is shown that he knew of the defects. Mere allegations in a declaration that he knew or by the exercise of ordinary care could have known of the defects have been held insufficient.¹⁶⁸

§ 1096. **Liability as Between Lessor and Lessee for Defects in an Elevator.**—A landlord furnishing a freight elevator for the joint use of his tenants is bound to exercise reasonable care toward such tenants and their employés to see that the elevator is safe.¹⁶⁹ The employé of a tenant, whose duty requires him to accompany freight carried on the elevator, is not a mere licensee to whom the owner of the building the elevator in motion: *Hawley v. Wright*, 34 N. S. 365.

¹⁶⁴ An instruction is faulty which is without support in the evidence. The principle was violated in a case where the evidence showed that the plaintiff was pushed off the elevator by the servant operating it, or that she tried to board it after it started with its doors nearly closed and was knocked off while clinging to it in its upward ascent, and the instruction was given on the hypothesis that the operator of the elevator allowed the elevator to be started up and caused the plaintiff to be pushed or fall from the elevator: *Hutchinson v. Reliance Realty Co.*, 88 Mo. App. 614.

¹⁶⁵ *Masonic &c. Ass'n v. Collins*,

210 Ill. 482; s. c. 71 N. E. Rep. 396; aff'g s. c. 110 Ill. App. 504.

¹⁶⁶ *Bullock v. Butler Exch. Co.*, 24 R. I. 50; s. c. 52 Atl. Rep. 122.

¹⁶⁷ *Field v. French*, 80 Ill. App. 78. But see *Kahner v. Otis Elevator Co.*, 96 App. Div. (N. Y.) 169; s. c. 89 N. Y. Supp. 185, where a contractor for the repair of an elevator was held liable for an injury to a passenger by reason of faulty repair.

¹⁶⁸ *Simons v. Gregory*, — Ky. —; s. c. 85 S. W. Rep. 751; 27 Ky. L. Rep. 509.

¹⁶⁹ *Rhodius v. Johnson*, 24 Ind. App. 401; s. c. 56 N. E. Rep. 942; *Bogendoerfer v. Jacobs*, 97 App. Div. (N. Y.) 355; s. c. 89 N. Y. Supp. 1051; *Burner v. Higman & Skinner Co.*, 127 Iowa 580; s. c. 103 N. W. Rep. 802.

owes no duty to see that the elevator is in good condition.¹⁷⁰ Under the doctrine which makes an elevator owner a common carrier a provision in a lease that the landlord will not be liable for damages occasioned by the failure to repair the elevator will not prevent recovery by an employé of the tenant who was not a party to the lease. The landlord can limit his liability only by express contract with the employé.¹⁷¹

§ 1097. **Liability for Injuries from Dumb-Waiters.**—A landlord's knowledge of the existence of defects in a dumb-waiter will be presumed where the fact would have been discovered by a proper inspection and this more particularly where his agent has been notified of the defects.¹⁷² A tenant in a tenement house was held not chargeable with negligence in using a dumb-waiter to elevate supplies, where the dumb-waiter was so arranged in the cellar that people delivering goods could come in the cellar and use it, and it was for the use of anybody coming into the cellar and wanting to send supplies to the upper floors.¹⁷³ A retail ice dealer was imputed with contributory negligence where it appeared that he was notified by the janitor of the house that the dumb-waiter used to elevate ice was in a dangerous condition on account of the bottom being rotten, and notwithstanding this knowledge, he used it daily and some time afterwards was injured by its fall while he was attempting to pull it down from an upper floor.¹⁷⁴

§ 1101. **Rule of the Common Law Touching the Right of the Owner of Land to its Lateral Support.**—The right to lateral support under the common law pertains to the ground itself in its natural

¹⁷⁰ *Springer v. Ford*, 88 Ill. App. 529. Where lessees of a portion of a building containing a freight elevator, which they were entitled to use in common with other tenants of the building, but which they had not covenanted to repair, stored goods therein for hire, they impliedly authorized the servants of the owner of the goods to use the premises to remove them, and were therefore liable for injuries to one of such servants caused by the negligent failure to properly guard the elevator shaft: *Burner v. Higman & Co.*, 127 Iowa 580; s. c. 103 N. W. Rep. 802.

¹⁷¹ *Springer v. Ford*, 189 Ill. 430; s. c. 52 L. R. A. 930; 59 N. E. Rep. 953; aff'g s. c. 88 Ill. App. 529. So, a clause in a lease exempting the owner from liability for injuries arising from the operation of the

elevator therein or the negligence of any person, though attested by an officer of a corporation leasing the premises, was held not to preclude this officer from recovering for injuries due to the negligent operation of the elevator, as this clause was clearly without application to the personal rights of the officers and employés of the lessee: *Griffen v. Manice*, 166 N. Y. 188; s. c. 59 N. E. Rep. 925; 52 L. R. A. 922; rev'g s. c. 62 N. Y. Supp. 364.

¹⁷² *Hirtenstein v. Farrell*, 34 Misc. (N. Y.) 515; s. c. 69 N. Y. Supp. 886; aff'g s. c. 68 N. Y. Supp. 1140.

¹⁷³ *Vandecar v. Universal Trust*

Co., 80 App. Div. (N. Y.) 274; s. c. 80 N. Y. Supp. 290.

¹⁷⁴ *McGuire v. Board*, 58 App. Div. (N. Y.) 388; s. c. 68 N. Y. Supp. 1026; s. c. aff'd, 171 N. Y. 672; 64 N. E. Rep. 1123.

state without incumbering buildings or improvements,¹⁷⁵ unless these structures do not add to the lateral pressure on the lands excavated.¹⁷⁶

§ 1103. **Right to Lateral Support with Superimposed Structures Acquired by Prescription.**¹⁷⁷

§ 1105. **Relative Rights of Owner of Artificially Weighted Soil and Adjoining Owner.**¹⁷⁸

§ 1107. **Rights may be Varied by Agreements between the Parties.**—The fact that the excavation, which injured the wall and damaged the property of a lessee of the building inclosed by the wall, was made by the adjoining owner with the knowledge and consent of the owner and lessor of the building, has been held not to affect the right of the lessee to recover damages from the adjoining owner for the destruction of his property.¹⁷⁹ In a case where the owner of land wrote his adjacent owner that he intended to excavate, and asked him to provide a lateral support for a portion of his wall, but stated that he would leave sufficient earth to protect the remaining part, it was held that the adjacent owner was entitled to maintain an action against the excavator for injuries arising from his failure to leave the earth necessary to protect the wall in accordance with his agreement, the court taking the view that the land-owner had a right to rely upon the voluntary promise of his neighbor.¹⁸⁰

§ 1108. **Right of Excavating Owner to Shore up and Charge Adjoining Owner with Cost.**—In accordance with the foregoing statements of doctrine, the cost of shoring up, underpinning, or taking whatever precautions will be needed to prevent injury to adjacent structures from excavating when carefully done, will fall on the owner of the structures.¹⁸¹ Many of the States regulate the matter by statute.¹⁸²

¹⁷⁵ *Carpenter v. Reliance Realty Co.*, 103 Mo. App. 480; s. c. 77 S. W. Rep. 1004. See also, *Joliet v. Schroeder*, 92 Ill. App. 68; *Kramer v. Northern Hotel Co.*, 185 Ill. 612; s. c. 57 N. E. Rep. 847; aff'g s. c. 85 Ill. App. 264.

¹⁷⁶ *White v. Tebo*, 43 App. Div. (N. Y.) 418; s. c. 60 N. Y. Supp. 231.

¹⁷⁷ The question of this right of easement should be pleaded: *Payne v. Moore*, 31 Ind. App. 360; s. c. 66 N. E. Rep. 483; 67 N. E. Rep. 1005.

¹⁷⁸ For an injury resulting to anything which has been placed on the land, caused by the removal of the soil of the adjacent land, the excavator is not liable unless the re-

moval of the soil was done in a negligent manner: *Pullan v. Stallman*, 70 N. J. L. 10; s. c. 56 Atl. Rep. 116; *Serio v. Murphy*, 99 Md. 545; s. c. 58 Atl. Rep. 435.

¹⁷⁹ *Payne v. Moore*, 31 Ind. App. 360; s. c. 66 N. E. Rep. 483; 67 N. E. Rep. 1005.

¹⁸⁰ *Delaney v. Bowman*, 82 Mo. App. 252.

¹⁸¹ *Carpenter v. Reliance Realty Co.*, 103 Mo. App. 480; s. c. 77 S. W. Rep. 1004.

¹⁸² The Pennsylvania statute of 1893 (P. L. 360), providing that an owner desiring to excavate more than ten feet must protect the wall of an adjoining owner at his own

§ 1109. **Negligent Exercise of the Right to Excavate in One's Own Soil.**—Though the owner of land adjoining that of another has a right to excavate on his premises even up to his neighbor's line, on giving notice, yet he must use ordinary care and reasonable precaution to sustain the land of his neighbor.¹⁸³ The fact that a lot intervened between the excavation and the lot injured by the excavation will not, as a matter of law, relieve the excavator from the duty to protect the property where he also owned the intervening lot, but the jury may consider this matter of distance, in connection with the tendency of the ground to crumble, on the question of the negligence of the excavator.¹⁸⁴ In an action for negligence in permitting an excavation to exist for a long period of time to the injury of the adjoining owner through the collection of a body of water in the excavation, which seeped through the earth to the adjoining owner's premises and froze, it is not essential to good pleading to charge the excavator with willfulness and malice.¹⁸⁵

§ 1110. **Degree of Care Demanded of the Land-Owner.**—The excavator of a lot adjacent to a building is bound to use only reasonable and ordinary care to prevent injury to the building.¹⁸⁶ Where the excavation is to be deeper than the foundation of the building, the excavator should notify his neighbor of this fact, and allow him a reasonable opportunity to protect his property.¹⁸⁷

§ 1113. **Questions for the Jury in these Cases.**¹⁸⁸

expense, is held to apply only to buildings other than dwelling houses erected after passage of the act: *Wadasz v. Arcade Real Estate Co.*, 206 Pa. 539; s. c. 56 Atl. Rep. 46. The New York act of 1855, making it the duty of the excavator where he digs more than ten feet below the curb to protect at his own expense adjacent premises, if afforded a license to enter upon such premises and not otherwise, does not authorize the adjacent landowner to impose as a condition of entry on his premises that a licensee should protect plumbing thereon from freezing: *Kor. v. Weir*, 88 N. Y. Supp. 976. Under a similar provision in the New York Building Code, it is held that a person requesting a license to shore up adjacent premises is estopped to say that he did not intend to go to a depth of more than ten feet, and this though his application filed with the proper bureau provided for an excavation of only five feet

and the wall of the adjoining building fell before the excavation had reached ten feet: *Blanchard v. Savarese*, 97 App. Div. (N. Y.) 58; s. c. 89 N. Y. Supp. 664.

¹⁸³ *Bass v. West*, 110 Ga. 698; s. c. 36 S. E. Rep. 244; *Wilkins v. Grant*, 118 Ga. 522; s. c. 45 S. E. Rep. 415.

¹⁸⁴ *Witherow v. Tannehill*, 194 Pa. St. 21; s. c. 44 Atl. Rep. 1088.

¹⁸⁵ *Garvy v. Coughlan*, 92 Ill. App. 582.

¹⁸⁶ *Serio v. Murphy*, 99 Md. 545; s. c. 58 Atl. Rep. 435 (the mere fact that the wall cracked while the work of excavation was in progress held not to raise a presumption of negligence by the excavator).

¹⁸⁷ *Gerst v. St. Louis*, 185 Mo. 191; s. c. 84 S. W. Rep. 34; *Carpenter v. Reliance Realty Co.*, 103 Mo. App. 480; s. c. 77 S. W. Rep. 1004; *Davis v. Summerfield*, 131 N. C. 352; s. c. 42 S. E. Rep. 818.

¹⁸⁸ The question of negligence was held for the jury, where there was evidence that the braces intended.

§ 1114. Damages Recoverable for the Unlawful Deprivation of Such Support.—Where the excavator is free from negligence in his method of making the excavation, his liability in damages for depriving his neighbor of lateral support is limited to the injury to the land, without regard to the buildings or structure thereon.¹⁸⁹ Where he fails to notify his neighbor of his intention to excavate, the jury may deduct from the amount they are authorized to find for the plaintiff such amount as they believe he would have been compelled to pay, in order to prevent injury to his building, if he had received timely notice of the proposed excavation.¹⁹⁰

§ 1119. Right to Lateral Support of Land under Civil Code of California, Affirming Common Law.¹⁹¹

§ 1121. Contributory Negligence of Injured Land-Owner.—The owner of a lot, whose lateral support is threatened, is required on his part to exercise reasonable care to preserve his property from injury, and will not be allowed to recover for injuries that could have been avoided by the use of this care. He cannot recover where his failure to exercise reasonable care has contributed to bring about the injury complained of.¹⁹²

§ 1122. Remedy by Injunction.—The owner of land may resort to injunction to restrain an excavation on an adjoining lot tending to deprive his land of lateral support in its natural state.¹⁹³

to hold the ground near the top of the excavation were of insufficient strength, and that no attempt was made, by shoring or otherwise, to hold in place the earth at the side near the bottom of the excavation: *Witherow v. Tannehill*, 194 Pa. St. 21; s. c. 44 Atl. Rep. 1088.

¹⁸⁹ *Jones v. Greenfield*, 25 Pa. Super. Ct. 315.

¹⁹⁰ *Gerst v. St. Louis*, 185 Mo. 191; s. c. 84 S. W. Rep. 34.

¹⁹¹ The section of the Civil Code set out in this section of the main work is construed to cover any excavation on the lot and is not limited to excavations immediately adjoining a building on such adjoining lot: *Nippert v. Warneke*, 128 Cal. 501; s. c. 61 Pac. Rep. 96.

¹⁹² *Carpenter v. Reliance Realty Co.*, 103 Mo. App. 480; s. c. 77 S. W. Rep. 1004. Thus, where the act of an adjacent owner in digging on his own lot tended to deprive it of its cohesive force, and contributed to its fall on being deprived of its lateral support by an excavation on

an adjoining lot, he was refused a recovery for the damages so caused: *Gillies v. Eckerson*, 97 App. Div. (N. Y.) 153; s. c. 89 N. Y. Supp. 609. So, where an excavator removed the lateral support from the land of an adjoining owner, and such person went near the excavation knowing that his land had been deprived of its support, and suffered injuries by reason of the land giving way under his weight, his act in taking the risk was held such negligence as to preclude a recovery for his injuries: *Pullan v. Stallman*, 70 N. J. L. 10; s. c. 56 Atl. Rep. 116. So, generally, where a lot owner fails to take measures to protect his buildings after receiving notice of a contemplated excavation on an adjoining lot, he will be deprived of his right to recover for injury to his structure where the excavation is made with ordinary care: *Serio v. Murphy*, 99 Md. 545; s. c. 58 Atl. Rep. 435.

¹⁹³ *Gillies v. Eckerson*, 97 App. Div. (N. Y.) 153; s. c. 89 N. Y.

§ 1124. Liability for Removing the Subjacent Support of Land.¹⁹⁴

§ 1125. **Liability for Removing Party-Wall.**¹⁹⁵—The fact that a line wall is covered by a party-wall agreement will not relieve an adjoining owner from liability for injuries resulting from the collapse of the wall by reason of a negligent excavation on his lot.¹⁹⁶

§ 1126. Rights of Grantees of State.¹⁹⁷

§ 1130. **No Implied Covenant that Premises are in a Fit Condition—No Liability on the part of the Landlord to the Tenant for Non-Repair.**—In an ordinary contract of leasing the law does not imply any guaranty on the part of the landlord that the leased premises are in a safe or habitable condition. The lessor takes the premises as he finds them unless he has an express contract with the lessor for repairs.¹⁹⁸

Supp. 609. So, injunction was held the proper remedy in a case where it appeared that the excavation of sand from a portion of the seashore by the owner thereof would, by the law of gravitation, and by wave motion, result in the removal of the adjoining soil of another person, and that this latter removal would expose the land of the complaining party to the action of the waves: *Murray v. Pannaci*, 64 N. J. Eq. 147; s. c. 53 Atl. Rep. 595; s. c. aff'd, 67 N. J. Eq. 724; 57 Atl. Rep. 1132.

¹⁹⁴ *Trinidad Asphalt Co. v. Ambard*, [1899] App. Cas. 594; s. c. 68 L. J. P. C. 114; 81 L. T. (N. S.) 132; 48 Wkly. Rep. 116 (doctrine applied to the withdrawal of pitch or other liquefying substance); *Jordeson v. Sutton & Co. Gas Co.*, [1899] 2 Ch. 217; s. c. 68 L. J. Ch. 457; 80 L. T. (N. S.) 815; 63 J. P. 692 (silt).

¹⁹⁵ In a Virginia case the right of the owner of an adjoining building to tear away a partition wall in which were communicating doors, was sustained on the ground that the property owner was entitled to pull down his building and was liable only for negligence in performing the work: *Fisher v. Seaboard Air Line R. Co.*, 102 Va. 363; s. c. 46 S. E. Rep. 381.

¹⁹⁶ *Payne v. Moore*, 31 Ind. App. 360; s. c. 66 N. E. Rep. 483; 67 N. E. Rep. 1005.

¹⁹⁷ The grant by the State of land inside the permanent bulkhead line, to be used for commercial purposes,

does not carry with it authority to the grantee to excavate a dry dock on such land without regard to injuries to adjoining owners: *White v. Tebo*, 43 App. Div. (N. Y.) 418; s. c. 60 N. Y. Supp. 231.

¹⁹⁸ *Gallagher v. Button*, 73 Conn. 172; s. c. 46 Atl. Rep. 819 (jury should consider the fact of long occupancy of premises as bearing on the opportunity of the tenant to observe unsafe conditions); *Schwalbach v. Shinkle & Co.*, 97 Fed. Rep. 483; *Gately v. Campbell*, 124 Cal. 520; s. c. 57 Pac. Rep. 567; *Carpenter v. Stone*, 112 Ill. App. 155; *Lazarus & Cohen v. Parmly*, 113 Ill. App. 624; *Merchants' Loan & Trust Co. v. Boucher*, 115 Ill. App. 101; *Roehrs v. Timmons*, 28 Ind. App. 578; s. c. 63 N. E. Rep. 481; *Flaherty v. Nieman*, 125 Iowa 546; s. c. 101 N. W. Rep. 280; *Bennett v. Sullivan*, 100 Me. 118; s. c. 60 Atl. Rep. 886; *Galvin v. Beals*, 187 Mass. 250; s. c. 72 N. E. Rep. 969; *Phelan v. Fitzpatrick*, 188 Mass. 237; s. c. 74 N. E. Rep. 326; *Cooper v. Lawson*, 139 Mich. 628; s. c. 103 N. W. Rep. 168; 12 Det. Leg. N. 34; *Rhoades v. Seidel*, 139 Mich. 608; s. c. 102 N. W. Rep. 1025; 12 Det. Leg. N. 17; *Whitely v. McLaughlin*, 183 Mo. 160; s. c. 81 S. W. Rep. 1094; *Roberts v. Cotty*, 100 Mo. App. 500; s. c. 74 S. W. Rep. 886; *Cate v. Blodgett*, 70 N. H. 316; s. c. 48 Atl. Rep. 281; *Land v. Fitzgerald*, 68 N. J. L. 28; s. c. 52 Atl. Rep. 229; *Lyon v. Buerman*, 70 N. J. L. 620; s. c. 57 Atl. Rep. 1009; *Klausner v. Her-*

In the case of latent defects of which the tenant has equal opportunities of knowledge with the landlord, the doctrine of *caveat emptor* will apply.¹⁹⁹ Where a tenant has knowledge of the defects which cause his injury, he may not recover damages for these injuries, even though the landlord had promised to make the repairs, but failed to do so.²⁰⁰ The voluntary attempt of the landlord to make repairs on the leased premises is not an admission of liability for the condition of the premises rendering him liable for injuries caused by defects.²⁰¹ A statute requiring a lessor of a building intended for the occupation of human beings to put the premises in condition for such occupation and repair all subsequent dilapidations, except those occasioned by the negligence of the tenant, is held not to apply to a building let for store or manufacturing purposes.²⁰²

ter, 36 Misc. (N. Y.) 869; s. c. 74 N. Y. Supp. 924 (damages to tenant's goods from leaky roof); *Boden v. Scholtz*, 101 App. Div. (N. Y.) 1; s. c. 91 N. Y. Supp. 437 (damages by fall of ceiling); *Kennedy v. Fay*, 31 Misc. (N. Y.) 776; s. c. 65 N. Y. Supp. 202; *Prahar v. Tousey*, 93 App. Div. (N. Y.) 507; s. c. 87 N. Y. Supp. 845; *Weber v. Lieberman*, 47 Misc. (N. Y.) 593; s. c. 94 N. Y. Supp. 460; *Weinkrantz v. Callahan*, 32 Misc. (N. Y.) 715; s. c. 65 N. Y. Supp. 546; *Anderson v. Steirerich*, 32 Misc. (N. Y.) 237; s. c. 65 N. Y. Supp. 799; s. c. rev'd, 66 N. Y. Supp. 498; *Cartier v. Durocher*, *Rap. Jud. Que.* 22 C. S. 255; *Tredway v. Machin*, 91 L. T. 310; s. c. 53 Wkly. Rep. 136; 20 Times L. R. 726. A tenant was denied a recovery against his landlord for personal injuries caused by the removal of steps for the purpose of making necessary repairs, the condition of the premises being well known to the tenant before and at the time of the injury: *Alexander v. Rhodes*, 104 Ga. 807; s. c. 30 S. E. Rep. 968. A landlord is not under obligation to disclose apparent defects in the premises which are equally within the knowledge of the defendant: *Borggard v. Gale*, 107 Ill. App. 128; s. c. aff'd, 205 Ill. 511; 68 N. E. Rep. 1063. A landlord who had agreed with his tenant to supply a dwelling with water, and the water was supplied in a cellar which was dark, and by reason of defects in the pipes water escaped and formed ice, which caused the tenant's injury,

was held not liable, since there was no duty on his part to keep the pipes in a suitable condition: *Whitehead v. Comstock & Co.*, 25 R. I. 423; s. c. 56 Atl. Rep. 446.

¹⁹⁹ *Ocean S. S. Co. v. Hamilton*, 112 Ga. 901; s. c. 38 S. E. Rep. 204; *Bennett v. Sullivan*, 100 Me. 118; s. c. 60 Atl. Rep. 886; *Smith v. Donnelly*, 45 Misc. (N. Y.) 447; s. c. 92 N. Y. Supp. 43; *Shinkle Co. v. Birney & Seymour*, 68 Ohio St. 328; s. c. 67 N. E. Rep. 715; 23 Ohio C. C. R. 525. An instruction that it was the duty of the landlord, in renting the premises, to use reasonable care to see that they were not in a dangerous condition, and to comply with the statutory regulation requiring fire escapes, and that if, when renting the premises, he knew, or by the exercise of reasonable care should have known that a fire escape was in a dangerous condition, he was liable for the injury caused by its fall, was erroneous, since it placed the duty of exercising reasonable diligence in discovering dangerous defects wholly on the lessor: *Gallagher v. Button*, 73 Conn. 172; s. c. 46 Atl. Rep. 819.

²⁰⁰ *Hedekin v. Gillespie*, 33 Ind. App. 650; s. c. 72 N. E. Rep. 143; *Shackford v. Coffin*, 95 Me. 69; s. c. 49 Atl. Rep. 57.

²⁰¹ *Phelan v. Fitzpatrick*, 188 Mass. 237; s. c. 74 N. E. Rep. 326; *Galvin v. Beals*, 187 Mass. 250; s. c. 72 N. E. Rep. 969.

²⁰² *Tucker v. Bennett*, — Okla. —; s. c. 81 Pac. Rep. 423.

§ 1131. But Landlord may Become Liable to Tenant in Case of Fraud or Concealment.—A landlord who knows that the premises which he is about to let are defective and in a dangerous condition, and such dangerous or defective condition is not obvious, or is not discoverable by the tenant by the exercise of ordinary care, will be liable for damages where he does not inform the tenant of this fact, and injury is occasioned thereby to the tenant or a member of his family, who is not aware of such defective or dangerous condition.²⁰³ In the absence of actual knowledge of a latent structural defect, a landlord will be liable only where he fails to exercise reasonable care in acquainting himself with the condition of the premises he lets.²⁰⁴ But the mere fact that a careful inspection of the premises by the landlord would have disclosed the defect has been held not sufficient to charge him with deceit. The tenant is charged with the duty of inspection on his own behalf.²⁰⁵

§ 1132. Landlord must not Expose Tenant to Hidden Dangers on Landlord's Own Premises.²⁰⁶

§ 1133. Rule which Exonerates Landlord Applied against Servants, Guests, and Others Entering Under Tenant's Title.²⁰⁷

²⁰³ *Borggard v. Gale*, 107 Ill. App. 128; s. c. aff'd, 205 Ill. 511; 68 N. E. 1063; *Fowler Cycle Works v. Fraser & Chalmers*, 110 Ill. App. 126; *Lazarus & Cohen v. Parmly*, 113 Ill. App. 624; *Watson v. Moulton*, 100 Ill. App. 560; *Moore v. Parker*, 63 Kan. 52; s. c. 64 Pac. Rep. 975; 53 L. R. A. 778; *Franklin v. Tracy*, 117 Ky. 267; s. c. 77 S. W. Rep. 1113; 78 S. W. Rep. 1112; 25 Ky. L. Rep. 1409, 1909; 63 L. R. A. 649; *Schoppel v. Daly*, 112 La. 201; s. c. 36 South. Rep. 322; *Shackford v. Coffin*, 95 Me. 69; s. c. 49 Atl. Rep. 57. A landlord was held liable for injuries to the servant of a lessee by reason of a fall of an elevator, where a defect in the apparatus was known to the owner, but could have been discovered by the lessee only by taking off a clamp which hid the defect: *Anderson v. Hayes*, 101 Wis. 538; s. c. 77 N. W. Rep. 891. The failure of a landlord to reveal dangerous conditions of the premises to a prospective tenant may amount to such culpable neglect of duty as to afford ground for action by the tenant against the landlord in case the tenant suffers injury because of these conditions:

Howell v. Schneider, 24 App. (D. C.) 532.

²⁰⁴ *Smith v. Donnelly*, 93 App. Div. (N. Y.) 569; s. c. 87 N. Y. Supp. 893.

²⁰⁵ *Howell v. Schneider*, 24 App. (D. C.) 532.

²⁰⁶ The rule of the section in the main title is inapplicable to a case where the landlord donates to his tenant the use of a portion of the premises not included in the demise. This principle has found application in a case where a landlord permitted his tenant to use the roof of an adjacent shed for drying clothes, with the conclusion that the landlord was not liable for an injury to the tenant caused by a collapse of the roof as a donation of the use of this property would not of itself impose upon the landlord an obligation to keep it in repair for clothes drying: *Culver v. Kingsley*, 78 Ill. App. 540.

²⁰⁷ *Borggard v. Gale*, 205 Ill. 511; s. c. 68 N. E. Rep. 1063; aff'g s. c. 107 Ill. App. 128. Landlord not guilty of fraud or concealment is not liable for an injury to a subtenant by reason of a defective condition in the premises: *Smith v. State*, 92 Md. 518; s. c. 48 Atl. Rep.

§ 1134. Illustrative Cases where Landlord was held Liable to his Tenant.—The landlord will be liable for the results where he knowingly lets premises infected with a contagious disease and fails to inform the tenant thereof.²⁰⁸ In an action for damages for injuries from escaping sewer gas in premises occupied as a place of business and residence, a declaration was held not demurrable which alleged the escape of the gas; that it was known to the defendant, and unknown to the plaintiff; and that the landlord at the time of renting the premises represented that they were free from sewer gas and in a healthy condition.²⁰⁹

§ 1137. In Case of a Mixed Possession as Between Landlord and Tenant.—It is the duty of a landlord who retains the exclusive possession and control of a portion of the premises, to exercise ordinary or reasonable care in the management of the portion of the building retained, and if damages are sustained by a tenant by reason of his failure in this duty, he will be liable to the tenant therefor.²¹⁰ Thus a landlord who occupied a portion of the premises and piped them for natural gas for his sole benefit, knowing the pipes to be defective and leaky, was held liable for damages to the tenant caused by an explosion of gas from these pipes and it was also ruled that the tenant was not required to make tests for the presence of gas in his room, but could presume that the part of the premises occupied by him was free from this dangerous agency.²¹¹ Generally, however, the landlord, thus situated, is entitled to notice of the defective condition, unless it has existed for such a length of time as to impute him with the knowledge.²¹²

§ 1138. Where Different Parts of the Building are Let to Different Tenants.—Generally speaking, the owner of premises let not as an entirety, but in separate apartments to different tenants, is bound to use reasonable care to keep such common passageways as hallways,²¹³

92; 51 L. R. A. 772. A child of a tenant stands in no better position to recover for personal injuries from defective premises than does the tenant himself: *Phelan v. Fitzpatrick*, 188 Mass. 237; s. c. 74 N. E. Rep. 326; *Cummings v. Ayer*, 188 Mass. 292; s. c. 74 N. E. Rep. 336.

²⁰⁸ *Davis v. Smith*, 26 R. I. 129; s. c. 58 Atl. Rep. 630.

²⁰⁹ *Sunasack v. Morey*, 196 Ill. 569; s. c. 63 N. E. Rep. 1039; rev'g s. c. 98 Ill. App. 505.

²¹⁰ *Merchants' Loan & Co. v. Boucher*, 115 Ill. App. 101; *Johns v. Eichelberger*, 109 Ill. App. 35; *Indianapolis Abattoir Co. v. Tem-*

perly, 159 Ind. 651; s. c. 64 N. E. Rep. 906; *Golob v. Pasinsky*, 72 App. Div. (N. Y.) 176; s. c. 76 N. Y. Supp. 388 (example of complaint in action of this character defective for failure to state facts showing negligence on the landlord's part); *Kneeland v. Beare*, 11 N. D. 233; s. c. 91 N. W. Rep. 56.

²¹¹ *Indianapolis Abattoir Co. v. Temperly*, 159 Ind. 651; s. c. 64 N. E. Rep. 906.

²¹² *Rubenstein v. Hudson*, 86 N. Y. Supp. 750; *Joshua v. Breithaupt*, 90 N. Y. Supp. 1053.

²¹³ *Idel v. Mitchell*, 158 N. Y. 134; s. c. 52 N. E. Rep. 740.

stairways,²¹⁴ balconies,²¹⁵ and areaways,²¹⁶ in repair and is liable to a tenant for an injury caused by his neglect to do so.²¹⁷ A landlord will be liable under this rule only where he has knowledge of the defect. Express notice is not required. It is sufficient if the defect causing the injury has existed for such a length of time as to charge the landlord with constructive knowledge of its existence. Where actual notice cannot be shown, the plaintiff must establish the facts imputing constructive notice.²¹⁸ In one case a landlord was charged with constructive knowledge where it appeared that the defect in the stairway causing the injury had existed for at least a week before the accident, and the landlord and his janitress had been up and down the stairs every day during that time.²¹⁹

§ 1140. Decisions which Exonerate the Landlord where Portions of the Building are Let to Different Tenants.—The doctrine of the foregoing section is not the rule where the landlord relinquishes control and the tenants take exclusive possession and control of the passageways.²²⁰

§ 1141. Liability of the Landlord to the Tenant for Damages Caused by Defects in the Demised Premises in the Case of his Breach of his Covenant to Repair.²²¹—The tenant by entry into possession

²¹⁴ *La Plante v. La Zear*, 31 Ind. App. 433; s. c. 68 N. E. Rep. 312; *Nadel v. Fichten*, 34 App. Div. (N. Y.) 188; s. c. 54 N. Y. Supp. 551; *Lewin v. Pauli*, 19 Pa. Super. Ct. 447. Where the tenant of an upper floor of a building was injured while escaping through a window during a fire, because of his inability to escape otherwise owing to an obstruction of a stairway by a lower tenant, the obstruction was held the proximate cause of the tenant's injury and not the negligence of the landlord: *Cohn v. May*, 210 Pa. 615; s. c. 60 Atl. Rep. 301.

²¹⁵ *Clarke v. Welsh*, 93 App. Div. (N. Y.) 393; s. c. 87 N. Y. Supp. 697; *Widing v. Penn Mut. Life Ins. Co.*, 95 Minn. 279; s. c. 104 N. W. Rep. 239; *Troude v. Meldrum*, Rap. Jud. Que. 21 C. S. 75.

²¹⁶ *Udden v. O'Reilly*, 180 Mo. 650; s. c. 79 S. W. Rep. 691.

²¹⁷ *Wessel v. Gerken*, 36 Misc. (N. Y.) 221; s. c. 73 N. Y. Supp. 192; *Wesener v. Smith*, 89 App. Div. (N. Y.) 211; s. c. 85 N. Y. Supp. 837. A pipe to carry water from roof, which ran through cellar of tenement into a sewer, has been held a part of the

appliances in control of the landlord, and hence the landlord was liable for negligence in failing to keep the pipe in repair: *Levine v. Baldwin*, 87 App. Div. (N. Y.) 150; s. c. 84 N. Y. Supp. 92. A tenant of an upper floor will not be charged with notice of defects in the foundation wall: *Thum v. Rhodes*, 12 Colo. App. 245; s. c. 55 Pac. Rep. 264.

²¹⁸ *Idel v. Mitchell*, 158 N. Y. 134; s. c. 52 N. E. Rep. 740; rev'g s. c. 5 App. Div. (N. Y.) 268; 39 N. Y. Supp. 1.

²¹⁹ *Nadel v. Fichten*, 34 App. Div. (N. Y.) 188; s. c. 54 N. Y. Supp. 551.

²²⁰ *Marley v. Wheelwright*, 172 Mass. 530; s. c. 52 N. E. Rep. 1066 (subtenant injured through defects in stairway used as common entrance); *Schroeck v. Reiss*, 46 App. Div. (N. Y.) 502; s. c. 61 N. Y. Supp. 1054 (third person injured by fall into open cellarway sidewalk); *Kearnines v. Cullen*, 183 Mass. 298; s. c. 67 N. E. Rep. 243 (tenant of one side of double house injured by fall on common step leading to both tenements).

²²¹ In support of doctrine that ten-

and the payment of rent waives any failure of the landlord to perform a covenant to make certain repairs prior to the entry by the tenant.²²² The rule that there may be no recovery for injuries the result of negligence in the case of a breach of a covenant to repair extends to the tenant's family, guests and others entering under the tenant's title.²²³ A landlord who admits an obligation to make repairs by undertaking to make them, is responsible to a tenant for injury from a negligent performance of this duty,²²⁴ though by strict construction of the lease, it was the duty of the lessee to repair at the landlord's expense.²²⁵ A tenant may recover damages to his property by reason of a failure to repair a roof, where he is induced to remain in the premises solely upon the strength of the landlord's promise to make the necessary repairs.²²⁶ The tenant, on his part, cannot permit a defective condition to remain an unreasonable length of time after notice to his landlord and thus enhance his damages, but he is bound to use diligent effort to reduce such damages, and, if necessary, make the repairs himself.²²⁷ The measure of damages for breach of an ordinary covenant of a landlord to repair is either the actual cost of making the repairs, or the difference in the rental value of the premises as they were, and as they would have been, had the contemplated repairs been made.²²⁸

ant may not recover for injuries based on breach of contract to repair, see *Van Tassel v. Read*, 36 App. Div. (N. Y.) 529; s. c. 55 N. Y. Supp. 502; *Kushes v. Ginsburg*, 99 App. Div. (N. Y.) 417; s. c. 91 N. Y. Supp. 216; *Frank v. Mandel*, 76 App. Div. (N. Y.) 413; s. c. 78 N. Y. Supp. 855. A breach of a covenant to repair does not authorize a recovery for injuries to goods by a leaky roof where the tenant has known for months of the leaky condition: *Reiner v. Jones*, 56 N. Y. Supp. 423. But see *Ehinger v. Bahl*, 208 Pa. 250; s. c. 57 Atl. Rep. 572. The agreement of the landlord to make repairs after the execution of the lease is without consideration and unenforceable: *Rhoades v. Seidel*, 139 Mich. 608; s. c. 102 N. W. Rep. 1025; 12 Det. Leg. N. 17; *Bennett v. Sullivan*, 100 Me. 118; s. c. 60 Atl. Rep. 886. See also, *Howell v. Schneider*, 24 App. (D. C.) 532. A promise of a landlord to repair plumbing on the premises and pay the tenant all damages caused by reason of defects therein, accepted by the tenant is based on a sufficient consideration and en-

forceable: *Beakes v. Holzman*, 47 Misc. (N. Y.) 384; s. c. 94 N. Y. Supp. 33.

²²² *Rubens v. Hill*, 115 Ill. App. 565; s. c. aff'd, 213 Ill. 523; 72 N. E. Rep. 1127.

²²³ *Brady v. Klein*, 133 Mich. 422; s. c. 95 N. W. Rep. 557; 10 Det. Leg. N. 282; *Folsom v. Parker*, 31 Misc. (N. Y.) 348; s. c. 64 N. Y. Supp. 263; *Frank v. Mandel*, 76 App. Div. (N. Y.) 413; s. c. 78 N. Y. Supp. 855; *Stelz v. Van Dusen*, 93 App. Div. (N. Y.) 358; s. c. 87 N. Y. Supp. 716; *Davis v. Smith*, 26 R. I. 129; s. c. 58 Atl. Rep. 630; *McGinn v. French*, 107 Wis. 54; s. c. 82 N. W. Rep. 724.

²²⁴ *Barron v. Liedloff*, 95 Minn. 474; s. c. 104 N. W. Rep. 289; *O'Rourke v. Feist*, 42 App. Div. (N. Y.) 136; s. c. 59 N. Y. Supp. 157.

²²⁵ *Blumenthal v. Prescott*, 70 App. Div. (N. Y.) 560; s. c. 75 N. Y. Supp. 710.

²²⁶ *Neglia v. Lielouka*, 32 Misc. (N. Y.) 707; s. c. 65 N. Y. Supp. 500.

²²⁷ *Beakes v. Holzman*, 47 Misc. (N. Y.) 384; s. c. 94 N. Y. Supp. 33.

²²⁸ *Beakes v. Holzman*, 47 Misc. (N. Y.) 384; s. c. 94 N. Y. Supp. 33.

§ 1142. Liability of the Landlord for Acts Done by Him on the Demised Premises During the Term.—It is the general rule that a landlord who gratuitously undertakes to make repairs at the request of his tenant will be liable to the tenant for damages the result of an unworkmanlike and unskillful method of making repairs.²²⁹

§ 1143. Effect of Special Stipulations in the Lease.—A landlord cannot shield himself from liability to a tenant for injuries due to his negligence under a clause in a lease that he will not be liable for any injury sustained by the tenant from negligence or improper conduct on the part of other tenants.²³⁰ It is clear that a landlord will not be liable for damages to the goods of a tenant by reason of defects occurring during the life of the lease, where the lease expressly exempts the landlord from any obligation to make repairs or improvements on the premises during this time.²³¹

§ 1145. Liability to Repair in Case the Premises are Destroyed or Injured by Fire.—The promise of a landlord to repair a roof destroyed by fire does not require immediate fulfilment; the landlord is entitled to a reasonable time in which to make such repairs.²³² In a case of this kind where the tenant was told that it would not be necessary to move on account of the fire, the statement was construed to refer solely to the safety of the building, and not as a guaranty that goods would not be damaged by rain.²³³

§ 1147. Liability of Tenant to Landlord.²³⁴

§ 1148. Whether Landlord Liable for Acts of Independent Contractor.²³⁵—One court has held that a landlord erecting additional

²²⁹ Mann v. Fuller, 63 Kan. 664; s. c. 66 Pac. Rep. 627; Holmes v. Feist, 35 Misc. (N. Y.) 863; s. c. 72 N. Y. Supp. 1107; aff'g s. c. 33 Misc. (N. Y.) 808; 68 N. Y. Supp. 622. In a case where a workman employed by a landlord to make repairs broke a board in a floor over which the tenant had frequent occasion to pass, and the landlord told the workman he would fix the break, and gave no further attention to it and the tenant, in the exercise of due care, was injured by stepping into the hole, it was held that the landlord was liable: Aldag v. Ott, 28 Ind. App. 542; s. c. 63 N. E. Rep. 480.

²³⁰ Levin v. Habicht, 45 Misc. (N. Y.) 381; s. c. 90 N. Y. Supp. 349.

²³¹ Beneteau v. Stubler, 79 Minn. 259; s. c. 82 N. W. Rep. 583.

²³² Gavan v. Norcross, 117 Ga. 356; s. c. 43 S. E. Rep. 771.

²³³ Gavan v. Norcross, 117 Ga. 356; s. c. 43 S. E. Rep. 771.

²³⁴ A lessee abandoning a house during his term and leaving it unlocked is not liable to the owner for its destruction by persons who entered the building and set fire to it, as the lessee's negligence is not the proximate cause of the loss: Winfree v. Jones, 104 Va. 39; s. c. 51 S. E. Rep. 153.

²³⁵ Boss v. Jarmulowsky, 81 App. Div. (N. Y.) 577; s. c. 81 N. Y. Supp. 400 (landlord not liable for negligence of independent contractor in permitting material to remain in a hallway). A landlord was held liable for the negligence of an independent contractor installing an automatic sprinkler system, who

stories on a building occupied by a tenant will not be relieved from liability for injuries to the stock of a tenant by falling rain merely because the work is being done by an independent contractor.²³⁶

§ 1149. **Duty to Provide Fire Escapes.**—The Maine statute, which requires business, trade, and other buildings to be provided with fire escapes from every story above the level of the ground, is held by the supreme court of that State to impose the duty of furnishing such fire escapes on the owner of the building, notwithstanding the building is occupied by a tenant.²³⁷

§ 1150. **When Landlord Entitled to Notice from Tenant that Building is Out of Repair.**—Where a landlord agrees to make necessary repairs he can be held liable for a defect in the premises only where reasonable notice of the defect has been given to him,²³⁸ and the tenant making a complaint of a particular defect in premises will be limited in his recovery to the injuries resulting from this defect. He cannot recover for injuries caused by other defects which were not called to the attention of the landlord at the time of making the complaint.²³⁹ Where the lease provides that the notice shall be a written notice, the tenant cannot recover for injuries from defective premises unless such a notice has been given.²⁴⁰ In case the injuries are caused by defects in the hallway or other parts of the premises under the control of the landlord, he will be liable only where he has neglected to make the repairs after notice of the defect, or, in the absence of notice has failed to exercise such reasonable means to ascertain the condition of the premises as his duty to the tenant demanded.²⁴¹

§ 1151. **Failure to Comply with Statutes Enacted for Safety of Tenants.**²⁴²

put in sprinkler heads which fused at too low a temperature and damage to goods from water resulted: *Peerless Mfg. Co. v. Bagley*, 126 Mich. 225; s. c. 85 N. W. Rep. 568; 7 Det. Leg. N. 787; 53 L. R. A. 285.
²³⁶ *Nahm & Friedman v. Register Newspaper Co.*, — Ky. —; s. c. 87 S. W. Rep. 296; 27 Ky. L. Rep. 887.
²³⁷ *Carrigan v. Stillwell*, 97 Me. 247; s. c. 61 L. R. A. 163; 54 Atl. Rep. 389.

²³⁸ *Cummings v. Ayer*, 188 Mass. 292; s. c. 74 N. E. Rep. 336; *Galvin v. Beals*, 187 Mass. 250; s. c. 72 N. E. Rep. 969; *Marley v. Wheelwright*, 172 Mass. 530; s. c. 52 N. E. Rep. 1066.

²³⁹ *Galvin v. Beals*, 187 Mass. 250;

s. c. 72 N. E. Rep. 969; *Roberts v. Cotty*, 100 Mo. App. 500; s. c. 74 S. W. Rep. 886.

²⁴⁰ *Sternberg v. Burke*, 84 N. Y. Supp. 862.

²⁴¹ *Flood v. Huff*, 29 Misc. (N. Y.) 351; s. c. 60 N. Y. Supp. 517.

²⁴² A New York court holds that a failure to comply with the Tenement House Act of that State requiring hallways to be lighted in the daytime so as to permit a person to read in every part thereof without artificial light, is merely evidence of negligence and not negligence *per se*: *Ziegler v. Brennan*, 75 App. Div. (N. Y.) 584; s. c. 78 N. Y. Supp. 342.

§ 1154. Liability to Third Persons for Defects in Leased Premises Presumptively on Lessee.²⁴³

§ 1155. Landlord Presumptively Exempt from Liability.²⁴⁴—The principle is not affected by the fact that the defects causing the injuries were within the line of the street and outside of the lot proper, particularly where the lease contains no covenant to repair, and the premises were not defective at the time of entry.²⁴⁵

§ 1156. A Catalogue of Circumstances under which Landlord is Liable to Strangers.—Under a principle which regards the lessee of a market stall as an agent of the owners of the market house, and not merely as a tenant, the owner of a market house is liable for the negligence of the lessees of the stalls in failing to keep the passage-

²⁴³ In support of the proposition of the text that the tenant or occupier is *prima facie* liable to third persons for damages arising from negligent defects, see: *De Tarr v. Ferd. Heim Brewing Co.*, 62 Kan. 188; s. c. 61 Pac. Rep. 689; *Walter v. Dennehy*, 93 Mo. App. 7 (subtenant); *Finigan v. Biehl*, 30 Misc. (N. Y.) 735; s. c. 63 N. Y. Supp. 147; rev'g s. c. 61 N. Y. Supp. 1116 (a lease admissible in landlord's behalf to show that, at the time of the accident through failure to repair a grating over an area, the area was in the possession of the tenant, who was responsible for repairs); *Hirschfeld v. Alsberg*, 47 Misc. (N. Y.) 141; s. c. 93 N. Y. Supp. 617; *Kushes v. Ginsburg*, 99 App. Div. (N. Y.) 417; s. c. 91 N. Y. Supp. 216; *Uggle v. Brokaw*, 77 App. Div. (N. Y.) 310; s. c. 79 N. Y. Supp. 244 (injury from fall of material from roof of building in exclusive possession of tenant at the time); *Weber v. Lieberman*, 47 Misc. (N. Y.) 593; s. c. 94 N. Y. Supp. 460; *Duffin v. Dawson*, 211 Pa. 593; s. c. 61 Atl. Rep. 76. A tenant is liable for injury to a pedestrian on an icy sidewalk in front of premises where he agreed to save the landlord harmless from any damages from neglect in not removing snow and ice from the roof of the building and from the sidewalks: *Wixon v. Bruce*, 187 Mass. 232; s. c. 72 N. E. Rep. 978; 68 L. R. A. 248.

²⁴⁴ In support of the correlative proposition that landlord is pre-

sumptively exempt from liability to third person for defects in leased premises, see: *Thompson v. Clemens*, 96 Md. 196; s. c. 53 Atl. Rep. 919; 60 L. R. A. 580 (tenant's wife injured by defect in porch); *O'Malley v. Twenty-Five Associates*, 178 Mass. 555; s. c. 60 N. E. Rep. 387 (injury to driver of coal wagon by breaking of hoisting apparatus while delivering coal to tenant); *Roche v. Sawyer*, 176 Mass. 71; s. c. 57 N. E. Rep. 216; *Brady v. Kline*, 133 Mich. 422; s. c. 95 N. W. Rep. 557; 10 Det. Leg. N. 282; *Towne v. Thompson*, 68 N. H. 317; s. c. 44 Atl. Rep. 492; 46 L. R. A. 748 (landlord not liable to guest of tenant for sickness caused by faulty and defective drainage in absence of contract to repair); *Curran v. Flammer*, 49 App. Div. (N. Y.) 293; s. c. 62 N. Y. Supp. 1061; *Weinberger v. Kratzenstein*, 71 App. Div. (N. Y.) 155; s. c. 75 N. Y. Supp. 537; aff'g s. c. 35 Misc. (N. Y.) 74; 71 N. Y. Supp. 244; *Frolich v. Cranker*, 11 Ohio C. D. 592; s. c. 21 Ohio Cir. Ct. R. 615; *Texas Loan Agency v. Fleming*, 92 Tex. 458; s. c. 49 S. W. Rep. 1039; rev'g s. c. 18 Tex. Civ. App. 668; 46 S. W. Rep. 63; *Ward v. Hinkleman*, 37 Wash. 375; s. c. 79 Pac. Rep. 956.

²⁴⁵ *Curran v. Flammer*, 49 App. Div. (N. Y.) 293; s. c. 62 N. Y. Supp. 1061; *Rider v. Clark*, 132 Cal. 382; s. c. 64 Pac. Rep. 564 (basement door opening into street not closed by tenant and passerby injured by falling into opening).

ways clear, notwithstanding the contract between the parties makes it the duty of the lessee to clear the passageways adjoining his stall.²⁴⁶

§ 1157. Landlord Liable to Strangers where he has Made an Express Agreement with Tenant to Repair.²⁴⁷

§ 1158. Landlord Liable to Strangers where the Nuisance Existed at the Commencement of the Term.²⁴⁸—Under this rule a landlord letting premises so out of repair as to be a nuisance, will be responsible to third persons, though the tenant is bound by his contract of leasing to keep the premises in repair.²⁴⁹ The fact that the lease is for a long term will not change the principle. Thus, a ninety-five-year lease containing no provision authorizing a re-entry for condition broken, was held not to release the landlord from liability to third persons for injuries resulting from a defective condition existing at the commencement of the term. In this case, however, the lease authorized the sale of the premises in case of non-payment of the rent, and gave other remedies to the lessor for breach of other covenants in the lease.²⁵⁰

§ 1159. In such Cases both Landlord and Tenant Liable.²⁵¹

²⁴⁶ *Washington Market Co. v. Claggett*, 19 App. (D. C.) 12.

²⁴⁷ That the lessor is liable to strangers where he has made an express agreement with the tenant to repair, see: *Schwandt v. Metzger Linseed Oil Co.*, 93 Ill. App. 365; *Boyce v. Snow*, 187 Ill. 181; s. c. 58 N. E. Rep. 403; aff'g s. c. 88 Ill. App. 402.

²⁴⁸ That the landlord is liable to a third person where the nuisance responsible for the injury existed at the commencement of the tenant's term, see: *Dyer v. Robinson*, 110 Fed. Rep. 99 (collapse of theater roof); *Donk Bros. Coal & Co. v. Leavitt*, 109 Ill. App. 385; *Copley v. Balle*, 9 Kan. App. 465; s. c. 60 Pac. Rep. 656 (guest of hotel injured by falling into dangerous excavation existing on premises at time of lease); *Leithman v. Vaught*, 115 La. 249; s. c. 38 South. Rep. 982 (collapse of defective roof under accumulation of heavy body of water); *Schoppel v. Daly*, 112 La. 201; s. c. 36 South. Rep. 322; *Isham v. Broderick*, 89 Minn. 397; s. c. 95 N. W. Rep. 224; *Stoetzele v. Swearingen*, 90 Mo. App. 588; *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310; s. c. 66 N. E. Rep. 968; 61 L. R. A. 829; rev'g s. c. 74 N. Y.

Supp. 301 (public toboggan slide defective and improperly protected); *May v. Ennis*, 78 App. Div. (N. Y.) 552; s. c. 79 N. Y. Supp. 896 (decayed platform attached to hotel); *Matthews v. New York*, 78 App. Div. (N. Y.) 422; s. c. 80 N. Y. Supp. 360 (defective coal hole in sidewalk); *Spaine v. Stiner*, 51 App. Div. (N. Y.) 481; s. c. 64 N. Y. Supp. 655; s. c. aff'd, 168 N. Y. 666; 61 N. E. Rep. 1135; *Wesener v. Smith*, 89 App. Div. (N. Y.) 211; s. c. 85 N. Y. Supp. 837; *Edwards v. Rissler*, 26 Ohio Cir. Ct. R. 428; s. c. aff'd, 69 Ohio St. 572; 70 N. E. Rep. 1129; *Kirchner v. Smith*, 207 Pa. 431; s. c. 56 Atl. Rep. 947; *Patterson v. Jos. Schlitz Brew. Co.*, 16 S. D. 33; s. c. 91 N. W. Rep. 336; *Waterhouse v. Jos. Schlitz Brew. Co.*, 16 S. D. 592; s. c. 94 N. W. Rep. 587; *Jackson v. Vanier*, Rap. Jud. Que. 18 C. S. 244 (fall of snow and ice from roof in jurisdiction where law required roof adjoining line of street to be constructed so as to prevent fall of snow and ice therefrom).

²⁴⁹ *Keeler v. Lederer Realty Corp.*, 26 R. I. 524; s. c. 59 Atl. Rep. 855.

²⁵⁰ *Keeler v. Lederer Realty Corp.*, 26 R. I. 524; s. c. 59 Atl. Rep. 855.

²⁵¹ See generally: *Schwalbach v.*

§ 1160. **When Either Landlord or Tenant Liable.**—In one case where a complaint for injuries caused by the collapse of a building alleged that the building collapsed because it was negligently constructed of improper material, but did not allege any decay or want of repairs, it was held that the tenant was not a necessary party.²⁵²

§ 1162. **Landlord Not Liable for Nuisances Created during the Term.**²⁵³—In Canada this rule was applied in a case where a city leased ground to an exhibition association, with the conclusion that the city was not liable for injury to a licensee during the continuance of the exhibition caused by stepping into a hole in a platform used by the patrons of the exhibition.²⁵⁴ The law will not indulge a presumption that a nuisance causing an injury to a third person after long occupancy by a tenant existed when the premises were originally let. This fact must be proved.²⁵⁵

§ 1165. **Who Deemed the "Occupier" in Case of Injuries to Third Persons.**²⁵⁶—In a case where the landlord kept the key of a fuel vault under the sidewalk, and tenants intending to use the same were required to obtain the key from the landlord's agent, and a third person was injured by falling into the hole while left open and unguarded by a tenant who was putting wood into the vault, it was held that the landlord, having retained control of the hole constructed by him in

Shinkle & Co., 97 Fed. Rep. 483; Mancuso v. Kansas City, 74 Mo. App. 138; Holroyd v. Sheridan, 53 App. Div. (N. Y.) 14; s. c. 65 N. Y. Supp. 442; Keeler v. Lederer Realty Corp., 26 R. I. 524; s. c. 59 Atl. Rep. 855.

²⁵² Waterhouse v. Joseph Schlitz Brewing Co., 12 S. D. 397; s. c. 81 N. W. Rep. 725; 48 L. R. A. 157.

²⁵³ In support of a proposition that a landlord without right of re-entry during a term of a lease cannot be charged with the maintenance of a nuisance created by the tenant in the use of the premises, see: Baker v. Allen, 66 Ark. 271; s. c. 50 S. W. Rep. 511; Edgar v. Walker, 106 Ga. 454; s. c. 32 S. E. Rep. 582; West Chicago Masonic Ass'n v. Cohn, 192 Ill. 210; s. c. 61 N. E. Rep. 439; 55 L. R. A. 235; rev'g s. c. 94 Ill. App. 333 (open coal hole in sidewalk); Hull v. Sherrod, 97 Ill. App. 298; Frischberg v. Hurter, 173 Mass. 22; s. c. 52 N. E. Rep. 1086 (open coal hole in sidewalk); Monroe v. Carlisle, 176 Mass. 199; s. c. 57 N. E. Rep. 332; Fehlhauer v. St. Louis,

178 Mo. 635; s. c. 77 S. W. Rep. 843 (open cellar door in sidewalk); Leonard v. Hornellsville, 41 App. Div. (N. Y.) 106; s. c. 58 N. Y. Supp. 266; Louisville & Terminal Co. v. Jacobs, 109 Tenn. 727; s. c. 72 S. W. Rep. 954; 61 L. R. A. 188 (round house leased from terminal company). Where a landlord has no right of re-entry a local board of health cannot confer such a right on him so as to make him chargeable with maintaining a nuisance created by a tenant: Eastlock v. Board of Health of West Deptford, 68 N. J. L. 585; s. c. 52 Atl. Rep. 999.

²⁵⁴ Marshall v. Industrial Exhibition Ass'n, 1 Ont. L. Rep. 319.

²⁵⁵ Hirschfield v. Alsberg, 47 Misc. (N. Y.) 141; s. c. 93 N. Y. Supp. 617.

²⁵⁶ De Tarr v. Ferd. Heim Brewing Co., 62 Kan. 188; s. c. 61 Pac. Rep. 689 (testimony as to the relations between landlord and tenant is admissible on the question who was in control of the premises at the time of an accident).

the manner indicated and under a license from the city, which carried with it the duty to see that the hole was properly guarded, was liable for the injuries.²⁵⁷

§ 1170. Landlord Liable to a Stranger for Injurious Acts Done by him during the Term.²⁵⁸

§ 1171. Circumstances under which Landlord Not Liable to Guests or Customers of Tenant.—The owner of a building used for lodge purposes, agreeing to heat and light the same, was held not liable to a guest of the lodge who fell and was injured, owing to the insufficient light at the hall entrance. In this case it was the conclusion that the injured person could have no greater rights against the landlord than the lodge itself would have had, and that the lodge could not complain that a jet should have been put in to light the entrance, where they had rented the rooms without such a jet.²⁵⁹ In another case the lessors of a building, without knowledge of the defects, were absolved from liability to persons therein injured by the fall of a ceiling.²⁶⁰ There is a holding that the owner of a business block in which rooms and offices are let owes no duty, to a person injured while visiting tenants, to keep the hallways and stairways lighted, where they are in all respects inherently safe and convenient.^{260a}

§ 1172. Circumstances under which Landlord is Liable to Guests or Customers of Tenant.—Generally speaking, an owner of a building occupied by numerous tenants, who provides stairs and platforms for their use in common, will be liable for injuries to guests occasioned by defects therein.²⁶¹ So, generally, a landlord in the possession of a part of the premises will be charged with liability for an injury to a third person properly on the premises, and injured by reason of negligence in the maintenance of stairways and halls. In such a case the landlord and tenant are liable as joint tort-feasors.²⁶²

§ 1173. Liability of Landlord to Employés of Lessee.—Under a principle heretofore considered²⁶³ the landlord will not be held liable

²⁵⁷ *Anderson v. Caulfield*, 60 App. Div. (N. Y.) 560; s. c. 69 N. Y. Supp. 1027.

²⁵⁸ In a case where it was contended that the sickness of a child had a fatal termination because the landlord failed to furnish steam to heat the sick room, though bound by a covenant to furnish heat when necessary, it was held that the landlord owed the duty to use ordinary care and diligence to furnish heat when necessary, though there was neither privity of estate nor of con-

tract between the sick person and himself: *O'Donnell v. Rosenthal*, 110 Ill. App. 225.

²⁵⁹ *Jordan v. Sullivan*, 181 Mass. 348; s. c. 63 N. E. Rep. 909.

²⁶⁰ *Dyer v. Robinson*, 110 Fed. Rep. 99.

^{260a} *Capen v. Hall*, 21 R. I. 364; s. c. 43 Atl. Rep. 847.

²⁶¹ *Coupe v. Platt*, 172 Mass. 458; s. c. 52 N. E. Rep. 526.

²⁶² *Brogan v. Hanan*, 55 App. Div. (N. Y.) 92; s. c. 66 N. Y. Supp. 1086.

²⁶³ *Ante*, § 1141.

to a servant of his tenant for injuries on the ground of a breach of a covenant to make repairs.²⁶⁴ It is clear that the landlord will not be liable for personal injuries to his tenant's employé occasioned by defects in the premises, of which defects the landlord was ignorant, and which he had not been notified to repair.²⁶⁵ The case of non-liability is even stronger where the contract of leasing obligates the tenant to make the repairs.²⁶⁶ But the landlord will be liable for injuries caused by defects in a portion of the premises over which he has retained control, and which he knew or ought to have known needed repairs.²⁶⁷ The lessor of a factory or mill, who gives possession and control thereof to the lessee, is under no duty to employés therein to inspect the machinery and appliances and keep them in a reasonably safe condition.²⁶⁸

§ 1177. Reciprocal Rights and Duties of Tenants of the Same Landlord.²⁶⁹

§ 1181. Contributory Negligence of the Tenant or Person Injured.

—Thus a tenant who knew that a stairway on the premises was out of repair and dangerous, and that it could have been repaired at a trifling expense, but continued its use for more than a year without asking for repairs, or making them himself, was held to have assumed the risk incident to its use, and was denied a recovery for injuries caused by its defective condition.²⁷⁰ A tenant was imputed with contributory negligence, where he continued to expose his family to the risk of disease from noxious gases on the premises caused by stoppage

²⁶⁴ *Sherlock v. Rushmore*, 99 App. Div. (N. Y.) 598; s. c. 91 N. Y. Supp. 152.

²⁶⁵ *Ocean S. S. Co. v. Hamilton*, 112 Ga. 901; s. c. 38 S. E. Rep. 204.

²⁶⁶ *Dood v. Rothschild*, 31 Misc. (N. Y.) 721; s. c. 65 N. Y. Supp. 214; *Leaux v. New York*, 87 App. Div. (N. Y.) 398; s. c. 84 N. Y. Supp. 514.

²⁶⁷ *Harrison v. Jelley*, 175 Mass. 292; s. c. 56 N. E. Rep. 283.

²⁶⁸ An allegation in the complaint that the lessor knew of the defective condition of a boiler which exploded and caused the injury, or by the exercise of ordinary care could have known of it at the time the mill was leased, was held to charge merely that the lessor was negligent in failing to exercise ordinary care to discover the defect, and did not render the lessor liable to the injured employé: *King v. Creek-*

more, 117 Ky. 172; s. c. 77 S. W. Rep. 689; 25 Ky. L. Rep. 1292. In one case the lessor was absolved from liability to an employé of his lessee for injuries from the explosion of a boiler in a mill he had leased, though the lessor knew at the time of leasing that the boiler was dangerous until it was inspected and repaired: *Lovitt v. Creekmore*, — Ky. —; s. c. 80 S. W. Rep. 1184; 26 Ky. L. Rep. 234.

²⁶⁹ A tenant on an upper floor operating an engine as an incident of his business has, with reference to a merchant on the first floor of the building, a right to use such a combination or boiler as he sees fit, provided he exercises reasonable care in its selection: *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 340; s. c. 73 Pac. Rep. 164.

²⁷⁰ *McGinn v. French*, 107 Wis. 54; s. c. 82 N. W. Rep. 724.

in drain pipes, since this condition was incapable of concealment.²⁷¹ Generally a tenant will be imputed with contributory negligence in case of injury to his property from water falling through a leaky roof, where he has knowledge of the condition of the roof, and takes no steps to protect his property.²⁷²

§ 1182. **Circumstances under which Negligence will Not be Imputed to the Tenant or to the Person Injured as Matter of Law.**—A tenant, with knowledge of the unsafe condition of the premises, is not necessarily charged with contributory negligence in continuing to live on the premises, and to pass over defective portions of the premises.²⁷³ Though he is required to use due care to avoid danger, he is not required, under some authorities, to keep constantly in mind the exact location of defective places in premises leased by him.²⁷⁴ A tenant, using a stairway under the control of his landlord, will not be charged with negligence in traversing such stairway after night solely on the ground that he failed to procure and carry a light with him.²⁷⁵ In one case it was held that a tenant was not to be imputed with negligence contributing to an injury from the fall of plaster, where he relied on his landlord's promise to make repairs, and left it to his judgment whether it was necessary to tear off the plaster, which he permitted to remain, and which fell and caused the injury sued upon.²⁷⁶

²⁷¹ *Davis v. Smith*, 26 R. I. 129; s. c. 58 Atl. Rep. 630.

²⁷² *Margolius v. Muldberg*, 88 N. Y. Supp. 1048. This was the conclusion of a court where goods were damaged by rain after the roof had been destroyed, though the landlord assured the tenant that the goods would not be damaged by rain. The promise of the landlord was not such as to relieve the tenant of the obligation to exercise ordinary care to protect his property from the dangers from the elements: *Gavan v. Norcross*, 117 Ga. 356; s. c. 43 S. E. Rep. 771. But see *Blumenthal v. Prescott*, 70 App. Div. (N. Y.) 560; s. c. 75 N. Y. Supp. 710, where a tenant was not charged with contributory negligence because of a failure to protect his property from the rain, though knowing that a contractor at work on the roof had not covered the roof when he quit work on Saturday night, since the tenant had a right to assume that

when the rain came the contractor would immediately take steps to protect property on the premises likely to be injured.

²⁷³ *Karlson v. Healy*, 56 N. Y. Supp. 361. A tenant will not be prevented from recovering for the death of his child from falling into an unprotected cistern, where the landlord promised as part of the contract of renting, to repair it: *Stillwell v. South Louisville Land Co.*, 58 S. W. Rep. 696; s. c. 22 Ky. L. Rep. 785; 52 L. R. A. 325.

²⁷⁴ *Keating v. Mott*, 92 App. Div. (N. Y.) 156; s. c. 86 N. Y. Supp. 1041.

²⁷⁵ *Kenney v. Rhineland*, 28 App. Div. (N. Y.) 246; s. c. 50 N. Y. Supp. 1088; s. c. aff'd, 163 N. Y. 576; 57 N. E. Rep. 1114; *Lendle v. Robinson*, 53 App. Div. (N. Y.) 140; s. c. 65 N. Y. Supp. 894.

²⁷⁶ *Mason v. Howes*, 122 Mich. 329; s. c. 81 N. W. Rep. 111.

TITLE NINE.

[§§ 1188-1340i.]

NEGLIGENCE IN RELATION TO THE HIGHWAY.

PART ONE.

GENERAL PRINCIPLES.

[§§ 1188-1281.]

§ 1188. **When Ground of Liability Nuisance and When Negligence.**—An obstruction of a public highway by a private person, whether looked at from the common law¹ or statutes directed to the subject,² is a nuisance and the question whether due care has been exercised by the obstructor is not material. Even the public authorities are without power to sanction a nuisance of this description.³ The question whether a person is required by statute to remove an obstruction from a highway is one of law for the court, and not one of fact for the jury.⁴

§ 1189. **Notice or Knowledge of the Nuisance.**⁵

§ 1190. **Obligation of Obstructor of Highway to Repair or Make Safe.**—So, the owner of land abutting on a public alley, digging a blind ditch in the alley for his own benefit, and without permission of the municipal authorities, is bound to keep it in repair, and is personally liable for injuries due to a neglect of this duty.⁶ A complaint in an action for injuries received in a collision with a barbed wire

¹ *Nelson v. Fehd*, 104 Ill. App. 114; s. c. aff'd, 203 Ill. 120; 67 N. E. Rep. 828; *Shippers' Compress &c. Co. v. Davidson*, 35 Tex. Civ. App. 558; s. c. 80 S. W. Rep. 1032.

² *Smith v. Gilreath*, 69 S. C. 353; s. c. 48 S. E. Rep. 262.

³ *Burt v. Utah Light &c. Co.*, 26 Utah 157; s. c. 72 Pac. Rep. 497.

⁴ *Smith v. Gilreath*, 69 S. C. 353; s. c. 48 S. E. Rep. 262.

⁵ In a case where the conductor of an electric car was struck by a tree standing near the track, while he was attempting to swing around a large man standing on the running board, and it was shown that the nearest part of the tree was thirty-eight and a half inches from the nearest rail of the track, and thirty-one inches from the sill or side of

the car, and eighteen inches from the outside of the running-board, and the distance from the side of the car to the outer edge of the running-board was thirteen inches, and the conductor had passed this particular tree nearly a thousand times, without complaint, it was held that the conditions were not such as to charge the authorities of the town with knowledge of the dangerous conditions and reason to anticipate injuries of this character so as to require them to take steps to have the tree removed: *Hall v. Wakefield*, 184 Mass. 147; s. c. 68 N. E. Rep. 15.

⁶ *Covington Saw Mill &c. Co. v. Drexilius*, — Ky. —; 87 S. W. Rep. 266; 27 Ky. L. Rep. 903.

fence constructed across a road was held sufficient on the question of the character of the road, which alleged that the road was in common use by the travelling public, and had been so used for a long time prior to the accident, the reason being that a person constructing such a fence across a road in common use to his knowledge would be liable for his negligent act, though the road was not a public road, and was in fact built over his own land.⁷

§ 1195. Existence of Unauthorized Obstruction Prima Facie Evidence of Negligence.⁸

§ 1199. Obligation of Abutting Owners Not to Injure the Street or Highway.—A private person or corporation cannot, by the permission of an abutting owner, or by long continued occupancy, acquire the right to use any portion of a public street or highway to the exclusion of the public.⁹ Water meter boxes, in reasonably safe condition,¹⁰ and carriage stones,¹¹ of the usual size and shape, and in the usual position for such stones, are not generally regarded as nuisances.

§ 1200. Liability of Abutting Owners for Maintaining Areas and Holes in Sidewalks.—A cellarway allowed to extend a little way into the street is not regarded as an actionable defect, as a matter of law,¹² unless it is raised so high above the sidewalk as to render the sidewalk unsafe for pedestrians.¹³ The maintenance of a defectively covered coal hole in a sidewalk is a nuisance, and a person injured by falling therein may recover from the owner of the premises to which the hole is appurtenant, without proof of negligence.¹⁴ It is held that a coal hole in the sidewalk, appurtenant to abutting property, and permitted to exist for more than twenty years without objection, will be presumed to have been constructed and maintained by permission of the proper authorities.¹⁵

⁷ Allison v. Haney (Tex. Civ. App.), 62 S. W. Rep. 933.

⁸ The act of an abutting owner in building an inclined gangway from a platform on one side of the street to a platform on the other side without authority from the city, and in such a way as to leave a space of but fifteen to twenty feet in width for the passage of vehicles, is negligence *per se*: Shippers' Compress & Co. v. Davidson, 35 Tex. Civ. App. 558; s. c. 80 S. W. Rep. 1032.

⁹ Hontros v. Chicago, 113 Ill. App. 318; Chicago v. Pooley, 112 Ill. App. 343.

¹⁰ Carvin v. St. Louis, 151 Mo. 334; s. c. 52 S. W. Rep. 210.

¹¹ Robert v. Powell, 40 App. Div. (N. Y.) 613; s. c. 57 N. Y. Supp. 1146; aff'g s. c. 24 Misc. (N. Y.) 241; 52 N. Y. Supp. 918.

¹² Boston v. Brooks, 187 Mass. 286; s. c. 73 N. E. Rep. 206.

¹³ Perrigo v. St. Louis, 185 Mo. 274; s. c. 84 S. W. Rep. 30; Sturmwald v. Scheiber, 69 App. Div. (N. Y.) 476; s. c. 74 N. Y. Supp. 995.

¹⁴ Berger v. Content, 47 Misc. Rep. (N. Y.) 390; s. c. 94 N. Y. Supp. 12.

¹⁵ Hart v. McKenna, 106 App. Div. (N. Y.) 219; s. c. 94 N. Y. Supp. 216.

§ 1201. **Persons Maintaining Areas in Sidewalks held to the Exercise of Reasonable Care.**—Persons constructing and maintaining areas and cellarways in front of buildings are under the obligation to use reasonable care to provide against accidents to persons using the street, and it is necessary to the fulfillment of this duty that an area or opening should have been properly constructed in the first instance and inspected and kept in repair afterwards.¹⁶ But the abutter is not an absolute guarantor that no opening may be found in the sidewalk. Before liability can attach to him for an unsafe condition in the sidewalk by the negligent acts of third persons he must have known of its defective condition, or as a careful and prudent man, should have known of it.¹⁷

§ 1202. **Illustrations of the Liability of Abutting Owners for Injuries from Dangerous Defects in Sidewalks.**¹⁸

¹⁶ *West Chicago Masonic Ass'n v. Cohn*, 192 Ill. 210; s. c. 61 N. E. Rep. 439; 55 L. R. A. 235; rev'g s. c. 94 Ill. App. 333; *Ray v. Manhattan Light & Co.*, 92 Minn. 101; s. c. 99 N. W. Rep. 782; *Devine v. National Wall Paper Co.*, 95 App. Div. (N. Y.) 194; s. c. 88 N. Y. Supp. 704. In one case it was held that mere general instructions to mechanics, given over a year prior to the injury from a defective grating in the sidewalk, to make necessary repairs about the building, will not relieve the owner of the property from liability for an injury, where the defect had existed for a sufficient length of time for a prudent man to have knowledge of its existence: *Stevens v. Walpole*, 76 Mo. App. 213.

¹⁷ *Frassi v. McDonald*, 122 Cal. 400; s. c. 55 Pac. Rep. 139 (the mere existence of an unsafe condition for from ten to twenty minutes before accident insufficient to charge him with knowledge); *Brady v. Shepard*, 42 App. Div. (N. Y.) 24; s. c. 58 N. Y. Supp. 674.

¹⁸ An unguarded opening in a sidewalk was held the proximate cause of injuries to an infant falling therein, though the child slipped on snow lying on the sidewalk close to the opening, and slipped a second time into the hole while recovering himself from the first fall: *Porcella v. Mutual Reserve Fund Life Ass'n*, 50 App. Div. (N. Y.) 158; s. c. 63 N. Y. Supp. 599. An abutting owner is liable for injuries caused by the defective condition of a sidewalk which

was rendered unsafe by hauling stone across it to be used in the construction of a wall for the abutting owner, and this particularly where such owner's wagons were also driven across the walk, thereby increasing its defective condition: *Mullins v. Siegel-Cooper Co.*, 95 App. Div. (N. Y.) 234; s. c. 88 N. Y. Supp. 73. The fact that a person maintaining a coal hole in a sidewalk temporarily surrendered possession of the premises to an independent contractor to make certain alterations in the building, and that he used the coal hole to put down materials, and negligently left the same unfastened, did not relieve the owner from liability for injuries to a person passing over such hole, without contributory negligence, though the owner had no notice that the contractor was using the hole, or of its unsafe and defective condition resulting therefrom: *Hart v. McKenna*, 106 App. Div. (N. Y.) 219; s. c. 94 N. Y. Supp. 216. A market company without authority to occupy the sidewalk adjoining its market house for market purposes, but which, nevertheless, allowed dealers and hucksters to occupy it and collected tolls from them according to the space they occupied, and undertook in a lease of a store fronting on such sidewalk to have the sidewalk cleaned each day, was held liable for injuries to a pedestrian who stepped on refuse vegetable matter on the sidewalk and fell. Here the occupation of the hucksters and dealers was

§ 1205. Liability as Between the Wrong-doer and the City.¹⁹

§ 1207. Are Liable where they Artificially Accumulate Ice and Snow on the Streets.—One court has found sufficient evidence to authorize a finding of negligence in a case where it was shown that for several days water coming off from the defendant's house had been allowed to run down a driveway beside it on to the sidewalk, and there freeze, and that the defendant's servants had dug a channel taking it on to the sidewalk, where it formed ice, upon which the injured person slipped and received the injuries sued upon.²⁰

§ 1208. Liability for Injuries Sustained by Falling of Snow and Ice from Roofs, Awnings, etc., upon the Street or Sidewalk.—In Wisconsin it is the rule that the tenant, and not the landlord of a building, is liable for injuries to a pedestrian on a sidewalk caused by the fall of snow negligently allowed to collect on the roof of the building.²¹ In an action for injuries thus received the plaintiff has the burden of proving that the snow fell from the defendant's premises.²²

§ 1210. Constitutional Validity of Such Ordinances.²³

§ 1214. Liability for Suspending Objects Above the Street or Sidewalk which Fall upon Travellers.—Persons working with edged tools above a thoroughfare on which people are constantly passing are charged with a high degree of care—a degree commensurate with the danger—to prevent injury to travellers from falling tools or material.²⁴ The fact that objects are erected under a permit from a city does not relieve the person so placing them from the exercise of care commensurate with the dangers apparent and to be foreseen therefrom.²⁵

§ 1219. Adjacent Owners and Occupiers Not Liable for Injuries

the occupation of the market company: *O'Dwyer v. Northern Market Co.*, 24 App. (D. C.) 81.

¹⁹ An abutting owner may be liable directly to one injured by a defective sidewalk in front of his premises: *Mintzer v. Hogg*, 192 Pa. St. 137; s. c. 43 Atl. Rep. 465; 44 W. N. C. (Pa.) 484.

²⁰ *Louis v. Eureka Club*, 37 App. Div. (N. Y.) 628; s. c. 56 N. Y. Supp. 66.

²¹ *Atwill v. Blatz*, 118 Wis. 226; s. c. 95 N. W. Rep. 99.

²² *McGee v. Boston Elevated R. Co.*, 187 Mass. 569; s. c. 73 N. E. Rep. 657.

²³ In these cases laws and ordinances imposing this duty on the owner or occupant are held uncon-

stitutional: *Chicago v. McDonald*, 111 Ill. App. 436. The act of congress providing for the removal of snow and ice from the sidewalks of the District of Columbia, is unconstitutional and void, as imposing unequal burdens upon and discriminating between citizens similarly situated and equally entitled to bear the same burden. The prime requisite of such legislation is that it should be uniform and capable of universal enforcement: *McGuire v. District of Columbia*, 24 App. (D. C.) 22.

²⁴ *Knott v. McGilvray*, 124 Cal. 128; s. c. 56 Pac. Rep. 789.

²⁵ *Durfield v. New York*, 101 App. Div. (N. Y.) 581; s. c. 92 N. Y. Supp. 204.

Produced by Accumulations of Snow and Ice on the Sidewalk from Natural Causes.²⁶

§ 1221. **Limitations on this Right to Obstruct the Streets.**—A person occupying premises along the line of a public street has a right to obstruct the sidewalk in front thereof for a reasonable time in order to move goods to and from his premises, provided he does so in such a way as not to interfere with the use of the sidewalk more than is necessary for the purpose, and while so engaged he is not bound to furnish pedestrians a safe passage around the obstruction thus created.²⁷ He cannot, however, so conduct even this phase of his business in such a way as practically to exclude the public during business hours from the use of all the sidewalk except a narrow passage. In a case of this kind, an offender was held liable for injuries caused by slipping on a banana in such a narrow walk, though it was not affirmatively shown that the banana was placed there by him. The earlier act of obstructing the sidewalk was regarded as the proximate cause of the injury.²⁸

§ 1222. **Temporary Obstructions in the Operations of Building.**²⁹—A person storing necessary building materials in the street is not charged with the duty to render them safe for persons—including children as held in one jurisdiction—using them for their own purposes, whether of pleasure, convenience, or profit.³⁰

§ 1224. **Whether Obstruction is Reasonable is a Question of Fact.**³¹

§ 1226. **Ordinances Licensing or Regulating such Excavations.**—A municipality may, in the exercise of its power to repair streets and

²⁶ Gardner v. Rhodes, 114 Ga. 929; s. c. 41 S. E. Rep. 63; 57 L. R. A. 749. Owners of property out of possession, with pavements in proper repair and properties properly constructed and also in proper repair, are not bound to keep watch and guard over the pavements to prevent the formation of ridges of ice upon them, and cannot be held liable for an injury consequent upon a sudden accumulation of ice in front of the property: New Castle v. Kurtz, 210 Pa. 183; s. c. 59 Atl. Rep. 989.

²⁷ Tompkins v. North Hudson R. Co., 63 N. J. L. 322; s. c. 43 Atl. Rep. 885.

²⁸ Garibaldi & Cuneo v. O'Connor, 210 Ill. 284; s. c. 71 N. E. Rep. 379; 66 L. R. A. 73; aff'g s. c. 112 Ill. App. 53.

²⁹ An abutter is liable to one in-

jured by contact with a guy rope stretched across a highway by his licensee so low as to be dangerous to travellers on the highway, and this though the derrick was erected before the abutter acquired the land: Rockport v. Rockport Granite Co., 177 Mass. 246; s. c. 58 N. E. Rep. 1017; 51 L. R. A. 779.

³⁰ Friedman v. Snare & Triest Co., 71 N. J. L. 605; s. c. 61 Atl. Rep. 401. There was no negligence on the part of a contractor in placing a mortar bed on the side of a street, near which he was erecting a building, where the city, under its powers, had granted him such privilege: White v. Roydhouse, 211 Pa. 13; s. c. 60 Atl. Rep. 316.

³¹ Lewis v. Ballston Terminal R. Co., 45 App. Div. (N. Y.) 129; s. c. 60 N. Y. Supp. 1035.

highways, require persons desiring to excavate the streets to procure a permit and exact a sufficient deposit as security for the restoration of the street to its former condition.³²

§ 1228. Liability of Land-Owners for Excavations so Near the Highway as to Endanger Travel.—An abutter, excavating on his own premises adjoining a highway, is charged with the duty to use reasonable care in digging and safeguarding the excavation to the end that the highway will not be rendered less safe and convenient for the public use.³³ Where an excavation is safeguarded by a fence it must be made sufficiently strong to withstand any wind that a reasonably prudent man would anticipate.³⁴ There seems no good reason why the abutter may not use the highway for drainage purposes, provided such use does not inconvenience the public or individuals, or injure the highway.³⁵

§ 1229. Employments on One's Own Premises Endangering Public Travel on the Highway.—The rule under this head is an exception to the doctrine that the owner of private grounds is under no obligation to keep them in a safe condition for trespassers or licensees.³⁶ And it is not necessary to the operation of the rule that the thoroughfare should be a public street or highway. It is enough if it is a travelled way long used with the acquiescence of the defendant.³⁷ Persons engaged in employments making the use of the public street hazardous are under the duty to give notice by warnings or otherwise to passers-by that the work is going on.³⁸ The question whether the abutter was negligent in the conduct of his employment is a question of fact for the jury, and not one of law for the court.³⁹ So in a case where horses were frightened by the noise of an exhaust of a gasoline engine, it was held that the method used for muffling the sound of the exhaust, and the sanction which had been given such method in practical use by others, could be considered by the jury on the questions of negligence.⁴⁰ It is not generally regarded as negligence *per se* to erect and operate a saw mill beside a public highway.⁴¹

³² Cook v. North Bergen Tp., — N. J. L. —; s. c. 59 Atl. Rep. 1035.

³³ Sutphen v. Hedden, 67 N. J. L. 324; s. c. 51 Atl. Rep. 721; Nelson v. Fehd, 203 Ill. 120; s. c. 67 N. E. Rep. 828; aff'g s. c. 104 Ill. App. 114.

³⁴ Sutphen v. Hedden, 67 N. J. L. 324; s. c. 51 Atl. Rep. 721.

³⁵ Thom v. Dodge Co., 64 Neb. 845; s. c. 90 N. W. Rep. 763.

³⁶ Northwestern Elevated R. Co. v. O'Malley, 107 Ill. App. 599.

³⁷ Wolf v. Des Moines Elevator Co.,

126 Iowa 659; s. c. 98 N. W. Rep. 301; 102 N. W. Rep. 517.

³⁸ Keys v. Second Baptist Church, 99 Me. 308; s. c. 59 Atl. Rep. 446.

³⁹ Wolf v. Des Moines Elevator Co., 126 Iowa 659; s. c. 98 N. W. Rep. 301; 102 N. W. Rep. 517; Selby v. Vancouver Waterworks Co., 32 Wash. 522; s. c. 73 Pac. Rep. 504.

⁴⁰ Wolf v. Des Moines Elevator Co., 126 Iowa 659; s. c. 98 N. W. Rep. 301; 102 N. W. Rep. 517.

⁴¹ Goodin v. Fuson (Ky.), 60 S. W. Rep. 293; s. c. 22 Ky. L. Rep. 873.

§ 1234. License from the City no Defense.⁴²

§ 1238. Injuries from Overhanging Wires.⁴³—The owner of wires may be liable for this species of negligence, although the accident occurs at a time when the driver was slightly deviating from the road as established, if it is likewise shown that the public in using the road generally deviated at this point.⁴⁴ It is essential to liability that the company charged with the care of the wires should have either actual or constructive notice of their dangerous condition.⁴⁵

§ 1246. Injuries from the Falling of Lamps, Glass Insulators, etc.⁴⁶

§ 1249. Contributory Negligence of the Traveller.⁴⁷

§ 1252. What Deemed a Public Street within the Meaning of this Chapter.⁴⁸

§ 1255. Carelessly Piling Lumber in a Public Street.⁴⁹

⁴² *Watts v. Southern Bell Tel. & Co.*, 100 Va. 45; s. c. 40 S. E. Rep. 107; 3 Va. Sup. Ct. Rep. 577.

⁴³ See *ante*, § 803.

⁴⁴ *Adams v. Weakley*, 35 Tex. Civ. App. 371; s. c. 80 S. W. Rep. 411.

⁴⁵ *Smith v. Gilreath*, 69 S. C. 353; s. c. 48 S. E. Rep. 262.

⁴⁶ An electric light company, the position of whose wires was determined by the public authorities, was held not liable for injuries to a pedestrian struck by pieces of glass from a globe broken by a trolley pole that had escaped from its wire: *Nelson v. Narragansett & Light Co.*, 26 R. I. 258; s. c. 58 Atl. Rep. 802.

⁴⁷ *Nebraska Tel. Co. v. Jones*, 60 Neb. 396; s. c. 83 N. W. Rep. 197; aff'g s. c. 59 Neb. 510; 81 N. W. Rep. 435 (held a question for the jury whether driver of a hay wagon thrown therefrom by collision of the wagon with the stump of a telephone pole standing in the travelled road was guilty of contributory negligence, he having knowledge of the existence of the obstruction, but having momentarily forgotten it).

⁴⁸ A person, negligently obstructing a highway in such a manner as to cause injury to a traveller, cannot defeat an action for these injuries by proving that the highway was not legally established, nor on the ground that the highway was on the right of way of a railroad, particularly where it appeared that the

road had been used by the public for many years: *Pewonka v. Stewart*, — N. D. —; s. c. 99 N. W. Rep. 1080.

⁴⁹ Both the owner of lumber piled in a public street and a municipality allowing the obstruction, may be liable for damages to a person so injured, and the fact that the lumber fell and inflicted the injury is sufficient to justify an inference that the lumber was liable to fall, and that there was a probability of the occurrence of such an accident: *Smith v. Davis*, 22 App. (D. C.) 298. The owners of a lumber yard piling lumber within the limits of the street in a careless manner are liable for injuries to a child, received while playing thereon: *Busse v. Rogers*, 120 Wis. 443; s. c. 98 N. W. Rep. 219; 64 L. R. A. 183. In a case where a person driving on a turnpike was injured by his buggy striking against a pile of lumber extending into the street in such a manner as to leave but a narrow passage-way unobstructed, the court was held properly to have instructed the jury that "it was the duty of the defendant to keep its road in a reasonably safe condition for travel, and free from obstructions of such a width that will permit vehicles to pass each other with safety by the use of ordinary care." *Floyd v. Henderson & Gravel Road Co.* (Ky.), 56 S. W. Rep. 6; s. c. 21 Ky. L. Rep. 1718.

§ 1258. Instances where Damages have been Recovered for Frightening Horses.⁵⁰

§ 1259. Instances where there was No Liability for Frightening Horses.—In the following cases the defendant was held not liable for frightening horses under the circumstances noted:—Where the owner of a buggy which broke down in the highway, left the buggy with the top half down and right side up, but without the front wheels, at one side of a road running through a woods, and at a distance of from nine to twelve feet from the center of the highway;⁵¹ where a large sign on the defendant's premises more than one hundred feet from the nearest highway was blown from its fastenings by a high wind and frightened a horse on the highway;⁵² where a horse was frightened by the appearance of a pony of diminutive size and of unusual color;⁵³ where a horse was frightened by a steam automobile of crude construction, though not differing materially from steam automobiles in common use, and the machine was manipulated by the operator in a careful manner;⁵⁴ where a horse was frightened by the escape of steam through an automatic safety valve on a steam road roller, and it appeared that the driver knew of the presence of the road roller, and the operator of the road roller had complied with the statute requiring him to notify persons approaching within one-eighth of a mile.⁵⁵

⁵⁰ *Lynn v. Hooper*, 93 Me. 46; s. c. 44 Atl. Rep. 127; 47 L. R. A. 752 (horse of ordinary gentleness frightened by the fluttering movement of a hay cap on the side of the highway, but within the located way); *Patnoudé v. New York & C. R. Co.*, 180 Mass. 119; s. c. 61 N. E. Rep. 813 (new street car wrapped in white canvas); *Nye v. Dibley*, 88 Minn. 465; s. c. 93 N. W. Rep. 521 (materials used in construction of public improvement piled in highway close to driveway); *Golden v. Chicago & C. R. Co.*, 84 Mo. App. 59 (pile of old lumber used in repairing bridge was allowed to remain along roadside for two weeks); *Southern Indiana R. Co. v. Norman*, 165 Ind. 126; s. c. 74 N. E. Rep. 896 (hand-car left in highway while section men at work); *Pecos & C. R. Co. v. Bowman*, 34 Tex. Civ. App. 98; s. c. 78 S. W. Rep. 22 (street car off the track); *Lewis v. Ballston Terminal R. Co.*, 45 App. Div. (N. Y.) 129; s. c. 60 N. Y. Supp. 1035 (locomotive used in construction of electric railroad blew off steam

while standing in highway and frightened horses of ordinary gentleness). The fact that a horse of ordinary gentleness was frightened by machinery on land abutting on the highway on which the owner of the horse was travelling is not conclusive on the question whether the machinery was calculated to frighten horses of ordinary gentleness, but the question is one of fact to be determined from the effect which the noise had on horses in other instances, and from evidence of the character of the machinery and its operation: *Barber v. Manchester*, 72 Conn. 675; s. c. 45 Atl. Rep. 1014.
⁵¹ *Kumba v. Gilham*, 103 Wis. 312; s. c. 79 N. W. Rep. 325.

⁵² *O'Sullivan v. Knox*, 81 App. Div. (N. Y.) 438; s. c. 80 N. Y. Supp. 848; s. c. aff'd, 178 N. Y. 565; 70 N. E. Rep. 1104.

⁵³ *Myers v. Lape*, 101 Ill. App. 182.
⁵⁴ *Nason v. West*, 31 Misc. (N. Y.) 583; s. c. 65 N. Y. Supp. 651.

⁵⁵ *Rector v. Syracuse & C. R. Co.*, 66 App. Div. (N. Y.) 395; s. c. 72 N. Y. Supp. 745.

§ 1260. Further of Objects Frightening the Horses of Travellers.

—In an action of this character the defendant has the burden of showing a reasonable necessity for placing the object in the highway.⁵⁶ In such an action it may be shown that other horses were frightened by the same object.⁵⁷

§ 1264. Excavating in the Street for Public Work.—It was held gross negligence on the part of a company excavating in a street, to leave an excavation unguarded at a place where passengers alighted from street cars and were likely to fall into the trench, and this though it may have been impracticable to protect the excavation in the mode prescribed by the ordinance because of its proximity to the street car track.⁵⁸ A statute authorizing gas companies to open streets as far as necessary to make connections, and requiring them to put all such streets into as good repair as they were when opened, is construed not to make it the duty of such companies to keep in repair the portion of the streets which they may temporarily dig up, but merely requires them to leave the street in the same condition in which they found it.⁵⁹

§ 1265. Tobogganing in the Public Street.⁶⁰

§ 1267. Street Obstructions and Dangers by Water Companies.⁶¹

§ 1269. Care as to Irrigation Ditches Encroaching on Highway.—

In jurisdictions where lands are watered by means of irrigation canals and ditches it is the rule that the owners of ditches, used for this purpose which follow or cross public highways or streets, are charged with the duty to keep such channels in such condition as the safety of persons travelling upon the highway, and exercising reasonable care to avoid danger, demand. A failure to keep a ditch in such safe condition is negligence, and will render the owner liable to damages for injuries resulting from such conditions, where the injured party is not guilty of contributory negligence.⁶²

⁵⁶ *Lewis v. Ballston Terminal R. Co.*, 45 App. Div. (N. Y.) 129; s. c. 60 N. Y. Supp. 1035.

⁵⁷ *Galt v. Woliver*, 103 Ill. App. 71; *Nye v. Dibley*, 88 Minn. 465; s. c. 93 N. W. Rep. 524.

⁵⁸ *MacDonald v. St. Louis T. Co.*, 108 Mo. App. 374; s. c. 83 S. W. Rep. 1001.

⁵⁹ A statutory requirement as to notice of the time, place and cause of an injury from a defect in a highway does not apply to an action against a gaslight company: *Seltzer v. Amesbury & C. Gas Co.*, 188 Mass. 242; s. c. 74 N. E. Rep. 339.

⁶⁰ A person coasting on streets and injured by a collision with a vehicle

left standing in the street cannot recover of the owner of such vehicle, who did not know the street was being used for coasting: *Reusch v. Licking Rolling Mill Co.*, 118 Ky. 369; s. c. 80 S. W. Rep. 1168; 26 Ky. L. Rep. 249.

⁶¹ A statute authorizing the construction of water-works over or under highways in such a manner as not to permanently obstruct or impede travel was held not to authorize the corporation to create or maintain an obstruction or defect in a highway: *Foley v. Ray*, 27 R. I. 127; s. c. 61 Atl. Rep. 50.

⁶² *Horn v. Boise City Canal Co.*, 7 Idaho 640; s. c. 65 Pac. Rep. 145.

§ 1271. **Contributory Negligence of Travellers Injured by Obstructions, Excavations, etc., in the Public Streets.**—A traveller on a highway is entitled to assume that it is reasonably safe,⁶³ and while required to observe due or ordinary care according to the degree of peril confronting him, yet, if the roadway is not impassable, or known to be so defective as to make injury probable by entering it at all, he will be justified in proceeding if he observes that degree of care which a person of ordinary prudence in like places would deem sufficient successfully to guard against the threatening danger.⁶⁴ He is not required to keep his eyes constantly fixed on the roadbed to note every defect therein, great or small, which can be detected by so doing.⁶⁵ Contributory negligence has been imputed under the following circumstances:—Where a traveller entered upon a road in course of reconstruction, and the contractors had given notice to the public that the road was in a dangerous condition and should be considered closed, and the traveller had actual notice of its condition by recent use;⁶⁶ where a traveller with full knowledge of the existence of a ditch in a highway, and without any emergency requiring him to cross the ditch, endeavored to pass over it, and stumbled and slipped on wet dirt on the further bank, and suffered injuries;⁶⁷ where a driver knew of the existence of a stump in the highway on the slanting side of a hill, and with this knowledge drove a spirited team down the road while sitting on top of a high load so that he could not readily reach the brake, and the wagon collided with the stump and caused the injuries sued for.⁶⁸

§ 1272. **Facts to which Contributory Negligence has Not been Ascribed.**—A traveller will not be charged with contributory negligence in driving an unsafe horse past an object calculated to frighten a horse of such a disposition where the horse was hired by the traveller and he was unaware of this trait.⁶⁹ So, the failure of an expressman to hitch his team was not imputed to him as negligence contributing to an injury caused by the team running away when frightened by the fall of a box being loaded into the wagon, where it appeared that the

⁶³ Neal v. Wilmington &c. R. Co., 3 Pen. (Del.) 467; s. c. 53 Atl. Rep. 338.

⁶⁴ Chicago &c. R. Co. v. Leachman, 161 Ind. 512; s. c. 69 N. E. Rep. 253; Missouri &c. Telephone Co. v. Vandervort, — Kan. —; s. c. 79 Pac. Rep. 1068.

⁶⁵ Smith v. Jackson Tp., 26 Pa. Super. Ct. 234.

⁶⁶ Shepard v. Bellow & Merritt Co.,

101 App. Div. (N. Y.) 257; s. c. 91 N. Y. Supp. 999.

⁶⁷ Kent v. Southern Bell Tel. &c. Co., 120 Ga. 980; s. c. 48 S. E. Rep. 399.

⁶⁸ Nebraska Tel. Co. v. Jones, 59 Neb. 510; s. c. 81 N. W. Rep. 435; s. c. aff'd, 60 Neb. 396; 83 N. W. Rep. 197.

⁶⁹ Peterson v. Adams Exp. Co., 111 Iowa 572; s. c. 82 N. W. Rep. 963.

team was gentle, and the reins were within easy reach of the expressman.⁷⁰

§ 1274. No Defense that the Person Injured might have Taken Another Way which was Safe.⁷¹

§ 1276. Right of Action in the Owner of the Fee for Obstructing the Highway.—Where the attempt of the authorities to close a highway is void for any reason, a bill may be maintained to restrain the obstruction established on such illegal attempt.⁷²

§ 1277. Private Action for Obstructing the Public Way Lies only where there is Special Damage.⁷³—The rule that a private action for obstructing the public way can be maintained only where the damages are special will not prevent a private individual from appearing as relator in an information by the attorney-general to accomplish the purpose sought.⁷⁴ A person who is himself an obstructor of the highway cannot maintain a suit in equity to enjoin another from maintaining a like obstruction at another point in the highway. He comes into court with unclean hands within the familiar equity rule.⁷⁵

§ 1279. Illustrations Showing what is Special Damage in this Relation.—A purchaser of a lot on land upon which the owner had dedicated a strip as a highway adjacent to the purchaser's lot, has such interest in the unobstructed use of the way in the nature of an appurtenance to his lot, that he may maintain an injunction to abate an obstruction thereof.⁷⁶ In the following instances courts have held that the plaintiff suing the obstructor of the highway had suffered special damages:—Where the county commissioners had allowed a highway to become totally impassable by failure to maintain it, and the plaintiff had no other way of getting to and from his highway;⁷⁷ where an obstruction to a public road deprived the plaintiff of access to the only public road leading to his market town,⁷⁸ and his church, mill and

⁷⁰ *Lochrain v. Autophone Co.*, 77 App. Div. (N. Y.) 542; s. c. 78 N. Y. Supp. 919.

⁷¹ See generally on the proposition that it is no defense that the person injured might have taken another safe way: *Chicago & C. R. Co. v. Leachman*, 161 Ind. 512; s. c. 69 N. E. Rep. 253; *Pecos & C. R. Co. v. Bowman*, 34 Tex. Civ. App. 98; s. c. 78 S. W. Rep. 22.

⁷² *Hill v. Hoffman* (Tenn.), 58 S. W. Rep. 929.

⁷³ In support of the general proposition indicated in the title, see: *Morris & C. Dredging Co. v. Greenville & C. R. Co.* (N. J. L.), 46 Atl.

Rep. 638; *Parsons v. Hunt* (Tex. Civ. App.), 81 S. W. Rep. 120; *Wees v. Coal & C. R. Co.*, 54 W. Va. 421; s. c. 46 S. E. Rep. 166; *Tilly v. Mitchell & Lewis Co.*, 121 Wis. 1; s. c. 98 N. W. Rep. 969.

⁷⁴ *Morris & C. Dredging Co. v. Greenville & C. R. Co.* (N. J. Ch.), 46 Atl. Rep. 638.

⁷⁵ *Brutsche v. Bowers*, 122 Iowa 226; s. c. 97 N. W. Rep. 1076.

⁷⁶ *Bohne v. Blankenship*, 77 S. W. Rep. 919; 25 Ky. L. Rep. 1645.

⁷⁷ *Bembe v. Anne Arundel Co.*, 94 Md. 321; s. c. 51 Atl. Rep. 179.

⁷⁸ *Cabell v. Williams*, 127 Ala. 320; s. c. 28 South. Rep. 405; *Eldert*

schoolhouse;⁷⁹ where the obstruction compelled an abutting owner to travel much further in reaching necessary points than previously;⁸⁰ where an obstruction was placed in an alley which was the only means of access to the rear of the plaintiff's lot and this alley was necessary to his enjoyment of the property.⁸¹

§ 1280. What is Not Special Damage in this Relation.—In Massachusetts a private action to enjoin the obstruction of a way was held properly dismissed where the court found that the way was a public road not adjoining the plaintiff's land, and that the injury to the plaintiff only differed in degree and not in kind from that suffered by the general public.⁸²

§ 1281. Special Damage must be Pleaded, and How.⁸³

v. Long Island &c. R. Co., 28 App. Div. (N. Y.) 451; s. c. 51 N. Y. Supp. 186; s. c. aff'd, 165 N. Y. 651; 59 N. E. Rep. 1122 (obstruction not in front of plaintiff's property but at or about his side boundary and obstructed highway leading to county town).

⁷⁹ *Jones v. Bright*, 140 Ala. 268; s. c. 37 South. Rep. 79.

⁸⁰ *Hill v. Hoffman* (Tenn.), 58 S. W. Rep. 929.

⁸¹ *Strunk v. Pritchett*, 27 Ind. App. 582; s. c. 61 N. E. Rep. 973.

⁸² *Robinson v. Brown*, 182 Mass. 266; s. c. 65 N. E. Rep. 377.

⁸³ Special injury was held properly pleaded in a complaint which alleged that the plaintiff's homestead and mills owned by him, which abutted on the public road obstructed as set out, were rendered much less valuable, and the plaintiff was by reason of such ob-

struction greatly harassed and worried, and was put to great inconvenience and expense: *Goggins v. Myrick*, 131 Ala. 286; s. c. 31 South. Rep. 22. In another case a declaration was held to show special and particular damages to the plaintiff, which alleged that by the plaintiff's occupancy of three farms, situated at different places on the public highway, it was necessary for him to travel from farm to farm, and that the highway was the only feasible means of so doing; that the defendant company by its charter was bound to keep in repair a bridge in the road between the farms, and that it failed to do so, whereby the plaintiff was hindered from passing over the highway, and was put to pecuniary expense: *Ryerson v. Morris Canal &c. Co.*, 69 N. J. L. 505; s. c. 55 Atl. Rep. 98.

PART TWO.

THE LAW OF THE ROAD.

[§§ 1283-1339.]

§ 1283. Degree of Care Exacted of Travellers on the Highway.—

It is the plain duty of a driver on a public highway to use the same with a proper regard for the rights of others thereon.⁸⁴ The care exacted is that known as ordinary care and is such care as prudent men ordinarily use under like circumstances, taking into consideration the time, place and condition of the highway, possible dangers, and the damage likely to result from driving carelessly at that particular time and place.⁸⁵ The driver of a wagon will be charged with negligence where, by the exercise of ordinary care or watchfulness, he could have seen the danger to which a person on the highway was exposed in time to have avoided inflicting the injuries.⁸⁶ The law does not require that the driver should keep a lookout behind to see whether children or adults are riding on the rear of his vehicle.⁸⁷

§ 1285. Duty to Keep to the Right.—Speaking generally a driver taking the wrong side of the street, without any necessity therefor being shown, will be held to have assumed the risk of the consequences of this act, and where this act is the proximate cause of a collision he will be liable in damages for resulting injuries to persons exercising reasonable care for their own safety.⁸⁸ The law requires persons approaching on the highway to turn seasonably to the right of the middle of the travelled portion of the road so that they can pass without interference;⁸⁹ that is, in such season that neither will be retarded by reason of the other occupying his half of the way.⁹⁰ In some jurisdic-

⁸⁴ *Adams Exp. Co. v. Aldridge*, 20 Colo. App. 74; s. c. 77 Pac. Rep. 6.

⁸⁵ *Ford v. Whiteman*, 2 Pen. (Del.) 355; s. c. 45 Atl. Rep. 543; *Gilbert v. Burque*, 72 N. H. 521; s. c. 57 Atl. Rep. 927; *McCorkle v. Anheuser-Busch Brewing Ass'n*, 107 La. 461; s. c. 31 South. Rep. 762 (driver of brewery wagon charged with negligence where he drove at a brisk pace along a street which intersected a car track without looking up or down the street to see if it could be safely crossed and collided with a car).

⁸⁶ *Heldmaier v. Taman*, 88 Ill. App. 209; s. c. aff'd, 188 Ill. 283; s.

c. 58 N. E. Rep. 960; *Brown v. Schellenberg*, 19 Pa. Super. Ct. 286; *Dieter v. Zbaren*, 81 Mo. App. 612. But see *McGee v. West* (Tex. Civ. App.), 57 S. W. Rep. 928.

⁸⁷ *Hebard v. Mabie*, 98 Ill. App. 543.

⁸⁸ *Fahrney v. O'Donnell*, 107 Ill. App. 608; *Dunn v. Moratz*, 92 Ill. App. 477; *Perlstein v. American Exp. Co.*, 177 Mass. 530; s. c. 59 N. E. Rep. 194; *Winter v. Harris*, 23 R. I. 47; s. c. 49 Atl. Rep. 398.

⁸⁹ *Neal v. Rendall*, 98 Me. 69; s. c. 56 Atl. Rep. 209; 63 L. R. A. 668.

⁹⁰ *Neal v. Rendall*, 98 Me. 69; s. c. 63 L. R. A. 668; 56 Atl. Rep. 209.

tions a failure to observe this rule is held not to charge the offending driver with negligence *per se*, but the matter is to be considered with other evidence on the question of negligence.⁹¹ The law of the road applies to bicycles,⁹² vehicles driven on a street car track,⁹³ and push carts and lawn mowers propelled along the street.⁹⁴

§ 1290. Collisions with Teams Approaching from Behind.—It would seem that a person who drives into a vehicle standing still on the side of the street at a point where there is ample room to pass without collision should be charged with negligence as a matter of law.⁹⁵ One driving along a highway, and seeing a team on a run and likely to overtake him, will not be charged with negligence as a matter of law, in not turning out to allow the team to pass, unless it is apparent that the driver has lost control of the team.⁹⁶

§ 1292. Construction of Statutes Enjoining the Duty of Keeping to the Right.—A statute, imposing a penalty for a failure to turn to the right of the center of the road, is a recognition of the law of the road which would exist without the passage of such an act.⁹⁷ A statute of this character has been construed to require drivers to pass to the right of the center of the street, though the vehicles are passing on the same side of a highway so wide that there is no necessity for them to turn to the right of the center line of the highway in order to pass safely.⁹⁸ In another case it is held that a statute, requiring travelers to keep as nearly as practicable to the right of a street, is not violated as a matter of law by driving on the left-hand side of a street, the right-hand side of which is in such a condition as to render driving thereon impracticable or unsafe.⁹⁹ Neither will such a law forbid persons driving on the right-hand side from crossing to the left-hand side to avoid danger—as in the particular case where a driver crossed the street to avoid collision with an approaching hose cart.¹⁰⁰

§ 1294. Liability for Injuries from Leaving Horses Unhitched and Unattended.—A person leaving his horse on the street is charged with

⁹¹ Foote v. American Product Co., 195 Pa. St. 190; s. c. 45 Atl. Rep. 934; 49 L. R. A. 764; Neal v. Rendall, 98 Me. 69; s. c. 63 L. R. A. 668; 56 Atl. Rep. 209; Wood v. Boston Elevated R. Co., 188 Mass. 161; s. c. 74 N. E. Rep. 298.

⁹² Diehl v. Roberts, 134 Cal. 164; s. c. 66 Pac. Rep. 202.

⁹³ Diehl v. Roberts, 134 Cal. 164; s. c. 66 Pac. Rep. 202.

⁹⁴ Fahrney v. O'Donnell, 107 Ill. App. 608.

⁹⁵ Odom v. Schmidt, 52 La. Ann. 2129; s. c. 28 South. Rep. 350; Nead

v. Roscoe Lumber Co., 54 App. Div. (N. Y.) 621; 66 N. Y. Supp. 419.

⁹⁶ Elenz v. Conrad, 123 Iowa 522; s. c. 99 N. W. Rep. 138.

⁹⁷ Wright v. Fleischman, 41 Misc. (N. Y.) 533; s. c. 85 N. Y. Supp. 62.

⁹⁸ Wright v. Fleischman, 41 Misc. (N. Y.) 533; s. c. 85 N. Y. Supp. 62.

⁹⁹ Indianapolis St. R. Co. v. Slifer (Ind. App.), 72 N. E. Rep. 1055; s. c. rev'd in 35 Ind. App. 700; 74 N. E. Rep. 19 on other grounds.

¹⁰⁰ Streeter v. Marshalltown, 123 Iowa 449; s. c. 99 N. W. Rep. 114.

the duty of using such care in fastening the animal as a prudent person would exercise under similar circumstances, and whether such care has been used is a question of fact for the jury.¹⁰¹ By the great weight of authority the leaving of a horse untied and unhitched in a public street is at least *prima facie* evidence of negligence,¹⁰² and where prohibited by ordinance is negligence *per se*¹⁰³ devolving the burden of explanation upon the defendant. In such a case it is not necessary for the injured person to show that the horse had the habit of running away, or that the owner knew of such a habit if it existed.¹⁰⁴ But it is not negligence *per se* to leave a horse untied on the street, while the driver is on the sidewalk loading or unloading his wagon.¹⁰⁵ A driver, with knowledge that it was Christmas Eve, and that this occasion was celebrated in the vicinity by the explosion of fire crackers, was held negligent where he released control of his team while putting in the wagon the weight to which the team had been hitched, and the horses, frightened by the explosion of a fire cracker thrown by a mischievous boy, started with such suddenness that the driver was unable to gain control of them, and the runaway team struck a vehicle and injured the occupant.¹⁰⁶

§ 1297. **Liability for Damages Arising from Collisions with Run-away Horses.**—Recent decisions uphold the doctrine that the mere fact standing alone that a horse runs away on a public street and does damage will not make out a *prima facie* case of negligence on the part

¹⁰¹ Becker v. Schutte, 85 Mo. App. 57; Nesbit v. Crosby, 74 Conn. 554; s. c. 51 Atl. Rep. 550. Whether the driver of a team was negligent in leaving his horse standing, with his trace unfastened, so near to passing street cars that a passenger standing on the running-board of a car was crushed between the horse and the car held a question for the jury: McCormack v. Boston &c. R. Co., 188 Mass. 342; s. c. 74 N. E. Rep. 599.

¹⁰² Becker v. Schutte, 85 Mo. App. 57; Kelly v. Adelmann, 72 App. Div. (N. Y.) 590; s. c. 76 N. Y. Supp. 574; Manthey v. Rauenbuehler, 71 App. Div. (N. Y.) 173; s. c. 75 N. Y. Supp. 714; Thompson v. Plath, 44 App. Div. (N. Y.) 291; s. c. 60 N. Y. Supp. 621; Williams v. Koehler, 41 App. Div. (N. Y.) 426; s. c. 58 N. Y. Supp. 863; Gorsuch v. Swan, 109 Tenn. 36; s. c. 69 S. W. Rep. 1113; Laffamme v. Staines, Rap. Jud. Que. 18 C. S. 105.

¹⁰³ Healy v. Johnson, 127 Iowa 221; s. c. 103 N. W. Rep. 92.

¹⁰⁴ Haywood v. Hamm, 77 Conn. 158; s. c. 58 Atl. Rep. 695. Where the defendant's servant negligently left his horse untied in the street, and the horse ran away, and injured the plaintiff, it was no defense that the horse was ordinarily gentle, and that the possible cause of his running away was his being stung by bees in the street: Healy v. Johnson, 127 Iowa 221; s. c. 103 N. W. Rep. 92.

¹⁰⁵ Belles v. Kellner, 66 N. J. L. 561; s. c. 48 Atl. Rep. 1010; Rohde v. Mantell, 95 N. Y. Supp. 5. The right of a merchant to leave his team standing in the street while merchandise is being unloaded therefrom must be exercised with due regard to the rights of others lawfully using the street: McCormack v. Boston Elevated R. Co., 188 Mass. 342; s. c. 74 N. E. Rep. 599.

¹⁰⁶ Houston Transfer Co. v. Renard (Tex. Civ. App.), 79 S. W. Rep. 838.

of the driver of the horse, but that the plaintiff must go further and prove by other evidence that the runaway was due to negligence on the part of the driver.¹⁰⁷ The mere fact that one of the runaway horses was shown to have run away on a prior occasion, when it was frightened by some one squirting water on him, has been held insufficient to show that the horse was not a reasonably safe horse.¹⁰⁸ The driver of a spirited team may be imputed with negligence, where he starts with such a team without making any inspection of the harness or wagon, and the team becomes frightened because of the breakdown of some part of the vehicle, the condition of which should have been noted by a proper inspection.¹⁰⁹ The owner of a horse will not be liable for punitive damages in an action for injuries caused by the animal running away when left unhitched in the street, where the owner neither authorized, approved or ratified the act of the driver in thus leaving the animal unhitched.¹¹⁰

§ 1299. Liability for Injuries Caused by Fast Driving and Racing.

—Generally speaking, the driving of a vehicle along the side of a street at an improper and reckless rate of speed, resulting in injuries to persons rightfully using the streets, will charge the driver with negligence as a matter of law.¹¹¹ A municipality has the power to regulate the rate of speed of vehicles traversing its streets,¹¹² and prescribe different rates of speed in different portions of the city, according to the width of the streets and their use, etc.¹¹³ Ordinances fixing this rate at six,¹¹⁴ seven,¹¹⁵ and eight miles an hour have been upheld as reasonable.¹¹⁶ The mere fact that a vehicle was driven within the limit fixed by law will not absolve the driver, where he was guilty of negligence in other respects.¹¹⁷ Nor will the driver of an ambulance be ab-

¹⁰⁷ *Rowe v. Such*, 134 Cal. 573; s. c. 66 Pac. Rep. 862; *Holliday v. Gardner*, 27 Ind. App. 231; s. c. 59 N. E. Rep. 686; 61 N. E. Rep. 16; *Cunningham v. Belknap* (Ky.), 60 S. W. Rep. 837; s. c. 22 Ky. L. Rep. 1580; *McGahie v. McClennen*, 86 App. Div. (N. Y.) 263; s. c. 83 N. Y. Supp. 692.

¹⁰⁸ *Vonderhorst Brewing Co. v. Amrhine*, 98 Md. 406; s. c. 56 Atl. Rep. 833.

¹⁰⁹ *Birdsell Mfg. Co. v. Loughman*, 26 Ind. App. 359; s. c. 59 N. E. Rep. 872.

¹¹⁰ *Haywood v. Hamm*, 77 Conn. 158; s. c. 58 Atl. Rep. 695.

¹¹¹ *Wikberg v. Olson Co.*, 138 Cal. 479; s. c. 71 Pac. Rep. 511; *Ford v. Whiteman*, 2 Pen. (Del.) 355; s. c. 45 Atl. Rep. 543; *Freel v. Wanamaker*, 208 Pa. 279; s. c. 57 Atl.

Rep. 563; *Fleming v. Anawanscott Mills*, 22 R. I. 211; s. c. 47 Atl. Rep. 215 (horse driven at twelve or fifteen miles an hour on a country road after dark).

¹¹² *Chicago v. Banker*, 112 Ill. App. 94.

¹¹³ *Chittenden v. Columbus*, 26 Ohio Cir. Ct. R. 531.

¹¹⁴ *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531; s. c. 71 N. E. Rep. 1081; aff'g s. c. 113 Ill. App. 435.

¹¹⁵ *Chittenden v. Columbus*, 26 Ohio Cir. Ct. R. 531.

¹¹⁶ *Commonwealth v. Crowninshield*, 187 Mass. 221; s. c. 72 N. E. Rep. 963; 68 L. R. A. 245.

¹¹⁷ *Thies v. Thomas*, 77 N. Y. Supp. 276.

solved from liability for injuries caused by driving at an excessive rate of speed by the fact that he drove at the order of a surgeon in order to save the life of the occupant of the ambulance.¹¹⁸ It is not necessary to the conviction of a driver of an automobile, under the English statute limiting the rate of speed of these vehicles, that it be shown that travellers were on the highway at the time, or that other vehicles or persons were interfered with or incommoded by the speed at which the machine was being driven.¹¹⁹ The driver of an automobile may be charged with negligence contributing to his injury, where he drives his machine at such an excessive rate of speed that he cannot note the condition of the road over which he is driving.¹²⁰

§ 1300. Relative Rights of Foot Passengers and Teamsters.¹²¹

§ 1302. Injuries by Vehicles to Persons at Work on the Public Street.¹²²

§ 1307. Fast Driving and Racing in Violation of Municipal Ordinance.—The violation of an ordinance, limiting the speed of vehicles on public streets, constitutes a *prima facie* case of negligence, where the violation of the ordinance caused or contributed to the injury of a person lawfully on the street.¹²³

§ 1308. Frightening the Horses of other Travellers.—Again the owner of an animal, whose presence on the highway is calculated to frighten horses driven over the highway, may be charged with negligence in failing properly to secure the animal so as to prevent his escape from his pasture to the highway.¹²⁴

¹¹⁸ Green v. Eden, 24 Ind. App. 583; s. c. 56 N. E. Rep. 240.

¹¹⁹ Mayhew v. Sutton, 71 L. J. K. B. 46; s. c. 86 L. T. 18; 50 Wkly. Rep. 216.

¹²⁰ Morris v. Interurban St. R. Co., 100 App. Div. (N. Y.) 295; s. c. 91 N. Y. Supp. 479.

¹²¹ Foot passengers and drivers of vehicles have equal rights on the streets of a city, and both are bound to exercise commensurate care to avoid injury: Richardson v. Henry F. Davis & Co., 94 Minn. 315; s. c. 102 N. W. Rep. 868.

¹²² In a case where a person, at work in an excavation safeguarded by barrels and boards placed around an opening, was injured by the fall of the barricade into the excavation on being struck by a passing vehicle, it was held a question for the

jury whether the plaintiff was guilty of contributory negligence in working in an excavation so insecurely safeguarded: Jones v. Swift & Co., 30 Wash. 462; s. c. 70 Pac. Rep. 1109. It was also held a question for the jury whether the driver of a wagon knew, or ought to have known, of the presence of the plaintiff in the excavation: Jones v. Swift & Co., 30 Wash. 462; s. c. 70 Pac. Rep. 1109.

¹²³ United States Brewing Co. v. Stoltenberg, 113 Ill. App. 435; s. c. aff'd, 211 Ill. 531; 71 N. E. Rep. 1081; Mahnke v. Freer, 126 Mich. 572; s. c. 85 N. W. Rep. 1099; Bresnehan v. Gove, 71 N. H. 236; s. c. 51 Atl. Rep. 916.

¹²⁴ Plumb v. Maher, 76 Conn. 706; s. c. 56 Atl. Rep. 494.

§ 1311. **Injuries by the "Ice-Man."**—The owner of an ice wagon may be charged with the negligence of his driver in allowing the horse to proceed along the street without any guidance, while such driver is preparing ice for delivery, and the horse, thus uncontrolled, collides with persons or vehicles using the street.¹²⁵

§ 1312. **Injuries from the Use of Steam Traction Engines on the Highway.**—The owner of a traction engine is charged with the duty to act with due regard for the rights and safety of persons travelling on the public road in moving the engine over such road, and he will be liable for injuries due to negligence on his part, as for example, where he does not stop his engine on discovering that a horse is frightened by it and render assistance in quieting the animal.¹²⁶ A Wisconsin statute requiring the operator of a traction engine on a public highway to signal, and stop it, when approached within fifteen rods in either direction by a team, or person riding, or driving any animal, and desiring to pass such engine, is construed to apply only where the team or person riding or driving the animal is approaching the engine with the desire of passing it, and not where the team or person is standing still.¹²⁷

§ 1314. **Negligence in Leading Horses in the Street.**¹²⁸

§ 1315. **Evidence of Negligence in these Cases.**—It is the rule that the plaintiff has the burden of showing the defendant's negligence, and this proof is not shifted to the defendant by the fact that the injured person was a child and the defendant was a grown man.¹²⁹ On the question of care and the safety of the animal driven by the defendant, evidence is admissible to show that the horse had previously exhibited fright when near objects of the character causing him to become frightened on the occasion under investigation.¹³⁰ Where the horse was tied, but insecurely, and broke loose and collided with another carriage, it is proper to show that the horse was teased and annoyed by boys, and thus caused to break loose.¹³¹ On the question of negli-

¹²⁵ *Turtenwald v. Wisconsin Lakes Ice & C. Co.*, 121 Wis. 65; s. c. 98 N. W. Rep. 948.

¹²⁶ *Miller v. Addison*, 96 Md. 731; s. c. 54 Atl. Rep. 967.

¹²⁷ *Cudd v. Larson*, 117 Wis. 103; s. c. 93 N. W. Rep. 810.

¹²⁸ In a case where a led horse was struck by a wagon, which caused him to become unmanageable for the moment, when he struck and injured the plaintiff, it was held that there was a lack of evidence to justify the finding of negligence, it appearing that the horse was gentle,

and was in the habit of being led every morning, and the servant leading him was an experienced horseman and did all that he could to control the horse: *Haines v. Keahon*, 46 App. Div. (N. Y.) 164; s. c. 61 N. Y. Supp. 757.

¹²⁹ *Lee v. Jones*, 181 Mo. 291; s. c. 79 S. W. Rep. 927.

¹³⁰ *Fleming v. Anawanscott Mills*, 22 R. I. 211; s. c. 47 Atl. Rep. 215.

¹³¹ *Thompson v. Plath*, 44 App. Div. (N. Y.) 291; s. c. 60 N. Y. Supp. 621.

gence in leaving a horse unhitched on the street, evidence is admissible that the street was much frequented, and that the person in charge of the horse had knowledge of that fact.¹³²

§ 1318. **Questions for the Jury.**¹³³—The question of negligence in cases of this character is always for the jury where the evidence is such that conflicting reasonable inferences may be drawn therefrom.¹³⁴

§ 1322. **Contributory Negligence of the Person Injured Generally a Question for Jury.**¹³⁵

§ 1323. **Facts to which Contributory Negligence Not Ascribed as Matter of Law.**—Courts have refused to ascribe contributory negligence, as a matter of law to the act of a person in riding a gentle horse bareback with a halter only, and thrown from the horse, which was caused to shy by a defect in the street;¹³⁶ to the act of a person in leaving his horse hitched to a telegraph pole in front of his place of business where the animal was struck by a runaway team before the owner had time to unhitch him.¹³⁷

§ 1327. **Not Contributory Negligence to Fail to Anticipate the Negligence of a Person Driving in the Road.**—Generally speaking, a person using the highway has a right to rely on the exercise of reasonable care by drivers of vehicles to avoid causing injury to him, and he is not to be imputed with contributory negligence in failing to anticipate the omission of such care.¹³⁸

¹³² Healy v. Johnson, 127 Iowa 221; s. c. 103 N. W. Rep. 92.

¹³³ Overhouser v. American Cereal Co., 118 Iowa 417; s. c. 92 N. W. Rep. 74 (whether the act of a contractor in scattering stones along street with which a bicyclist collided and suffered injuries was reasonably incident to the work being done or the result of the negligent method of the teamster); Neal v. Rendall, 98 Me. 69; s. c. 56 Atl. Rep. 209; 63 L. R. A. 668 (whether defendant was negligent in crossing to the wrong side of the road, where the evidence showed that he had ample time to turn to the right before colliding with an approaching team); Knight v. Lanier, 69 App. Div. (N. Y.) 454; s. c. 74 N. Y. Supp. 999 (whether an automobilist driving his machine along a private lane should have halted his machine until the fear of an approaching team of horses had subsided).

¹³⁴ Morgan v. Pleshek, 120 Wis. 306; s. c. 97 N. W. Rep. 916.

¹³⁵ For cases illustrative of the proposition indicated, see: Glickson v. Shannon, 88 Ill. App. 240; Graham v. Evening Press Co., 135 Mich. 298; s. c. 97 N. W. Rep. 697; 10 Det. Leg. N. 730 (whether plaintiff failed to use due care in not looking in the direction in which a team was approaching); Bachmann v. Paul Weidmann Brewing Co., 80 App. Div. (N. Y.) 634; s. c. 80 N. Y. Supp. 931; Connaughton v. Sun Printing & Ass'n, 73 App. Div. (N. Y.) 316; s. c. 76 N. Y. Supp. 755; Thies v. Thomas, 77 N. Y. Supp. 276 (whether six-year-old boy run over by automobile was negligent in playing on the street).

¹³⁶ Helbig v. Grays Harbor Elec. Co., 37 Wash. 130; s. c. 79 Pac. Rep. 612.

¹³⁷ Birdsell Mfg. Co. v. Loughman, 26 Ind. App. 359; s. c. 59 N. E. Rep. 872.

¹³⁸ Schwartz v. London, 90 N. Y. Supp. 449; Stroub v. Meyer, 132 Mich. 75; s. c. 92 N. W. Rep. 779; 9

§ 1328. Contributory Negligence of Foot Passengers Run Over by Horses and Vehicles.—Contributory negligence as a matter of law will not be ascribed to a pedestrian struck by a vehicle—in this case an automobile—because he was standing in the roadway conversing with a person who had stopped his team to talk with him.¹³⁹ In the case of a child nine years old who was injured while playing in the street by contact with a team driven thereon it was held that evidence that the child, being absorbed in play, deliberately ran into the team without looking, was sufficient to impute the child with contributory negligence when judged by the ordinary standards of care shown by children of a like age.¹⁴⁰

§ 1329. Whether Contributory Negligence for Footman to Fail to Look for Approaching Teams.¹⁴¹—In one case a court has held that an elderly person, crossing an icy street, and seeing an approaching sleigh at a distance, is not to be charged with negligence in failing to watch the sleigh and keep out of its way, the street being otherwise unoccupied.¹⁴² In another case contributory negligence was not imputed where the injured person, though nearly deaf, listened as well as she could for approaching vehicles, and a jog in the street interfered with her vision so that she could not note the approach of a runaway team coming from that direction, and she was run over and injured.¹⁴³ Clearly a person will not be required to look backward to see whether he is in danger of being run into by teams going in the direction he is travelling.¹⁴⁴ An injured person was held to have failed to show his freedom from contributory negligence, though he testified that he did not see the horse that struck him, where the evidence was clear that he was struck so soon after leaving the sidewalk that the horse must have been in plain sight at the time he left the sidewalk.¹⁴⁵

§ 1335. Bicycles are "Vehicles" and have the Same Rights as Other Vehicles.—The bicycle is generally regarded by the courts as a vehicle subject to the rules of law governing other vehicles using the

Det. Leg. N. 530; *Gilbert v. Burque*, 72 N. H. 521; s. c. 57 Atl. Rep. 927; *Caesar v. Fifth Ave. Coach Co.*, 45 Misc. (N. Y.) 331; s. c. 90 N. Y. Supp. 359; *Kelly v. Adelman*, 72 App. Div. (N. Y.) 590; s. c. 76 N. Y. Supp. 574.

¹³⁹ *Kathmeyer v. Mehl*, — N. J. L. —; s. c. 60 Atl. Rep. 40.

¹⁴⁰ *Young v. Small*, 188 Mass. 4; s. c. 73 N. E. Rep. 1019.

¹⁴¹ That the traveller is negligent where he fails to look for approach-

ing teams, see: *West v. New York Transp. Co.*, 47 Misc. (N. Y.) 603; s. c. 94 N. Y. Supp. 426; *Mead v. Otto Huber Brewery*, 104 App. Div. (N. Y.) 10; s. c. 93 N. Y. Supp. 244.

¹⁴² *McCrohan v. Davison*, 187 Mass. 466; s. c. 73 N. E. Rep. 553.

¹⁴³ *Groom v. Kavanagh*, 97 Mo. App. 362; s. c. 71 S. W. Rep. 362.

¹⁴⁴ *Scofield v. Myers*, 27 Ind. App. 375; s. c. 60 N. E. Rep. 1005.

¹⁴⁵ *Lieberman v. Stanley*, 88 N. Y. Supp. 360.

highway, and its rider is required to use the same degree of care to avoid injury to persons or vehicles on the highway as the driver of a team of horses.¹⁴⁶ Under a Massachusetts statute requiring highways to be kept repaired "so that the same may be reasonably safe and convenient for travellers, with their horses, teams and carriages at all seasons of the year," a bicycle is not included in the term "carriage" so as to permit a recovery by a bicycle rider injured by being thrown from his wheel because of a defect in the highway.¹⁴⁷

§ 1338. Rights and Duties of Bicyclers in Traversing the Streets.

—Bicycles are subject to the requirement of the law of the road that persons shall seasonably turn to the right of the road on meeting any other person so travelling,¹⁴⁸ and a rider, injured while travelling on the left-hand side of the road, must show a sufficient excuse for being there to charge the driver of the colliding vehicle with negligence.¹⁴⁹ The rider of a bicycle, like the driver of other vehicles, has a right to act on the assumption that an approaching vehicle will respect the law of the road.¹⁵⁰ The doctrine of *res ipsa loquitur* is inapplicable to bicycle collisions; no inference of negligence on the part of one riding on a bicycle is raised by the law by the mere fact of a collision with a pedestrian or vehicle on the highway.¹⁵¹ In one case where a bicycle rider, following a wagon, turned to pass between the wagon and the curb at the instant that the driver turned his horse toward the curb, and a collision with attendant injuries resulted, it was held that negligence on the part of the driver was not shown, where he claimed that he was unaware of the presence of the bicycle at the rear of his wagon, and that he did not hear a bell that the bicyclist claimed that he rung. The law does not require a driver of a vehicle to keep a lookout toward the rear of his wagon.¹⁵²

§ 1339. Contributory Negligence of the Wheelman.—A bicycle rider is not negligent, as a matter of law in riding his wheel at the rate

¹⁴⁶ North Chicago St. R. Co. v. Cosar, 203 Ill. 608; s. c. 68 N. E. Rep. 88 (bicycle rider struck a street car conductor who had alighted to assist a passenger to the car); Lee v. Jones, 181 Mo. 291; s. c. 79 S. W. Rep. 927; Nelson v. Breman, 22 R. I. 283; s. c. 47 Atl. Rep. 696 (bicycle rider passing out of a gate to cross the sidewalk of a travelled highway, rode so close to the gate-posts as to be unable to see a pedestrian on the sidewalk in time to stop, and thereby inflicted a personal injury).

¹⁴⁷ Richardson v. Danvers, 176 Mass. 413; s. c. 50 L. R. A. 127; 57 N. E. Rep. 688. See also, Howard

v. Union R. Co., 25 R. I. 652; s. c. 57 Atl. Rep. 867; 65 L. R. A. 231.

¹⁴⁸ Foote v. American Product Co., 195 Pa. St. 190; s. c. 49 L. R. A. 764; 45 Atl. Rep. 934.

¹⁴⁹ Pick v. Thurston, 25 R. I. 36; s. c. 54 Atl. Rep. 600.

¹⁵⁰ Foote v. American Product Co., 195 Pa. St. 190; s. c. 45 Atl. Rep. 934; 49 L. R. A. 764.

¹⁵¹ Lee v. Jones, 181 Mo. 291; s. c. 79 S. W. Rep. 927.

¹⁵² Holt v. Cutler, 185 Mass. 24; s. c. 69 N. E. Rep. 333. See also, Pick v. Thurston, 25 R. I. 36; s. c. 54 Atl. Rep. 600.

of seven miles per hour,¹⁵³ particularly where the speed limit for bicycles is placed at a higher rate by municipal ordinance.¹⁵⁴ Nor will a bicyclist be imputed with contributory negligence in riding in a bent position, where this attitude is consistent with such observation as a traveller on a highway is obliged to make in respect to obstructions on the highway—as in this case, a hose stretched across the highway with which he collided and was thrown.¹⁵⁵ In another case a bicycle rider was riding down a steep hill, and at a sharp turn in the road which he knew was dangerous, he collided with an ascending team. The evidence left it doubtful whether the bicyclist was on the left or right side of the road, but it was clearly established that there was sufficient room for him to pass on either side. Under these facts a recovery for his injuries was refused.¹⁵⁶

¹⁵³ *Overhouser v. American Cereal Co.*, 118 Iowa 417; s. c. 92 N. W. Rep. 74; *Foote v. American Product Co.*, 201 Pa. 510; s. c. 51 Atl. Rep. 364.

¹⁵⁴ *Jones v. Shattuck*, 175 Mass. 415; s. c. 56 N. E. Rep. 736.

¹⁵⁵ *North Jersey St. R. Co. v. Morhart*, 64 N. J. L. 236; s. c. 45 Atl. Rep. 812.

¹⁵⁶ *Rowland v. Wanamaker*, 193 Pa. St. 598; s. c. 44 Atl. Rep. 918.

PART THREE.

AUTOMOBILE LAW.

[§§ 1340-1340i.]

§ 1340. **The Right of Automobiles to Use Roads and Streets.**—The law is now settled that streets and highways are subject to new uses. Travellers are no longer confined to the use of vehicles propelled by animal power; the highways and streets are not for the exclusive use of such methods of transportation. The law presumes that when highways and streets are laid out and dedicated that it was in contemplation of the use of new and improved means of locomotion, whenever the general benefit of the public required it. These new and improved means of transportation over such streets and highways cannot be excluded merely because such use tends to the inconvenience or even to the danger of persons who continue the use of former methods.¹⁵⁷ This principle was stated by one court as follows: "Persons making use of horses as means of travel or traffic by the highways have no rights therein superior to those who make use of the ways in other modes. It is true that locomotion upon public roads has hitherto been chiefly by means of horses and similar animals, but persons using them have no prescriptive rights, and are entitled only to the same reasonable use of the ways which they must accord to all others. Improved methods of locomotion are perfectly admissible if any shall be discovered, and they cannot be excluded from the existing public roads provided their use is consistent with the present methods."¹⁵⁸ On this subject the

¹⁵⁷ *Bogue v. Bennett*, 156 Ind. 478; s. c. 60 N. E. Rep. 143; 83 Am. St. 212; *Macomber v. Nichols*, 34 Mich. 212; s. c. 22 Am. 522; *Mason v. West*, 61 App. Div. (N. Y.) 40; s. c. 70 N. Y. Supp. 478; *Nason v. West*, 31 Misc. (N. Y.) 583; s. c. 65 N. Y. Supp. 651.

¹⁵⁸ *Cooley, J.*, in *Macomber v. Nichols*, 34 Mich. 212; s. c. 22 Am. 522. See also *Laufer v. Traction Co.*, 68 Conn. 475; s. c. 37 Atl. Rep. 379; *Moses v. Pittsburg & C. R. Co.*, 21 Ill. 515; *Murphy v. Chicago*, 29 Ill. 279; *Chicago v. Rumsey*, 87 Ill. 348; *People v. Branson*, 96 Ill. 232; *Quincy v. Bull*, 106 Ill. 337; *Chicago Dock & C. Co. v. Garrity*, 115 Ill. 155; s. c. 3 N. E. Rep. 448; *Ligare v. Chicago*, 139 Ill. 46; s. c. 28 N. E.

934; 32 Am. St. 179; *Doane v. Lake St. & C. R. Co.*, 165 Ill. 510; s. c. 46 N. E. Rep. 520; 56 Am. St. 265; 36 L. R. A. 97; *Chicago Office Bldg. v. Lake St. & C. R. Co.*, 87 Ill. App. 594; *Chicago v. Banker*, 112 Ill. App. 94; *Fulton v. Short Route R. & C. Co.*, 85 Ky. 640; s. c. 4 S. W. Rep. 332; *Louisville Bagging & C. Co. v. Central & C. R. Co.*, 95 Ky. 50; s. c. 23 S. W. Rep. 592; 44 Am. St. 203; *Detroit City R. Co. v. Mills*, 85 Mich. 634; s. c. 48 N. W. Rep. 1007; *People v. Eaton*, 100 Mich. 208; s. c. 59 N. W. Rep. 145; *Knight v. Lanier*, 69 App. Div. (N. Y.) 454; s. c. 74 N. Y. Supp. 999; *Nason v. West*, 31 Misc. (N. Y.) 583; s. c. 65 N. Y. Supp. 651; *Elliot Roads & Streets*, § 851.

supreme court of Indiana, in an automobile case, said: "The law does not denounce motor carriages, as such, on the public ways. For, so long as they are constructed and propelled in a manner consistent with the use of highways, and are calculated to subserve the public as a beneficial means of transportation, with reasonable safety to travelers by ordinary modes, they have an equal right with other vehicles in common use to occupy the streets and roads. Because novel and unusual in appearance, and for that reason likely to frighten horses unaccustomed to see them, is no reason for prohibiting their use. In all human activities the law keeps up with the improvement and progress brought about by discovery and invention, and, in respect to highways, by the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience and even incidentally injury to those using ordinary modes, there can be no recovery, provided the contrivance is compatible with the general use and safety of the road."¹⁵⁹

§ 1340a. Right to Use Highways—Limitations.—This right to use the highways for all modes of travel is subject to the limitation that the right must be exercised so as not to destroy the rights of others or exclude them from the use of the highways. The right of one person to an unusual or peculiar use of a highway must be reasonably consistent with the right of all other persons in their use of such highway. As to this right the supreme court of Rhode Island has said: "The defendant had a right to transport his machinery over the highway; and as was stated by way of illustration, any person has a right to transport over the highway elephants and animals which may frighten horses. So, also, loads of goods which, from their height or appearance, or the noise made in transport, might terrify some horses. This right is undoubted, but it is to be so exercised as not to endanger the lives or property of others who have equal rights upon the highway."¹⁶⁰

§ 1340b. Legislative Control Over Use of Automobiles.—Upon the advent of the automobile and motor car, for obvious reasons the legislatures of many States passed statutes regulating their speed upon highways, requiring their registration and the display of numerals upon the machines. And licenses are required by States and municipalities. The courts have been practically unanimous in holding that the States and municipalities have power to regulate the driving of

¹⁵⁹ Hadley, J., in *Indiana Springs Co. v. Brown*, 165 Ind. 465; s. c. 74 N. E. Rep. 615; 1 L. R. A. (N. S.)

238. See also *Elliot Roads and Streets*, § 851.

¹⁶⁰ Potter, J., in *Bennett v. Lovell*, 12 R. I. 166; s. c. 34 Am. 628.

these machines upon the streets and highways as well as to require registration and the display of numerals. The supreme court of Massachusetts, in passing upon the validity of such a statute, said: "There can be no question of the right of the legislature, in the exercise of the police power to regulate the driving of automobiles and motor cycles on the public ways of the commonwealth. They are capable of being driven and are apt to be driven at such a high rate of speed and when not properly driven are so dangerous, as to make some regulation necessary for the safety of other persons on the public ways."¹⁶¹

§ 1340c. Negligence.—The rule as to the liability for negligence for injuries occasioned by improper use of highways was established before automobiles were in use, but the rule applies to these vehicles as well as to other means of travel. This general rule is that where an injury occurs to one using the highways by the old or ordinary means of travel by a person using some new or different method, the right of action depends upon the question of negligence.¹⁶² It has been held that negligence in operating an automobile on a street or highway may consist in the high rate of speed at which the machine is being driven, in being on the wrong side of the highway, or the failure to give warning by sounding a whistle, bell or gong.¹⁶³ Again, actionable negligence may consist in the failure of an operator of an automobile to stop where he knew, or by the exercise of ordinary care could have known, that the machine had so far excited an approaching horse as to render him unmanageable.¹⁶⁴

§ 1340d. Duty and Degree of Care Required.—The rule of law as to the degree of care required of drivers of automobiles does not differ either in nature or degree from the rules regulating the use of other machinery, vehicles, or engines. As said by the Rhode Island supreme court: "As in other cases of the use of a dangerous article, the required degree of care increases with the danger to be apprehended from the use of it and from exposure to it. * * * The man who, claiming to be in the exercise of his own right to drive along the highway an object or animal which, from its appearance, noise or other offensiveness, is calculated to frighten horses, without

¹⁶¹ Loring, J., in *Commonwealth v. Boyd*, 188 Mass. 79; s. c. 74 N. E. Rep. 255. See also *People v. Schneider*, 139 Mich. 673; s. c. 103 N. W. Rep. 172; *People v. MacWilliams*, 94 App. Div. (N. Y.) 176; s. c. 86 N. Y. Supp. 357; *Fonsler v. Atlantic City*, 70 N. J. L. 125; s. c. 56 Atl. Rep. 119; *State v. Cobb*, 113 Mo. App. 156; s. c. 87 S. W. Rep. 551.

¹⁶² *Macomber v. Nichols*, 34 Mich. 212; s. c. 22 Am. 522.

¹⁶³ *Collard v. Beach*, 81 App. Div. (N. Y.) 582; s. c. 81 N. Y. Supp. 619.

¹⁶⁴ *Shinkle v. McCullough*, 116 Ky. 960; s. c. 77 S. W. Rep. 196; 25 Ky. L. Rep. 1143.

taking precautions by having a sufficient number of persons in charge of it to warn others of the danger, and if need be, to aid them in passing, for women and children have a right to drive on the highway as well as men, or who leaves such an object on the highway without proper precautions, cannot be said to be using that due care he ought to use, and which the law and a proper regard for the lives of his fellow men and the common duty of humanity require of him.”¹⁶⁵ The rule was stated by the New York supreme court thus: “The rules governing the degree of care which individuals upon the highway should exercise for mutual safety are well settled and related in their application to the danger to be reasonably apprehended under ever-varying conditions of exposure and peril. While the automobile is a lawful means of conveyance and has equal rights upon the roads with the horse and carriage, its use cannot be lawfully countenanced unless accompanied with that degree of prudence in management and consideration for the rights of others which is consistent with safety.”¹⁶⁶ The supreme court of Indiana expressed the same rule more fully as follows: “As drivers about to meet upon the road, each owed the other the reciprocal duty to conduct himself and conveyance in a manner to avoid placing the other in jeopardy. And when the defendant saw that the plaintiff’s horse had become frightened at the rapid approach of the strange, noisy carriage, and that plaintiff was in danger, * * * it was the highest moral as well as legal duty of the defendant to stop and remove the plaintiff’s peril, rather than increase it by rushing onward. * * * Will any one seriously say that the driver of such automobile, recently brought to the vicinity, may speed it at twenty miles an hour along the highway toward approaching harnessed horses, puffing and whirring so as to be heard several hundred yards away, and, seeing a horse in front of him, hitched to a buggy, rearing, plunging and trying to bolt from the road without any other apparent cause, is justified in maintaining his speed because he does not know what it is that causes the horse’s fright? Such contention is not argument. Any reasonable chauffeur, inclined to respond to the simplest offices of humanity, would not think of circumscribing his conduct under such circumstances by the rules of the law, even if such rules lead to the absurd limits suggested. The law of the road does not tolerate any such inconsiderate and reckless disregard of the rights of other travellers on the highway.”¹⁶⁷ The court of appeals of Kentucky stated the duty

¹⁶⁵ Potter, J., in *Bennett v. Lovell*, 12 R. I. 166; s. c. 34 Am. 628.

¹⁶⁶ Hirschberg, J., in *Knight v. Lannier*, 69 App. Div. (N. Y.) 454; s. c.

74 N. Y. Supp. 999; *Banks v. Braman*, 188 Mass. 367; s. c. 74 N. E. Rep. 594.

¹⁶⁷ Hadley, J., in *Indiana Springs*

and degree of care required by a driver of an automobile thus: "While automobiles are a lawful means of conveyance and have equal rights upon the public roads with horses and carriages, their use should be accompanied with that degree of prudence in management and consideration for the rights of others which is consistent with their safety. If, as the jury found by their verdict, appellee knew, or could have known by the exercise of ordinary care, that the machine in his possession and under his control had so far excited appellee's horse as to render him dangerous and unmanageable, it was his duty to have stopped his automobile and taken such other steps for appellee's safety as ordinary prudence might suggest."¹⁶⁸

§ 1340e. **Negligence—Illustrations.**—A horse became frightened at an approaching automobile and the driver alighted from the vehicle, and motioned the chauffeur with his hand, and held the horse by the bit. The automobile stopped, but started again toward the horse, and as it approached the horse became unmanageable, reared and plunged while the driver struggled to control it, but the automobile was not stopped. The horse in its fright turned the vehicle in the ditch and the plaintiff was injured. It was held that a finding of negligence was justified.¹⁶⁹ In an Illinois case it appeared that the automobile was running at a high rate of speed on an unobstructed road, where the driver of the machine could easily have seen the approaching team. On the question of the driver's negligence the court said: "The jury were justified in concluding that, if he did not see the team approaching, he could have done so by the exercise of ordinary prudence and care. The evidence is of such a character, too, that the jury were justified in believing that the appellant saw that the horses were frightened by the approach of his machine. This being so, it was his duty to stop his automobile. But the evidence is that he did not do so, nor did he slacken its speed, but proceeded upon his way without taking any notice whatever of the parties in the wagon, who were injured. The statute does not contemplate that the driver of an automobile can proceed until a team turns over the wagon and runs away, but is intended to prevent such occurrences."¹⁷⁰ The New York appellate division, by a divided court,

Co. v. Brown, 165 Ind. 465; s. c. 74 1035; 1 L. R. A. (N. S.) 215. See N. E. Rep. 615.

¹⁶⁸ Burnham, J., in Shinkle v. McCullough, 116 Ky. 960; s. c. 77 S. W. Rep. 196.

¹⁶⁹ Murphy v. Wait, 102 App. Div. (N. Y.) 121; s. c. 92 N. Y. Supp. 253.

¹⁷⁰ Magruder, J., in Christy v. Elliot, 216 Ill. 31; s. c. 74 N. E. Rep. s. c. 96 N. Y. Supp. 270.

held that the evidence was insufficient to show negligence on the part of an automobile, where it was left doubtful that the rate of speed was excessive, and where it further appeared that the boy who was struck stepped suddenly out from behind a mass of building material, and that the driver had perfect control of his machine.¹⁷¹ A charge that the defendant was running his automobile at a high rate of speed and negligently, and with great violence drove the machine against the plaintiff's horses and caused them to run away, was held not to be supported by proof that the defendant was driving his automobile at a reasonable rate of speed, but failed to stop when he discovered that the plaintiff's horses were frightened and about to run away.¹⁷²

§ 1340f. Negligence—Rate of Speed.—It is generally considered by the authorities that States, municipalities and townships have the power to regulate the rate of speed at which automobiles may be driven on the highways and streets.¹⁷³ It has been held within the power of a city council to prescribe different rates of speed for automobiles in different parts of the city, according to the width of streets, their use, and the density of the population.¹⁷⁴ The question here is not so much the power of States and municipalities to regulate the speed and operation of automobiles as it is the effect of such regulations on the question of negligence. The question is whether it is sufficient to escape liability, where the driver of an automobile is charged with negligence, to show that at the time of the injury complained of he was acting or driving within the statutory regulation. The decided cases very clearly answer this question in the negative, and show that the mere fact that the machine was operated or driven within the permitted rate of speed is no defense on the question of negligence. On this subject the supreme court of New York said: "No owner or operator of an automobile is, therefore, exempt from liability for collision in a public street by simply showing that at the time of the accident he did not run at a rate of speed exceeding the limit allowed by law or the ordinances. On the contrary, * * * he still remains bound to anticipate that he may meet persons at any point in a public street, and he must keep a proper lookout for them,

¹⁷¹ *Polsky v. New York Transp. Co.*, 96 App. Div. (N. Y.) 613; s. c. 88 N. Y. Supp. 1024; *Stewart v. Baruch*, 93 N. Y. Supp. 161.

¹⁷² *Trout Brook Ice & Co. v. Hartford Electric & Co.*, 77 Conn. 338; s. c. 59 Atl. Rep. 405.

¹⁷³ *Berry, Ex parte*, 147 Cal. 523; s. c. 82 Pac. Rep. 44; *Chicago v.*

Banker, 112 Ill. App. 94; *Commonwealth v. Crowninshield*, 187 Mass. 221; s. c. 72 N. E. Rep. 963; 68 L. R. A. 245; *Radnor Twp. v. Bell*, 27 Pa. Sup. Ct. 1; *People v. Ellis*, 88 App. Div. (N. Y.) 471; s. c. 85 N. Y. Supp. 120.

¹⁷⁴ *Chittenden v. Columbus*, 26 Ohio C. C. 531.

and keep his machine under such control as will enable him to avoid a collision with another person also using proper care and caution. If necessary he must slow up, and even stop. No blowing of a horn or of a whistle, nor ringing of a bell or gong, without an attempt to slow the speed, is sufficient, if the circumstances at a given point demand that the speed should be slackened, or the machine be stopped, and such a course is practicable, or, in the exercise of ordinary care and caution proportionate to the circumstances, should have been practicable. The true test is, that he must use all the care and caution which a careful and prudent driver would have exercised under the same circumstances."¹⁷⁵ In an action for damages for injury caused by an automobile, the court was requested to instruct the jury to the effect that an owner of an automobile had the right to use the highway, provided he did not violate the law of the State. The court refused, and on appeal it was said: "The instruction, as offered, would tend to make the jury believe that, if there was no infraction of the statute the appellant would not be liable, whereas, under the fifth and sixth counts, the appellant was liable if he was guilty of common-law negligence, or if he failed to perform his duty under the common law to avoid injury to the appellee."¹⁷⁶ Statutes granting and regulating the uses of highways and streets may protect a person in the proper use of the highway, but do not shield him from the result of his negligence in the exercise of that right as against other persons. A statute involving this principle, but not relating to automobiles, was commented upon by the supreme court of Rhode Island thus: "That act might indeed protect the party from being indicted for a public nuisance, but could not protect him from the consequences of his negligent exercise of his rights as against other persons."¹⁷⁷

§ 1340g. **Negligence—Intervening Agency.**—The rules of law as to proximate and remote cause apply to owners and drivers of automobiles. Where the injury complained of was caused by an intervening agency there is no liability. This principle was applied in a case where a chauffeur left his automobile standing in the street temporarily; he turned off the power and set the brake; in his absence the machine was started by the willful act of two boys and an injury resulted to a third person. In passing upon the case the court suggested that it was not the duty of the chauffeur to chain his machine to a post or to fasten it so that it would be absolutely impossible for a third person to start it. Only reasonable care was to be exercised

¹⁷⁵ Freedman, J., in *Thies v. liot*, 216 Ill. 31; s. c. 74 N. E. Rep. 1035; 1 L. R. A. (N. S.) 214.

¹⁷⁶ Thomas, 77 N. Y. Supp. 276.

¹⁷⁷ Magruder, J., in *Christy v. El-* ¹⁷⁷ Potter, J., in *Bennett v. Lovell*, 12 R. I. 166; s. c. 34 Am. 628.

in such a case. But where a statute requires a certain manner of locking the machine, it must be complied with.¹⁷⁸

§ 1340h. Duty of Chauffeur—General Rule.—From the statutes of the various States and the adjudicated cases a general rule may be deduced to the effect that the chauffeur or driver of an automobile upon a public highway must manage and control his machine with the care and prudence that is consistent with the safety of others lawfully using such highway; and when he sees or knows, or by the exercise of ordinary care might know, that his automobile by reason of its unusual and peculiar construction, or by reason of the peculiar noise, smoke or vapor that it emits, or by reason of the rate of speed at which it is driven, is frightening the horse or team of another using the highway, and that such horse or team is or will become unmanageable, and is likely to injure persons in the vehicle drawn by such horses or team, it is his duty to stop his automobile immediately and give the other person reasonable time in which to extricate himself from the probable injury likely to be occasioned by reason of such fright of the horse or team.¹⁷⁹

§ 1340i. Duty of Chauffeur toward Persons in Streets.¹⁸⁰—The same rules of law apply to the drivers of automobiles as to other per-

¹⁷⁸ *Berman v. Schultz*, 40 Misc. (N. Y.) 212; s. c. 81 N. Y. Supp. 292.

¹⁷⁹ *Indiana Spring Co. v. Brown*, 165 Ind. 465; s. c. 74 N. E. Rep. 615; *Shinkle v. McCullough*, 116 Ky. 960; s. c. 77 S. W. Rep. 196; *Mason v. West*, 61 App. Div. (N. Y.) 40; s. c. 70 N. Y. Supp. 478.

¹⁸⁰ The statute of New York defines the duties of drivers of automobiles when meeting persons driving or riding horses on the highway thus: "Every person driving an automobile shall, at request or signal, by putting up the hand, from a person driving or riding a restive horse or horses or driving domestic animals, cause the automobile to immediately stop and remain stationary, and upon request, shall cause the engine of such automobile to cease running so long as may be necessary to allow said horses, or domestic animals to pass. This provision shall apply to automobiles going in the same or in an opposite direction." New York Laws 1903, chap. 625, p. 1421, § 3. See also *Murphy v. Wait*, 102 App. Div. (N. Y.) 121; s. c. 92 N. Y. Supp. 253. The statute of Illinois provides

that: "Whenever it shall appear that any horse driven or ridden by any person, upon any of said streets, roads or highways is about to become frightened by the approach of any such automobile or vehicle, it shall be the duty of the person driving or conducting such automobile or vehicle to cause the same to come to a full stop, until such horse or horses have passed:" Act of May 13, 1903, § 2, p. 301. The statute of Rhode Island provides: "Every person having control or charge of an automobile, motor car, or motor cycle, shall, whenever upon any public street or way and approaching any vehicle drawn by a horse or horses, or approaching any horse upon which any person is riding, operate, manage and control such automobile, motor car or motor cycle in such manner as to exercise every reasonable precaution to prevent frightening of such horse or horses and to insure the safety and protection of any person riding or driving the same. And if such horse or horses appear to be frightened, the person in control of such automobile, motor car or motor

sons driving or operating horse and steam or electric cars in streets or highways. The general rule is that when a driver or operator of such carriages, by the exercise of a proper lookout, either knows or should have known that a child of tender years, or a person in a somewhat helpless condition, is in a position of disadvantage in the street or highway and seemingly unable to avoid the collision, the driver is required to exercise increased care in order to avoid inflicting injury upon such child or person.¹⁸¹ Pedestrians, adults and infants, have the right to assume that a person in charge of an automobile will exercise care and respect their rights when he turns the corners of a street. Due care at such a time requires that it be slowed down and operated under control. The driver is bound to take notice that people will be at the crossing or entering thereon; the pedestrian has a right to assume that the operator of the machine will discharge this obligation.¹⁸² So the chauffeur is bound to take notice of and respect the rights of a person standing in the roadway talking with a friend sitting in a carriage.¹⁸³

cycle shall reduce its speed, and shall not proceed farther toward such animal unless such movement be necessary to avoid accident or injury, or until such animal appears to be under the control of its rider or driver, and in case of extreme fright shall reduce the motive power to a full stop." Acts R. I. 1904, chap. 1157, § 4. To the same effect, substantially, are the statutes of the following states: Alabama, California, Connecticut, Delaware, District of Columbia, Florida, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Oregon, South Carolina, South Da-

kota, Tennessee, Vermont, Virginia, Washington, Wisconsin and England. These statutes are collected and set out in full in Huddy's Law of Automobiles, published in 1906.

¹⁸¹ Thies v. Thomas, 74 N. Y. Supp. 276.

¹⁸² Buscher v. New York Transp. Co., 106 App. Div. (N. Y.) 493; s. c. 94 N. Y. Supp. 798; Hennessey v. Taylor, 189 Mass. 583; s. c. 76 N. E. Rep. 224.

¹⁸³ Kathmeyer v. Mehl, — N. J. L. —; s. c. 60 Atl. Rep. 40; Caesar v. Fifth Ave. Coach Co., 45 Misc. (N. Y.) 331; s. c. 90 N. Y. Supp. 359; Christy v. Elliot, 216 Ill. 31; s. c. 74 N. E. 1035; 1 L. R. A. (N. S.) 214.

TITLE TEN.

STREET RAILWAY NEGLIGENCE.

[§§ 1345a-1482.]

PART ONE.

IN GENERAL.

[§§ 1345a-1434.]

§ 1345a. **Municipal Regulation.**—The right of a municipality to exercise a reasonable control over street railroads exists notwithstanding the company occupies the streets under direct authority from the State.¹

§ 1350. **Liability for Obstructing Streets and Highways by Railway Trains.**²

§ 1353. **Liability of Railway Companies for Injuries from Tracks Laid in Streets.**—Under a principle which imposes upon a street railroad company the duty to keep its track in a proper state of repair, a street railroad company will be liable for injuries caused by negligently maintaining its track at such a height above the travelled way as to amount to an obstruction;³ and the company will not be excused on the ground that this condition was caused by the wearing away or natural sinking of the street from the rails.⁴ Actionable negligence has been imputed to a cable car line in maintaining a slot so wide as to allow a bicycle wheel to drop therein and throw a bicycle rider.⁵

¹ *Norfolk R. &c. Co. v. Corletto*, 100 Va. 355; s. c. 41 S. E. Rep. 740.

² In a case where the plaintiff's injuries were occasioned by a fall over the fender of an unlighted street-car at night, it was held improper to refuse an instruction that the street-car company was entitled to have its cars stand on the tracks for a reasonable length of time, without being charged with a breach of duty or an obstruction of the highway: *Adams v. Metropolitan St. R. Co.*, 82 App. Div. (N. Y.) 354; s. c. 81 N. Y. Supp. 553.

³ *Shelton v. Northern Texas T. Co.* (Tex. Civ. App.), 75 S. W. Rep. 338. In a case where a vehicle attached

to a runaway horse struck projecting rails and was overturned, the court refused to say, as a matter of law, that the runaway was the proximate cause of the injury received by the occupant of the vehicle, and left the question of the proximate cause to the jury: *Gray v. Washington Water Power Co.*, 27 Wash. 713; s. c. 68 Pac. Rep. 360.

⁴ *Groves v. Louisville R. Co.*, 58 S. W. Rep. 508; s. c. 22 Ky. L. Rep. 599.

⁵ *Brown v. Metropolitan St. R. Co.*, 60 App. Div. (N. Y.) 184; s. c. 70 N. Y. Supp. 40; s. c. aff'd, 171 N. Y. 699; 64 N. E. Rep. 1119.

§ 1356. **Liability of Street Railway Companies for Failing to Keep the Surface of the Street in Repair.**—Under the general doctrine that a pedestrian has a right to presume that a street is safe, a person using the street is not required to anticipate the failure of a street railway company to restore a paved street after having torn it up to lay tracks thereon.⁶ The street railroad company is required to anticipate and provide for the natural effect of rains on the earth placed in excavations by its employes, and will be liable to a traveller on the highway injured by reason of a defective condition traceable to this neglect, though having no actual knowledge of the condition of the highway.⁷ But a street railroad company, charged with the statutory duty of keeping in repair a space of a certain width on each side of its track, is not required to fill excavations made within this space by other persons operating under municipal authority, and hence is not liable for injuries sustained by reason of such excavations.⁸ In another case a street railroad company, which removed a fence safeguarding a ditch contiguous to and paralleling the track, and did not replace it, was held liable for an injury to a person who fell into such a ditch while attempting to board a car in the dark.⁹

§ 1357. **Liability where there is an Express Covenant to Repair.**¹⁰

§ 1359. **Notice to the Company of the Defect.**¹¹

§ 1364. **Liability where Construction or Maintenance is in Accordance with Municipal or Official Direction.**¹²

§ 1369. **Liability for Injuries Caused by Ice and Snow on or near their Tracks.**—There is a general concurrence of recent authorities in a doctrine that a street railroad company is liable for damages caused

⁶ *Union T. Co. v. Barnett*, 31 Ind. App. 467; s. c. 67 N. E. Rep. 205.

⁷ *Citizens' St. R. Co. v. Marvil*, 161 Ind. 506; s. c. 67 N. E. Rep. 921.

⁸ *Leary v. Boston El. R. Co.*, 180 Mass. 203; s. c. 62 N. E. Rep. 1.

⁹ *Call v. Portsmouth &c. St. R.*, 69 N. H. 562; s. c. 45 Atl. Rep. 405.

¹⁰ A street railroad company, allowed to enter the campus of a university under an agreement to keep in thorough order all the construction necessary for its road, is directly liable to a person impliedly invited to use the campus by the university, and injured by a defect in the track therein: *Bolster v. Ithaca St. R. Co.*, 79 App. Div. (N. Y.) 239; s. c. 79 N. Y. Supp. 597; s. c. aff'd, 178 N. Y. 554; 70 N. E. Rep. 1096.

¹¹ Under a statute making it the duty of a street railroad company to keep in repair the street between, and two feet outside its tracks, "under supervision of the local authorities and whenever required by them to do so," the company is liable for damages from defects within the space mentioned, where it has knowledge of the defect, though no official notice has been given by the local authorities: *Simon v. Metropolitan St. R. Co.*, 29 Misc. (N. Y.) 126; s. c. 60 N. Y. Supp. 251.

¹² *Hayden v. Fair Haven &c. R. Co.*, 76 Conn. 355; s. c. 56 Atl. Rep. 613 (order of city council to locate tracks along lines shown on blue prints attached to the order admissible to show a lawful location).

by dangerous banks of snow left by it on the side of tracks after clearing them, where a reasonable time within which to remove the snow has elapsed, and a person injured thereby was free from contributory negligence.¹³ In a Canadian case where a contract between a city and a street railroad company required the company to keep its track free from ice and snow, and reserved an option in the city to remove the ice and snow between curbs, in which event the company should pay half the cost of the removal, it was held that the street car company was not bound to remove the snow cleared from its tracks and thrown into the streets.¹⁴

§ 1370. Evidence in Such Actions.—In the absence of any evidence as to the location of a street railroad the jury is warranted in presuming that the tracks were laid in a public highway and not over private lands, and that a person struck by a street car was not a trespasser.¹⁵

§ 1371. Injuries to Travellers from the Fall of Electric Wires.—In Tennessee the courts hold electric railway companies to the obligation to use the highest degree of care in constructing and maintaining electric wires so as to avoid injury to persons in the street,¹⁶ and there, as elsewhere generally, proof of the presence of a fallen live wire in the streets and contact therewith makes a *prima facie* case of negligence, which, unless rebutted, entitles the injured person to recover damages from the company.¹⁷

§ 1374. Relative Rights of the Company and Other Travellers.—Street railways have no exclusive rights to their tracks laid in a public highway, and persons travelling along these tracks are not regarded as trespassers. The rule that a railroad company is not liable to trespassers on its tracks for the simple negligence of its servants is without application to street railroads. Persons driving vehicles on city streets have a right to use the tracks of the street railroad company laid therein, as well as other parts of the street, and are held only to the exercise of ordinary care to avoid collision with the street cars, and the street car company is required to operate its cars at a reason-

¹³ West Chicago St. R. Co. v. O'Connor, 85 Ill. App. 278; Smith v. Nashua St. R., 69 N. H. 504; s. c. 44 Atl. Rep. 133; Newport News R. & C. Co. v. Bradford, 100 Va. 231; s. c. 40 S. E. Rep. 900; 4 Va. Supp. Ct. Rep. 219. It is not negligence *per se* to attempt to drive across a street railroad track at a point where there is a slope of about twelve inches in the snow in a distance of from two to three feet: Gerrard v. La Crosse

City R. Co., 113 Wis. 258; s. c. 89 N. W. Rep. 125.

¹⁴ Montreal v. Montreal St. R. Co., Rap. Jud. Que. 19 C. S. 504.

¹⁵ Vincent v. Norton & C. R. Co., 180 Mass. 104; s. c. 61 N. E. Rep. 822.

¹⁶ Memphis St. R. Co. v. Kart-right, 110 Tenn. 277; s. c. 75 S. W. Rep. 719.

¹⁷ Chattanooga Elec. R. Co. v. Mingle, 103 Tenn. 667; s. c. 56 S. W. Rep. 23.

able rate of speed, and under such control that the safety of persons on the track may be properly preserved. The rights are reciprocal, and must be exercised in so reasonable and careful a manner as not unreasonably to abridge or interfere with the rights of each other.¹⁸ Fire engines and other fire equipment,¹⁹ and ambulances connected with public departments of health²⁰ are given the right of way at street crossings by law in many States and cities. But these laws do not exempt the drivers of these preferred vehicles from the duty of exercising care in driving across street railway tracks.²¹ These provisions are often strictly construed. Thus a city ordinance, giving ambulances of the "department of health" a right of way in the streets, was held not to include other ambulances, though under the jurisdiction of the department of health, but not belonging to the department.²²

§ 1375. **Sense in which the Rights of the Street Railway Company are Paramount.**—The street railway is a public agency, and the interests of the public demand the movement of cars without unreasona-

¹⁸ See generally, *Little Rock T. & Elec. Co. v. Morrison*, 69 Ark. 289; s. c. 62 S. W. Rep. 1045; *Wilman v. People's R. Co.*, — Del. —; s. c. 55 Atl. Rep. 332; *Snyder v. People's R. Co.*, — Del. —; s. c. 53 Atl. Rep. 433; *Knickerbocker Ice Co. v. Benedix*, 206 Ill. 362; s. c. 69 N. E. Rep. 50; *North Chicago St. R. Co. v. Johnson*, 205 Ill. 32; s. c. 68 N. E. Rep. 463; *North Chicago St. R. Co. v. Smadraft*, 189 Ill. 155; s. c. 59 N. E. Rep. 527; aff'g s. c. 89 Ill. App. 441; *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1; *Joliet R. Co. v. Barty*, 96 Ill. App. 351; *Greene v. Louisville R. Co.*, — Ky. —; s. c. 84 S. W. Rep. 1154; 27 Ky. L. Rep. 316; *South Covington & St. R. Co. v. McHugh*, 77 S. W. Rep. 202; s. c. 25 Ky. L. Rep. 1112; *Kerr v. Boston Elevated R. Co.*, 188 Mass. 434; s. c. 74 N. E. Rep. 669; *Rouse v. Detroit Electric R.*, 135 Mich. 545; s. c. 98 N. W. Rep. 258; 10 Det. Leg. N. 866; 100 N. W. Rep. 404; *Ablard v. Detroit United R.*, 139 Mich. 248; s. c. 102 N. W. Rep. 741; 11 Det. Leg. N. 832; *Armstead v. Mendenhall*, 83 Minn. 136; s. c. 85 N. W. Rep. 929; *Schafstette v. St. Louis & C. R. Co.*, 175 Mo. 142; s. c. 74 S. W. Rep. 826; *Strode v. St. Louis Transit Co.*, — Mo. —; s. c. 87 S. W. Rep. 976; *Buren v. St. Louis Transit Co.*, 104 Mo. App. 224;

s. c. 78 S. W. Rep. 680; *Klockenbrink v. St. Louis & C. R. Co.*, 172 Mo. 678; s. c. 72 S. W. Rep. 900; *Degel v. St. Louis Transit Co.*, 101 Mo. App. 56; s. c. 74 S. W. Rep. 156; *Little v. Boston & C. R.*, 72 N. H. 502; s. c. 57 Atl. Rep. 920; *Cushing v. Metropolitan St. R. Co.*, 92 App. Div. (N. Y.) 510; s. c. 87 N. Y. Supp. 314; *Prince v. Third Avenue R. Co.*, 84 N. Y. Supp. 542; *Venuta v. New York & C. Traction Co.*, 87 App. Div. (N. Y.) 561; s. c. 84 N. Y. Supp. 544; *McFarland v. Consolidated Traction Co.*, 204 Pa. 423; s. c. 54 Atl. Rep. 308; *Hellriegel v. Southern Traction Co.*, 23 Pa. Super. Ct. 392; *Lightfoot v. Winnebago Traction Co.*, 123 Wis. 479; s. c. 102 N. W. Rep. 30.

¹⁹ *Knox v. North Jersey St. R. Co.*, 70 N. J. L. 347; 57 Atl. Rep. 423; *New York v. Metropolitan St. R. Co.*, 90 App. Div. (N. Y.) 66; s. c. 85 N. Y. Supp. 693.

²⁰ *Dillon v. Nassau Elect. R. Co.*, 59 App. Div. (N. Y.) 614; s. c. 68 N. Y. Supp. 1098.

²¹ *Birmingham R. & C. Co. v. Baker*, 126 Ala. 135; s. c. 28 South. Rep. 87; *New York v. Metropolitan St. R. Co.*, 90 App. Div. (N. Y.) 66; s. c. 85 N. Y. Supp. 693.

²² *Dillon v. Nassau & C. R. Co.*, 59 App. Div. (N. Y.) 614; s. c. 68 N. Y. Supp. 1098.

ble delay by the conduct of persons to whom the remainder of the highway is available. For this reason and to this extent the general right of the street railway company over that portion of the street where the tracks lie is superior to that of other persons using the streets. Though the street railway company has in this sense a paramount right of way at places other than street crossings, it must use all reasonable means to avoid injuring those who it knows may lawfully use that part of the street occupied by its tracks. The person using the tracks must, on his part, use ordinary prudence to discover the approach of the cars.²³ It is the holding of a Delaware court that a street car is not required to stop at street intersections for a funeral procession to pass nor to give such a procession the right of way, and this would seem a proper rule where the matter is uncontrolled by law.²⁴

§ 1376. Sense in which the Rights of the Company and the Public are Equal.—The great weight of authority regards the rights of the street car company and the public as equal at street crossings. Neither vehicle nor street car has an absolute right of way at this point to the exclusion of the other. Their rights are reciprocal and each must respect those of the other.²⁵ A point where two streets intersect a third

²³ See generally: *Di Prisco v. Wilmington City R. Co.*, — Del. —; s. c. 57 Atl. Rep. 906; *Cox v. Wilmington City R. Co.*, — Del. —; s. c. 53 Atl. Rep. 569; *Adams v. Wilmington & c. R. Co.*, 3 Pen. (Del.) 512; s. c. 52 Atl. Rep. 264; *Farley v. Wilmington & c. R. Co.*, 3 Pen. (Del.) 581; s. c. 52 Atl. Rep. 543; *Chicago City R. Co. v. Mauger*, 105 Ill. App. 579; *Chicago City R. Co. v. Meinheit*, 114 Ill. App. 497; *Ford v. Hine Bros. Co.*, 115 Ill. App. 153; *West Chicago St. R. Co. v. Dougherty*, 89 Ill. App. 362; *West Chicago St. R. Co. v. Schwartz*, 93 Ill. App. 387; *Belford v. Brooklyn Heights R. Co.*, 88 N. Y. Supp. 267; *Hewlett v. Brooklyn Heights R. Co.*, 63 App. Div. (N. Y.) 423; s. c. 71 N. Y. Supp. 531; *Frank v. Metropolitan St. R. Co.*, 91 App. Div. (N. Y.) 485; s. c. 86 N. Y. Supp. 1018; *Zerr v. Interurban St. R. Co.*, 88 N. Y. Supp. 353; *McCracken v. Consolidated Traction Co.*, 201 Pa. 378; s. c. 50 Atl. Rep. 830; *Tesch v. Milwaukee & c. R. & c. Co.*, 108 Wis. 593; s. c. 84 N. W. Rep. 823. That the right of the street car between crossings is paramount, see: *Chicago City R. Co. v. Ahler*, 107 Ill.

App. 397; *Marden v. Portsmouth, & c. St. R.*, 100 Me. 41; s. c. 60 Atl. Rep. 530; 69 L. R. A. 300; *Barney v. Metropolitan St. R. Co.*, 94 App. Div. (N. Y.) 388; s. c. 88 N. Y. Supp. 335; *Lejonne v. Dry Dock & c. R. Co.*, 86 N. Y. Supp. 749; *Citizens' St. R. Co. v. Howard*, 102 Tenn. 474; s. c. 52 S. W. Rep. 864.

²⁴ *Foulk v. Wilmington City R. Co.*, — Del. —; s. c. 60 Atl. Rep. 973.

²⁵ *Wilman v. People's R. Co.*, — Del. —; s. c. 55 Atl. Rep. 332; *Consumers' & c. R. Co. v. Pryor*, 44 Fla. 354; s. c. 32 South. Rep. 797; *Chicago City R. Co. v. Martensen*, 100 Ill. App. 306; s. c. aff'd, 193 Ill. 511; 64 N. E. Rep. 1017; *Chicago City R. Co. v. Iverson*, 108 Ill. App. 433; *Cole v. Central R. Co.*, 103 Ill. App. 160; *Fisher v. Chicago City R. Co.*, 114 Ill. App. 217; *Union Traction Co. v. Vandercook*, 32 Ind. App. 621; s. c. 69 N. E. Rep. 486; *Marden v. Portsmouth & c. St. R.*, 100 Me. 41; s. c. 60 Atl. Rep. 530; 69 L. R. A. 300; *Mertz v. Detroit & c. R. Co.*, 125 Mich. 11; s. c. 83 N. W. Rep. 1036; 7 Det. Leg. N. 393; *Smith v. Minneapolis St. Ry. Co.*, 95 Minn. 254; s. c. 104 N. W.

so as to form a triangle is to be regarded as a street crossing within the rule.²⁶ The rights of the parties being equal, the question of the motive of a person in attempting to cross a street railway at a street intersection is not material.²⁷ One court has held the rule of equality inapplicable, where the vehicle is proceeding along the street in the same direction as the car, and there is a mere attempt to cross to the other side at an intersection instead of at some other point. In this case it was held that the care required of the driver of the team was as though the crossing was attempted at a place other than the crossing.²⁸

§ 1377. Relative Rights of Street Railway Companies and Pedestrians.—Though it be granted that pedestrians have an equal right with others to use the street in an ordinary manner, yet they must do so with respect to the rights of other users including street cars, and since street cars must run on their tracks, and cannot give way or stop so easily as pedestrians, the latter should reasonably yield the right of way along the tracks to the approaching car.²⁹

§ 1378. Relative Care Required of the Company and of the Public.—Both the ordinary traveller and the street railway company are charged with the duty to observe an equal degree of care to avoid accidents, and the degree of care is such care as reasonably prudent persons would exercise under like circumstances.³¹

Rep. 16; *Riska v. Union Depot R. Co.*, 180 Mo. 168; s. c. 79 S. W. Rep. 445; *Brown v. St. Louis Transit Co.*, 108 Mo. App. 310; s. c. 83 S. W. Rep. 310; *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524; s. c. 85 S. W. Rep. 140; *Camden & C. R. Co. v. United States Cast Iron Pipe & C. Co.*, 68 N. J. Eq. 279; s. c. 59 Atl. Rep. 523; *Woodland v. North Jersey St. R. Co.*, 66 N. J. L. 455; s. c. 49 Atl. Rep. 479; *Freeman v. Brooklyn Heights R. Co.*, 87 App. Div. (N. Y.) 127; s. c. 84 N. Y. Supp. 108; *Koehler v. Interurban St. R. Co.*, 88 N. Y. Supp. 904; *Reilly v. Brooklyn Heights R. Co.*, 65 App. Div. (N. Y.) 453; s. c. 72 N. Y. Supp. 1080; *Toledo Electric St. R. Co. v. Westenhuber*, 12 Ohio C. D. 22; s. c. 22 Ohio Cir. Ct. R. 67; *Nashville R. v. Norman*, 108 Tenn. 324; s. c. 67 S. W. Rep. 479; *Traver v. Spokane St. R. Co.*, 25 Wash. 225; s. c. 65 Pac. Rep. 284.

²⁶ *Solomon v. Buffalo R. Co.*, 96 App. Div. (N. Y.) 487; s. c. 89 N. Y. Supp. 99.

²⁷ *Solomon v. Buffalo R. Co.*, 96 App. Div. (N. Y.) 487; s. c. 89 N. Y. Supp. 99.

²⁸ *Schmedding v. New York & C. R. Co.*, 85 App. Div. (N. Y.) 24; s. c. 82 N. Y. Supp. 1034.

²⁹ *Louisville R. Co. v. Colston*, 117 Ky. 804; s. c. 79 S. W. Rep. 243; 25 Ky. L. Rep. 1933; *Goldmann v. Milwaukee & C. R. & C. Co.*, 123 Wis. 168; s. c. 101 N. W. Rep. 384.

³¹ See generally: *Birmingham R. & C. Co. v. Oldham*, 141 Ala. 195; s. c. 37 South. Rep. 452; *Snyder v. People's R. Co.*, — Del. —; s. c. 53 Atl. Rep. 433; *West Chicago St. R. Co. v. Maday*, 88 Ill. App. 49; s. c. aff'd, 188 Ill. 308; 58 N. E. Rep. 933; *West Chicago St. R. Co. v. Callow*, 102 Ill. App. 322; *Butler v. Rockland & C. St. R.*, 99 Me. 149; s. c. 58 Atl. Rep. 775; *Kerr v. Boston & C. R. Co.*, 188 Mass. 434; s. c. 74 N. E. Rep. 669; *O'Brien v. Blue Hill St. R. Co.*, 186 Mass. 446; s. c. 71 N. E. Rep. 951; *Scannell v. Boston & C. R. Co.*, 176 Mass. 170; s. c. 57 N. E. Rep. 341; *Mathiesen*

§ 1379. **Degree of Care Required of the Street Railway Company.**—The degree of care required in operating street cars in order to prevent accidents to persons on the streets is the care described as reasonable or ordinary care; that is, such care as an ordinarily prudent person would exercise under the circumstances.³² It is different in degree and greater than that required from an engineer of a railroad train with reference to trespassers on the track, to whom the company owes no duty except not to injure them willfully or maliciously. A traveller on the highway is not a trespasser.³³ The care exacted of the operator of the street car may be increased or diminished as the ordinary liability to danger and accident is increased or diminished in the movement and operation of the car.³⁴ Thus the motorman of an electric car will be expected to exercise a greater amount of care at street crossings and the more thronged streets of the thickly popu-

v. Omaha St. R. Co., — Neb. —; s. c. 97 N. W. Rep. 243; rev'g s. c. 92 N. W. Rep. 639; Beers v. Metropolitan St. R. Co., 104 App. Div. (N. Y.) 96; s. c. 93 N. Y. Supp. 278; Hellriegel v. Southern Traction Co., 23 Pa. Super. Ct. 392.

³² Goldstein v. People's R. Co., — Del. —; s. c. 60 Atl. Rep. 975; Southern Elec. R. Co. v. Hageman, 121 Fed. Rep. 262; s. c. 57 C. C. A. 348; West Chicago St. R. Co. v. Petters, 196 Ill. 298; s. c. 63 N. E. Rep. 662; aff'g s. c. 95 Ill. App. 479; McGary v. West Chicago St. R. Co., 85 Ill. App. 610; West Chicago St. R. Co. v. Wizemann, 83 Ill. App. 402; Indianapolis St. R. Co. v. Schomberg, 164 Ind. 111; s. c. 72 N. E. Rep. 1041; aff'g s. c. 71 N. E. Rep. 237 (instruction held not open to construction that it made the street car company liable in case of unavoidable accident); Gorman v. Louisville R. Co., 72 S. W. Rep. 760; s. c. 24 Ky. L. Rep. 1938; O'Leary v. Brockton St. R. Co., 177 Mass. 187; s. c. 58 N. E. Rep. 585; Kube v. St. Louis Transit Co., 103 Mo. App. 582; s. c. 78 S. W. Rep. 55; Meng v. St. Louis & C. R. Co., 108 Mo. App. 553; s. c. 84 S. W. Rep. 213; Klimpl v. Metropolitan St. R. Co., 92 App. Div. (N. Y.) 291; s. c. 87 N. Y. Supp. 39; Lockwood v. Troy City R. Co., 92 App. Div. (N. Y.) 112; s. c. 87 N. Y. Supp. 311; New York v. Metropolitan St. R. Co., 90 App. Div. (N. Y.) 66; s. c. 85 N. Y. Supp. 693; Kelly v. United Traction Co., 88 App. Div.

(N. Y.) 234; s. c. 85 N. Y. Supp. 433; New York v. Metropolitan St. R. Co., 90 App. Div. (N. Y.) 66; s. c. 85 N. Y. Supp. 693; Perras v. United Traction Co., 88 App. Div. (N. Y.) 260; s. c. 84 N. Y. Supp. 992; Quinn v. New York City R. Co., 94 N. Y. Supp. 560; Memphis St. R. Co. v. Wilson, 108 Tenn. 618; s. c. 69 S. W. Rep. 265; Norfolk R. & C. Co. v. Corletto, 100 Va. 355; s. c. 41 S. E. Rep. 740; Atherton v. Tacoma R. & C. Co., 30 Wash. 395; s. c. 71 Pac. Rep. 39; Stafford v. Chippewa & C. R. Co., 110 Wis. 331; s. c. 85 N. W. Rep. 1036. Where a motorman using ordinary prudence erred in a matter of judgment as to stopping the car in time, or as to the method of stopping it, it was not negligence for which plaintiff can recover in an action for injuries by collision: Adsit v. Catskill Electric R. Co., 88 App. Div. (N. Y.) 167; s. c. 84 N. Y. Supp. 393.

³³ Stelk v. McNulta, 99 Fed. Rep. 138; s. c. 40 C. C. A. 357.

³⁴ Di Prisco v. Wilmington City R. Co., — Del. —; s. c. 57 Atl. Rep. 906; Snyder v. People's R. Co., — Del. —; s. c. 53 Atl. Rep. 433 (greater care demanded where street railroad approaches a street crossing at a steep down grade); Adams v. Wilmington & C. R. Co., 3 Pen. (Del.) 512; s. c. 52 Atl. Rep. 264; Farley v. Wilmington & C. R. Co., 3 Pen. (Del.) 581; s. c. 52 Atl. Rep. 543; Consumers' & C. R. Co. v. Pryor, 44 Fla. 354; s. c. 32 South. Rep. 797.

lated portions of the city than in open or suburban parts thereof.³⁵ It is greater on a line upon a public road than on one over a private way.³⁶ A motorman must not only use due care in view of apparent dangers but must exercise this degree of care with reference to dangers which may reasonably be expected,³⁷ and this requires that a car should be kept under control,³⁸ particularly where the motorman's view of the track is obstructed.³⁹ The street railway company may be charged with actionable negligence by reason of the employment of incompetent employes.⁴⁰ Again, what is ordinary care toward persons upon a street crossing not passengers may depend upon the age of such persons and upon the place, conditions and circumstances.⁴¹ A street railroad company using its tracks for moving freight cars without authority and in violation of law is charged with the maintenance of a nuisance and a person injured thereby is entitled to recover without regard to the care exercised in operating such cars.⁴²

§ 1381. Excludes Liability for Mistakes of Judgment by Competent Men.⁴³

³⁵ *Di Prisco v. Wilmington City R. Co.*, — Del. —; s. c. 57 Atl. Rep. 906; *Chicago City R. Co. v. Biederman*, 102 Ill. App. 617; *Fisher v. Chicago City R. Co.*, 114 Ill. App. 217; *Haas v. New Orleans R. Co.*, 112 La. 747; s. c. 36 South. Rep. 670; *Schwartz v. New Orleans & C. R. Co.*, 110 La. 534; s. c. 34 South. Rep. 667.

³⁶ *Hooper v. Staten Island Midland R. Co.*, 32 Misc. (N. Y.) 721; s. c. 66 N. Y. Supp. 308.

³⁷ *Consumers' & C. R. Co. v. Pryor*, 44 Fla. 354; s. c. 32 South. Rep. 797; *Chicago City R. Co. v. Anderson*, 193 Ill. 9; s. c. 61 N. E. Rep. 999; aff'g s. c. 93 Ill. App. 419; *Butler v. Rockland & C. St. R.*, 99 Me. 149; s. c. 58 Atl. Rep. 775; *New York v. Metropolitan St. R. Co.*, 90 App. Div. (N. Y.) 66; s. c. 85 N. Y. Supp. 693. The exercise of ordinary care is required at a street crossing immediately after a car bound in the opposite direction has stopped there to discharge passengers: *Chicago & C. T. Co. v. Nuetzel*, 114 Ill. App. 466.

³⁸ *Chicago City R. Co. v. Loomis*, 102 Ill. App. 326; s. c. aff'd, 201 Ill. 118; 66 N. E. Rep. 348; *Marden v. Portsmouth & C. St. R.*, 100 Me. 41; s. c. 60 Atl. Rep. 530; 69 L. R. A. 300; *Smith v. Minneapolis St. R. Co.*, 95 Minn. 254; s. c. 104 N. W. Rep. 16; *Geary v. Metropolitan St.*

R. Co., 73 App. Div. (N. Y.) 441; s. c. 77 N. Y. Supp. 54; *Towner v. Brooklyn Heights R. Co.*, 44 App. Div. (N. Y.) 628; s. c. 60 N. Y. Supp. 289. It is not conclusive on the question of the negligence of a motorman that his car ran quite a distance after an accident where the evidence shows that it was disabled in the collision and became uncontrollable and slipped on wet rails: *Riley v. Shreveport Traction Co.*, 114 La. 135; s. c. 38 South. Rep. 83.

³⁹ *Foult v. Wilmington City R. Co.*, — Del. —; s. c. 60 Atl. Rep. 973; *Schoener v. Metropolitan St. R. Co.*, 72 App. Div. (N. Y.) 23; s. c. 76 N. Y. Supp. 157. It does not necessarily follow that a street railway company is free from negligence because the car at the time of the collision was running within the speed fixed by ordinance and the bell was being rung: *Atherton v. Tacoma R. & C. Co.*, 30 Wash. 395; s. c. 71 Pac. Rep. 39.

⁴⁰ *Crisman v. Shreveport Belt R. Co.*, 110 La. 640; s. c. 34 South. Rep. 718 (collision caused by a motorman eighteen years old and experience of twenty days).

⁴¹ *Chicago City R. Co. v. O'Donnell*, 114 Ill. App. 359.

⁴² *Daly v. Milwaukee & C. R. & C. Co.*, 119 Wis. 398; s. c. 96 N. W. Rep. 832.

⁴³ A motorman confronted with a

§ 1382. **Duty of Driver, Motorman or Gripman to Keep a Constant Lookout.**⁴⁴—Where the line of vision of a track is obstructed, the motorman is charged with the duty of using increased care and caution in proportion to such conditions.⁴⁵ A city ordinance making it the duty of the motorman to keep a constant lookout for vehicles and persons on foot on the track, and on the first appearance of danger to stop the car in the shortest space possible,⁴⁶ is not open to the objection that it is extraordinary or unreasonable in its requirements, as the care imposed is that ordinary degree of care which the common law requires under like circumstances.⁴⁷ The ordinance intends that the car shall be stopped only when it is perceived that the danger is

sudden danger is not liable for failure to follow what might appear on reflection to be the wiser course: *Ackerman v. Union Trac. Co.*, 205 Pa. 477; s. c. 55 Atl. Rep. 16.

⁴⁴ That it is the duty of the driver, motorman, or gripman to keep a constant lookout for persons on the track, see: *Columbus R. Co. v. Peddy*, 120 Ga. 589; s. c. 48 S. E. Rep. 149; *Central R. Co. v. Knowles*, 191 Ill. 241; s. c. 60 N. E. Rep. 829; aff'g s. c. 93 Ill. App. 581; *Chicago City R. Co. v. Anderson*, 93 Ill. App. 419; s. c. aff'd, 193 Ill. 9; s. c. 61 N. E. Rep. 999; *West Chicago St. R. Co. v. Williams*, 87 Ill. App. 548; *Indianapolis St. R. Co. v. Schmidt*, 35 Ind. App. 202; s. c. 72 N. E. Rep. 478; *Floyd v. Paducah R. & C. Co.*, 73 S. W. Rep. 1122; s. c. 24 Ky. L. Rep. 2364; *Greene v. Louisville R. Co.*, — Ky. —; s. c. 84 S. W. Rep. 1154; 27 Ky. L. Rep. 316; *Gray v. St. Paul City R. Co.*, 87 Minn. 280; s. c. 91 N. W. Rep. 1106; *Koenig v. Union Depot R. Co.*, 173 Mo. 698; s. c. 73 S. W. Rep. 637; *Heinzle v. Metropolitan St. R. Co.*, 182 Mo. 528; s. c. 81 S. W. Rep. 848; *Jersey Farm Dairy Co. v. St. Louis Transit Co.*, 103 Mo. App. 90; s. c. 77 S. W. Rep. 346; *Kolb v. St. Louis Transit Co.*, 102 Mo. App. 143; s. c. 76 S. W. Rep. 1050; *McLeland v. St. Louis Transit Co.*, 105 Mo. App. 473; s. c. 80 S. W. Rep. 30; *Goldstein v. Dry Dock & C. R. Co.*, 35 Misc. (N. Y.) 200; s. c. 71 N. Y. Supp. 477; *Mitchell v. Third Ave. R. Co.*, 62 App. Div. (N. Y.) 371; s. c. 70 N. Y. Supp. 1118; *Piercy v. Metropolitan St. R. Co.*, 30 Misc. (N. Y.) 612; s. c. 62 N. Y. Supp. 867; *Boyles v. Monongahela St. R.*

Co., 20 Pa. Super. Ct. 443; *Sharpton v. Augusta & C. R. Co.*, 72 S. C. 162; s. c. 51 S. E. Rep. 553; *San Antonio Traction Co. v. Court*, 31 Tex. Civ. App. 146; s. c. 71 S. W. Rep. 777; *Hanlon v. Milwaukee Elec. R. & C. Co.*, 118 Wis. 210; s. c. 95 N. W. Rep. 100; *Forrestal v. Milwaukee Elec. R. & C. Co.*, 119 Wis. 495; s. c. 97 N. W. Rep. 182. A motorman must keep a lookout for live stock and run his car at such a rate that he can stop it within the distance he can see an animal on the track; *Anniston Electric & C. Co. v. Hewitt*, 139 Ala. 442; s. c. 36 South. Rep. 39; 101 Am. St. 42. There is an example of negligence in failing to keep a lookout where a motorman on a fast moving car when within one hundred twenty-five feet of a child approaching the track, heard a woman scream in an adjoining building and looked in that direction, and then looked back into his car, and did not discover the presence of the child on the track until too close to avoid striking him: *Fullerton v. Metropolitan St. R. Co.*, 63 App. Div. (N. Y.) 1; s. c. 71 N. Y. Supp. 326; s. c. aff'd, 170 N. Y. 592; 63 N. E. Rep. 1116.

⁴⁵ *Dungan v. Wilmington City R. Co.*, 4 Pen. (Del.) 458; s. c. 58 Atl. Rep. 868.

⁴⁶ *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524; s. c. 85 S. W. Rep. 140.

⁴⁷ *J. F. Conrad Grocer Co. v. St. Louis & C. R. Co.*, 89 Mo. App. 391; *Sluder v. St. Louis Transit Co.*, 189 Mo. 107; s. c. 88 S. W. Rep. 648.

imminent,⁴⁸ and then as soon as possible under the circumstances and with due regard to the safety of passengers on the car.⁴⁹ The violation of such an ordinance is negligence *per se* for the results of which the street railroad company is liable to an injured person.⁵⁰ An ordinance of this character is regarded as a police regulation, and as such, binding on street railway companies operating cars within the limits of the city enacting the ordinance regardless of their acceptance of it.⁵¹

§ 1387. Defense that the Driver, Motorman, etc., Failed to see the Person on the Track.—The fact that a motorman was not aware of the peril of one on the track at a street crossing in time to avoid injuring him will not relieve the company from liability for such injuries, if the motorman drove the car over the crossing at a rate of speed showing wantonness and a willful disregard of safety of persons using the crossing.⁵²

§ 1388. Duty to Avoid Injury to Traveller after Seeing Him in a Position of Danger.—When the motorman knows, or by the exercise of due care should know of the inability of the traveller from any cause to avoid a collision, it is his duty to exercise due care to prevent the car from striking him.⁵³ This degree of care has been de-

⁴⁸ Memphis St. R. Co. v. Haynes, 112 Tenn. 712; s. c. 81 S. W. Rep. 374.

⁴⁹ Gray v. St. Paul City R. Co., 87 Minn. 280; s. c. 91 N. W. Rep. 1106.

⁵⁰ Sluder v. St. Louis Transit Co., 189 Mo. 107; s. c. 88 S. W. Rep. 648.

⁵¹ Riska v. Union Depot R. Co., 180 Mo. 168; s. c. 79 S. W. Rep. 445; Sluder v. St. Louis Transit Co., 189 Mo. 107; s. c. 88 S. W. Rep. 648; Gebhardt v. St. Louis Transit Co., 97 Mo. App. 373; s. c. 71 S. W. Rep. 448; Meyers v. St. Louis Transit Co., 99 Mo. App. 363; s. c. 73 S. W. Rep. 379; Nagel v. St. Louis Transit Co., 104 Mo. App. 438; s. c. 79 S. W. Rep. 502.

⁵² Birmingham R. & Co. v. Jackson, 136 Ala. 279; s. c. 34 South. Rep. 994.

⁵³ For illustrations of this principle, which really belongs with a discussion of the doctrine of contributory negligence, see: Di Prisco v. Wilmington City R. Co., — Del. —; s. c. 57 Atl. Rep. 906; Chicago Union Traction Co. v. Browdy, 206 Ill. 615; s. c. 69 N. E. Rep. 570; rev'g s. c. 108 Ill. App. 177; Indianapolis St. R. Co. v. Schmidt, 35 Ind. App. 202; s. c. 71 N. E. Rep. 663; 72 N. E.

Rep. 478; Riska v. Union Depot R. Co., 180 Mo. 168; s. c. 79 S. W. Rep. 445; Schafstette v. St. Louis & Co. R. Co., 175 Mo. 142; s. c. 74 S. W. Rep. 826; Moore v. St. Louis Transit Co., 95 Mo. App. 728; s. c. 75 S. W. Rep. 699; Kube v. St. Louis Transit Co., 103 Mo. App. 582; s. c. 78 S. W. Rep. 55; Little v. Boston & Co. R., 72 N. H. 502; s. c. 57 Atl. Rep. 920; Conrad v. Elizabeth & Co. R. Co., 70 N. J. L. 676; s. c. 58 Atl. Rep. 376; Legare v. Union R. Co., 61 App. Div. (N. Y.) 202; s. c. 70 N. Y. Supp. 718; Wagner v. Metropolitan St. R. Co., 79 App. Div. (N. Y.) 591; s. c. 80 N. Y. Supp. 191; s. c. aff'd, 176 N. Y. 610; 68 N. E. Rep. 1125; McFarland v. Consolidated Traction Co., 204 Pa. 423; s. c. 54 Atl. Rep. 308; Waechter v. Second Ave. Traction Co., 198 Pa. 129; s. c. 47 Atl. Rep. 967; Dallas Consol. Electric & Co. R. Co. v. Illo, 32 Tex. Civ. App. 290; s. c. 73 S. W. Rep. 1076; Danville R. & Co. v. Hodnett, 101 Va. 361; s. c. 43 S. E. Rep. 606; Richmond Passenger & Co. v. Gordon, 102 Va. 498; s. c. 46 S. E. Rep. 772. The duty of a street railway motorman to control a car in order to avoid a collision does not arise solely when a person is on the

scribed as the highest degree of care to avoid an injury after discovery of the traveller's peril,⁵⁴ and imposes upon the motorman the duty to use all practicable means to prevent the collision.⁵⁵ Where the motorman has put forth such efforts the company will not be liable though an injury results.⁵⁶ The question whether the motorman was negligent in this respect is a question of fact for the jury,⁵⁷ and in determining the question they may take into consideration the speed of the car and the distance which it had to go when the motorman saw, or ought to have seen, the situation of the traveller.⁵⁸ But the danger to the traveller must be plain. In a case where a bicycle rider was injured by falling against a car, it was held that the danger was not obvious, the evidence showing that the bicycle had left the track and seemed to be drawing farther away as the motorman sounded the gong, and as a matter of fact, the front part of the car actually passed the bicycle in safety.⁵⁹ In another case where a traveller on the track did not stop or notice the car, notwithstanding the ringing of the bell, and was apparently absorbed in a newspaper he held in his hand, it was argued that his behavior was such as to warn the motorman to get ready to avoid an accident.⁶⁰

§ 1389. Right to Assume that a Person on the Track will Act Reasonably.—It is the doctrine of this section that a motorman has a right to assume that a person on or approaching the track over which he is driving his car, and apparently capable of taking care of himself, will act reasonably and leave the track before the car reaches him, and may indulge this presumption until the danger of collision with the traveller is imminent.⁶¹ Applying this principle, a motorman in

track, but also obtains if his danger was apparent while he was approaching the track: *Murray v. St. Louis Transit Co.*, 108 Mo. App. 501; s. c. 83 S. W. Rep. 995.

⁵⁴ *Louisville R. Co. v. Blaydes* (Ky.), 52 S. W. Rep. 960.

⁵⁵ *Butler v. Rockland & C. St. R.*, 99 Me. 149; s. c. 58 Atl. Rep. 775.

⁵⁶ *Sauers v. Union T. Co.*, 193 Pa. St. 602; s. c. 44 Atl. Rep. 917; *Kap-pus v. Metropolitan St. R. Co.*, 82 App. Div. (N. Y.) 13; s. c. 81 N. Y. Supp. 442.

⁵⁷ *Moritz v. St. Louis Transit Co.*, 102 Mo. App. 657; s. c. 77 S. W. Rep. 477; *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712; s. c. 81 S. W. Rep. 374; *Stelk v. McNulta*, 99 Fed. Rep. 138; s. c. 40 C. C. A. 357 (motorman and passenger standing beside him thought an object lying on the track sixty-five feet ahead

was a dog, and applied the brakes, and sounded the gong, and on near approach reversed, but car was on down grade and could not be stopped when the object was seen to be a man—motorman held not guilty of negligence rendering company liable).

⁵⁸ *Zolpher v. Camden & S. R. Co.*, 69 N. J. L. 417; s. c. 55 Atl. Rep. 249; *Ryan v. La Crosse City R. Co.*, 108 Wis. 122; s. c. 83 N. W. Rep. 770.

⁵⁹ *Shaw v. Louisville R. Co.*, — Ky. —; s. c. 81 S. W. Rep. 268; 26 Ky. L. Rep. 359.

⁶⁰ *Aldrich v. St. Louis Transit Co.*, 101 Mo. App. 77; s. c. 74 S. W. Rep. 141.

⁶¹ *Hayden v. Fair Haven & C. R. Co.*, 76 Conn. 355; s. c. 56 Atl. Rep. 613; *Consumers' & Light & C. Co.*, 44 Fla. 354; s. c. 32 South. Rep.

charge of a car was held not open to the charge of negligence in assuming that a person approaching the track, who stops just before reaching it, will wait until the car passes before attempting to cross.⁶² So, a motorman has been held not negligent in not anticipating that a push cart would be run into his car after the head of the car had safely passed it;⁶³ and so a motorman was not charged with negligence because he failed to apprehend that a boy who was riding on the back of a wagon in front of his car would jump therefrom and run into his car while he was engaged in looking at the wagon to avoid a collision with it.⁶⁴ The rule, that a motorman may act on this presumption of reasonable action of one on the track, does not apply after it becomes reasonably apparent that he will not do so.⁶⁵ Thus where the traveller on the track was deaf and unable to hear the gong, and the motorman, though not aware of this infirmity, could see that persons on the street were signalling the man and that he did not understand the signals, it was held that an instruction was justified which told the jury that the street railway company was liable if the motorman was negligent in the management of his car, in view of the position and behavior of the injured person.⁶⁶

§ 1390. Liability for Failing to Avoid Injury where Driver might have Seen the Exposed Person in Time to have Prevented it.⁶⁷—The

797; *South Chicago City R. Co. v. Kinnare*, 96 Ill. App. 210; *West Chicago St. R. Co. v. Schwartz*, 93 Ill. App. 387; *Louisville R. Co. v. Colston*, 117 Ky. 804; s. c. 79 S. W. Rep. 243; 25 Ky. L. Rep. 1933; *Farrar v. New Orleans &c. R. Co.*, 52 La. Ann. 417; s. c. 26 South. Rep. 995; *Heying v. United R. &c. Co.*, 100 Md. 281; s. c. 59 Atl. Rep. 667; *Garvick v. United Rys. &c. Co.*, 101 Md. 239; s. c. 61 Atl. Rep. 133; *Aldrich v. St. Louis Transit Co.*, 103 Mo. App. 77; s. c. 74 S. W. Rep. 141; *Markowitz v. Metropolitan St. R. Co.*, 186 Mo. 350; s. c. 85 S. W. Rep. 351; *Petty v. St. Louis &c. R. Co.*, 179 Mo. 666; s. c. 78 S. W. Rep. 1003; *Ross v. Metropolitan St. R. Co.*, 113 Mo. App. 600; s. c. 88 S. W. Rep. 144; *McLean v. Omaha &c. R. &c. Co.*, — Neb. —; s. c. 103 N. W. Rep. 285; aff'g s. c. 100 N. W. Rep. 935; *Matulewicz v. Metropolitan St. R. Co.*, 107 App. Div. (N. Y.) 230; s. c. 95 N. Y. Supp. 7; *Barney v. Metropolitan St. R. Co.*, 94 App. Div. (N. Y.) 388; s. c. 88 N. Y. Supp. 335; *Jackson v. Union R. Co.*, 77 App. Div. (N. Y.) 161; s. c. 78 N.

Y. Supp. 1096; *Trauber v. Third Ave. R. Co.*, 80 App. Div. (N. Y.) 37; s. c. 80 N. Y. Supp. 231; *Simpson v. Rhode Island Co.*, 26 R. I. 200; s. c. 58 Atl. Rep. 658; *Citizens' St. R. Co. v. Shepherd*, 107 Tenn. 444; s. c. 64 S. W. Rep. 710; *Helber v. Spokane St. R. Co.*, 22 Wash. 319; s. c. 61 Pac. Rep. 40.

⁶² *Wolf v. City &c. R. Co.*, 45 Or. 446; s. c. 72 Pac. Rep. 329; 78 Pac. Rep. 668.

⁶³ *Schneiders v. Central Crosstown R. Co.*, 87 N. Y. Supp. 453.

⁶⁴ *Baier v. Camden &c. R. Co.*, 68 N. J. L. 42; s. c. 52 Atl. Rep. 215.

⁶⁵ *Strode v. St. Louis Transit Co.*, — Mo. —; s. c. 87 S. W. Rep. 976; *Peterson v. New York City R. Co.*, 94 N. Y. Supp. 22; *Holden v. Missouri R. Co.*, 177 Mo. 456; s. c. 76 S. W. Rep. 973; *Denison & S. R. Co. v. Craig*, 35 Tex. Civ. App. 548; s. c. 80 S. W. Rep. 865.

⁶⁶ *Bedell v. Detroit &c. R.*, 131 Mich. 668; s. c. 92 N. W. Rep. 349; 9 Det. Leg. N. 479.

⁶⁷ That the motorman is negligent where he fails to exercise reasonable care to discover the presence

principle of this section was applied and a street railway company held liable for injuries where a street car collided with a frightened and unmanageable horse on the track, and it appeared that the motor-man did not notice the situation of the horse until the car was about ninety feet away, and then he either could not stop his car, or did not make use of all the means in his power to avoid a collision, and the view was such that if he had been watchful he could have discovered the presence of the horse at least a block away.⁶⁸

§ 1391. **Running over Persons at Work on the Streets.**—The motorman is required to use the care which ordinarily prudent men would use under the circumstances to prevent injury to persons at work on the streets and whose work is of such a character as to make constant watchfulness for approaching street cars impracticable.⁶⁹ Where a car sufficiently clears men at work in a trench at the side of the track the company will not be charged with negligence by the mere fact alone that a workman in the trench was struck by the body of the conductor passing around passengers standing on the footboard while collecting fares.⁷⁰

§ 1392. **Duty of Company to Give Warning by Means of Gongs, Lights, etc.**—It is the duty of a street railway company to give signals by gong, or otherwise, to persons or vehicles on the track in front of the car, or persons about to cross the track, particularly at intersecting street crossings, and actionable negligence may be predicated on a failure to do so⁷¹ provided the omission was the proximate cause

of persons negligently exposing themselves on the track, see: *Harrington v. Los Angeles R. Co.*, 140 Cal. 514; s. c. 63 L. R. A. 238; 74 Pac. Rep. 15; *South Chicago City R. Co. v. Kinnare*, 96 Ill. App. 210; *Indianapolis St. R. Co. v. Schmidt*, 35 Ind. App. 202; s. c. 71 N. E. Rep. 663; 72 N. E. Rep. 478; *Indianapolis St. R. Co. v. Seerley*, 35 Ind. App. 467; s. c. 72 N. E. Rep. 1034, 169; *Carney v. Concord St. R.*, 72 N. H. 364; s. c. 57 Atl. Rep. 218; *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712; s. c. 81 S. W. Rep. 374.

⁶⁸ *Joliet R. Co. v. Eich*, 96 Ill. App. 240.

⁶⁹ *Third Ave. R. Co. v. Krausz*, 112 Fed. Rep. 379; s. c. 50 C. C. A. 293; *Hennessey v. Forty-Second St. & C. R. Co.*, 44 Misc. (N. Y.) 198; s. c. 88 N. Y. Supp. 728; *O'Connor v. Union R. Co.*, 67 App. Div. (N. Y.) 99; s. c. 73 N. Y. Supp. 606 (street sweeper); *Wells v. Brooklyn*

Heights R. Co., 67 App. Div. (N. Y.) 212; s. c. 74 N. Y. Supp. 196; aff'g s. c. 68 N. Y. Supp. 305.

⁷⁰ *United Railway & C. Co. v. Fletcher*, 95 Md. 533; s. c. 52 Atl. Rep. 608.

⁷¹ *Murphy v. Derby St. R. Co.*, 73 Conn. 249; s. c. 47 Atl. Rep. 120; *Adams v. Wilmington & C. R. Co.*, 3 Pen. (Del.) 512; s. c. 52 Atl. Rep. 264; *Farley v. Wilmington & C. Electric Ry. Co.*, 3 Pen. (Del.) 581; s. c. 52 Atl. Rep. 543; *Cox v. Wilmington City R. Co.*, — Del. —; s. c. 53 Atl. Rep. 569; *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1; *Hart v. Cedar Rapids & C. R. Co.*, 109 Iowa 631; s. c. 80 N. W. Rep. 662; *Owensboro City R. Co. v. Hill* (Ky.) 21 Ky. L. Rep. 1638; s. c. 56 S. W. Rep. 21; *Louisville R. Co. v. French*, 24 Ky. L. Rep. 1278; s. c. 71 S. W. Rep. 486; *Schmidt v. St. Louis R. Co.*, 163 Mo. 645; s. c. 63 S. W. Rep. 834; *Baxter v. St. Louis Transit*

of the accident.⁷² But a person who has actual knowledge of the car's approach will not be heard to complain of a failure to sound the gong or bell;⁷³ since the object of sounding the gong has been fully accomplished in his case. Again it is the plain duty of the street railway company to have its cars so lighted by headlights or otherwise as to be visible at a safe distance to persons using the street, and likely to cross or enter upon the tracks.⁷⁴ Where it is so dark that the motorman is unable to see vehicles and persons on the track far enough

Co., 103 Mo. App. 597; s. c. 78 S. W. Rep. 70; *Brown v. St. Louis Transit Co.*, 108 Mo. App. 310; s. c. 83 S. W. Rep. 310; *Dennis v. North Jersey St. R. Co.*, 64 N. J. L. 439; s. c. 45 Atl. Rep. 807; *Kleiner v. Third Ave. R. Co.*, 162 N. Y. 193; s. c. 56 N. E. Rep. 497; *rev'g s. c. 38 App. Div. (N. Y.) 623*; 57 N. Y. Supp. 1140; *Cosgrove v. Metropolitan St. R. Co.*, 74 App. Div. (N. Y.) 166; s. c. 77 N. Y. Supp. 624; *Hoon v. Beaver Valley T. Co.*, 204 Pa. 369; s. c. 54 Atl. Rep. 270 (cars run at rate of twenty-five miles an hour near schoolhouse when children were in street without sounding gong); *Fenney v. Wilkesbarre &c. Traction Co.*, 202 Pa. 365; s. c. 51 Atl. Rep. 1034; *Hellriegel v. Southern Traction Co.*, 23 Pa. Super. Ct. 392; *Shaughnessy v. Consolidated Traction Co.*, 17 Pa. Super. Ct. 538; *Bass v. Norfolk R. &c. Co.*, 100 Va. 1; s. c. 40 S. E. Rep. 100; 3 Va. Sup. Ct. Rep. 571. A motorman is charged with this duty, though it is not commanded by ordinance or statute: *East St. Louis Electric R. v. Snow*, 88 Ill. App. 660. Passenger alighting from car struck by car coming from the opposite direction on adjoining track without sounding signal—carrier liable: *Pelletreau v. Metropolitan St. R. Co.*, 74 App. Div. (N. Y.) 192; s. c. 77 N. Y. Supp. 386; s. c. *aff'd*, 174 N. Y. 503; 66 N. E. Rep. 1113; *Stevens v. Union R. Co.*, 75 App. Div. (N. Y.) 602; s. c. 78 N. Y. Supp. 624. It is a matter of common knowledge of which judicial notice will be taken that every street car is furnished with a gong, and hence an instruction submitting to the jury the question whether the motorman negligently failed to sound signals is not open to the objection that it fails to state in what man-

ner the warning should have been given: *Story v. St. Louis Transit Co.*, 108 Mo. App. 424; s. c. 83 S. W. Rep. 992.

⁷² *Murphy v. Derby St. R. Co.*, 73 Conn. 249; s. c. 47 Atl. Rep. 120; *Heinzle v. Metropolitan St. R. Co.*, 182 Mo. 528; s. c. 81 S. W. Rep. 848; *Jersey Farm Dairy Co. v. St. Louis Transit Co.*, 103 Mo. App. 90; s. c. 77 S. W. Rep. 346; *Burian v. Seattle Electric Co.*, 26 Wash. 606; s. c. 67 Pac. Rep. 214 (question for the jury).

⁷³ *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572; s. c. 82 S. W. Rep. 245; *Garvick v. United Rys. &c. Co.*, 101 Md. 239; s. c. 61 Atl. Rep. 138; *Louisville R. Co. v. Colston*, 117 Ky. 804; s. c. 79 S. W. Rep. 243; 25 Ky. L. Rep. 1933; *Tashjian v. Worcester Consol. St. R. Co.*, 177 Mass. 75; s. c. 58 N. E. Rep. 281; *Murray v. St. Louis Transit Co.*, 176 Mo. 183; s. c. 75 S. W. Rep. 611; *Anderson v. Metropolitan St. R. Co.*, 30 Misc. (N. Y.) 104; s. c. 61 N. Y. Supp. 899; *Williamson v. Metropolitan St. R. Co.*, 29 Misc. (N. Y.) 324; s. c. 60 N. Y. Supp. 477; *Thompson v. Metropolitan St. R. Co.*, 89 App. Div. (N. Y.) 10; s. c. 85 N. Y. Supp. 181; *Johnson v. Third Ave. R. Co.*, 69 App. Div. (N. Y.) 247; s. c. 74 N. Y. Supp. 599; *Stafford v. Chipewa Val. Electric R. Co.*, 110 Wis. 331; s. c. 85 N. W. Rep. 1036.

⁷⁴ *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1; *Buren v. St. Louis Transit Co.*, 104 Mo. App. 224; s. c. 78 S. W. Rep. 680. A street car company is chargeable with negligence in running a street car without a headlight on a dark and foggy night at a high rate of speed: *Indianapolis St. R. Co. v. Slifer*, 35 Ind. App. 700; s. c. 74 N. E. Rep. 19; *rev'g s. c. 72 N. E. Rep. 1055*.

ahead to give them warning of the car's approach, he should continually sound the gong in anticipation of their presence on the track.⁷⁵ The motorman having sounded the gong may presume that it will be heeded by persons about to enter upon the track, and he is only bound as an ordinarily careful man to exert efforts to stop the car after he sees his warning is not heeded.⁷⁶ An ordinance requiring motormen to stop street cars and ring the bell five feet from the intersection of the street car track with a railroad crossing has been held a reasonable enactment.⁷⁷ Another ordinance requiring a continuous ringing of the bell while in motion has been held an unreasonable condition, though included in the grant of the franchise to the company.⁷⁸ The term "street crossing," within the meaning of an ordinance requiring the ringing of the bell on the approach to a street crossing, has been held to include a street intersecting with the street on which the cars are run, although it terminates at the point of intersection.⁷⁹

§ 1393. Injuries from the Use of Defective Appliances.—Again actionable negligence may be predicated on the failure of a street railway company to provide its cars with safeguards such as brakes and fenders, where the injury under investigation would have been prevented by their use and they are usually attached to cars of similar construction operated in similar localities generally throughout the country⁸⁰ at the time of the accident and have proved ordinarily efficacious for the purpose.⁸¹ Having equipped the car with sufficient appliances, the duty still remains to keep these appliances in good condition.⁸² Where the appliances for the control of the car are defective to the knowledge of the company, it cannot escape responsibility for a collision on the ground that the motorman did all that he could with the equipment to stop the car in time to prevent a collision.⁸³ Where the character of the safety appliances is designated by ordinance, the street railway company is entitled to a reasonable time

⁷⁵ *J. F. Conrad Grocer Co. v. St. Louis &c. R. Co.*, 89 Mo. App. 391.

⁷⁶ *Cawley v. La Crosse City R. Co.*, 106 Wis. 239; s. c. 82 N. W. Rep. 197. See also, *Farrar v. New Orleans &c. R. Co.*, 52 La. Ann. 417; s. c. 26 South. Rep. 995.

⁷⁷ *Gulf &c. R. Co. v. Holt*, 30 Tex. Civ. App. 330; s. c. 70 S. W. Rep. 591.

⁷⁸ *Stafford v. Chippewa Val. Electric R. Co.*, 110 Wis. 331; s. c. 85 N. W. Rep. 1036.

⁷⁹ *Schneider v. Market St. R. Co.*, 134 Cal. 482; s. c. 66 Pac. Rep. 734.

⁸⁰ *Warren v. Manchester St. R.*,

70 N. H. 352; s. c. 47 Atl. Rep. 735; *Indianapolis St. R. Co. v. Schomberg*, 164 Ind. 111; s. c. 72 N. E. Rep. 1041; aff'g s. c. 71 N. E. Rep. 237; *Fritsch v. New York &c. R. Co.*, 93 App. Div. (N. Y.) 554; s. c. 87 N. Y. Supp. 942.

⁸¹ *Zimmerman v. Denver Consol. Tramway Co.*, 18 Colo. App. 480; s. c. 72 Pac. Rep. 607.

⁸² *Mock v. Los Angeles Traction Co.*, 139 Cal. 616; s. c. 73 Pac. Rep. 455.

⁸³ *Roberts v. Spokane St. R. Co.*, 23 Wash. 325; s. c. 63 Pac. Rep. 506.

in which to procure the appliances, and it has been held that one day after the adoption of the ordinance prescribing the appliances was too short.⁸⁴

§ 1394. Injuries Springing from the Disobedience of Statutes and Ordinances.⁸⁵

§ 1395. Injuries from Propelling Street Cars at a High Rate of Speed.—In the absence of laws regulating the speed of electric cars, the speed at which they may be run, and the watchfulness required of those in charge of cars will depend on the surrounding conditions.⁸⁶ The care to be exercised is reasonable care and must be proportioned to the danger reasonably to be apprehended at the time and place. The motorman traversing a crowded city street must have his car under such control that he may stop or sufficiently check its speed to avoid collision with persons engaged in a lawful and customary use of the highway in question.⁸⁷ In the country and through sparsely settled communities a high rate of speed is allowed and demanded in order to serve the public, and here no attainable rate of speed is *per se* excessive.⁸⁸ The test of speed in all cases is the speed at which an or-

⁸⁴ *Platt v. Albany R.*, 170 N. Y. 115; s. c. 62 N. E. Rep. 1071; *rev'd* s. c. 67 N. Y. Supp. 1144.

⁸⁵ See *ante*, § 1382. That violation of statute is some evidence of negligence, see *Buys v. Third Ave. R. Co.*, 45 App. Div. (N. Y.) 11; s. c. 61 N. Y. Supp. 113 (collision by a street car with an ambulance). An ordinance fixing the maximum speed for carts, wagons or other vehicles carrying passengers through streets of a city does not apply to street surface cars operated by electricity: *Robinson v. Metropolitan St. R. Co.*, 103 App. Div. (N. Y.) 243; s. c. 92 N. Y. Supp. 1010.

⁸⁶ *West Chicago St. R. Co. v. Callow*, 102 Ill. App. 323; *Butler v. Rockland & C. St. R.*, 99 Me. 149; s. c. 58 Atl. Rep. 775; *Camden & C. R. Co. v. United States Cast Iron Pipe & Co.*, 68 N. J. Ch. 279; s. c. 59 Atl. Rep. 523; *Cincinnati St. R. Co. v. Lewis*, 23 Ohio Cir. Ct. R. 127; *Toledo & C. R. Co. v. Gilbert*, 24 Ohio Cir. Ct. R. 181.

⁸⁷ *Wilman v. People's R. Co.*, — Del. —; s. c. 55 Atl. Rep. 332; *Adams v. Wilmington & C. R. Co.*, 3 Pen. (Del.) 512; s. c. 52 Atl. Rep. 264; *Farley v. Wilmington & C. Elec. R. Co.*, 3 Pen. (Del.) 581; s. c. 52 Atl. Rep. 543; *Moran v. Leslie*, 33

Ind. App. 80; s. c. 70 N. E. Rep. 162; *Ablard v. Detroit United R.*, 139 Mich. 248; s. c. 102 N. W. Rep. 741; 11 Det. Leg. N. 832; *Riska v. Union Depot R. Co.*, 180 Mo. 168; s. c. 79 S. W. Rep. 445; *Searles v. Elizabeth & C. R. Co.*, 70 N. J. L. 388; s. c. 57 Atl. Rep. 134; *Fisher v. Union R. Co.*, 86 App. Div. (N. Y.) 365; s. c. 83 N. Y. Supp. 694; *Freeman v. Brooklyn Heights R. Co.*, 87 App. Div. (N. Y.) 127; s. c. 84 N. Y. Supp. 108; *O'Callaghan v. Metropolitan St. R. Co.*, 69 App. Div. (N. Y.) 574; s. c. 75 N. Y. Supp. 171; s. c. *aff'd*, 174 N. Y. 521; 66 N. E. Rep. 1112; *Sesselmann v. Metropolitan St. R. Co.*, 76 App. Div. (N. Y.) 336; 78 N. Y. Supp. 482; *Bass v. Norfolk R. & C. Co.*, 100 Va. 1; s. c. 40 S. E. Rep. 100; 3 Va. Sup. Ct. Rep. 571. It is the duty of a motorman approaching a crossing where there is a steep down grade to make the descent at such a reasonable speed that he can retain control of the car: *Foulk v. Wilmington City R. Co.*, — Del. —; s. c. 60 Atl. Rep. 973.

⁸⁸ *Petty v. St. Louis & C. R. Co.*, 179 Mo. 666; s. c. 78 S. W. Rep. 1003; *Vizacchero v. Rhode Island Co.*, 26 R. I. 392; s. c. 59 Atl. Rep. 105.

dinarily prudent man would have run the car under similar circumstances.⁸⁹ It follows from the foregoing that negligence is not sufficiently alleged by the bare statement that a street car was running at a high rate of speed.⁹⁰ In all cases, however, it is essential to liability of the street railway company that the excessive speed should have been the proximate cause of the injuries sued upon, and a recovery will not be justified where the collision could not have been avoided even if the car had been propelled at a proper rate of speed and under proper control,⁹¹ as, for example, in a case where a child ran unexpectedly in front of a car running at a high rate of speed and was injured, and the car could not have been stopped if it had been running at a low speed.⁹² Excessive speed and want of sufficient control of the car by the motorman are shown where the car runs a considerable distance after the happening of the accident notwithstanding the efforts to stop it.⁹³

§ 1397. Instances and Examples of Rates of Speed.⁹⁴

§ 1398. **Running Street Cars at a Prohibited Rate of Speed.**—In the view of most of the courts it is negligence *per se* to propel a street car at a speed in excess of the rate fixed by a valid statute or ordinance,⁹⁵ provided the excessive speed is the proximate cause of the

⁸⁹ *Stafford v. Chippewa Val. Electric R. Co.*, 110 Wis. 331; s. c. 85 N. W. Rep. 1036; *Story v. St. Louis Transit Co.*, 108 Mo. App. 424; s. c. 83 S. W. Rep. 992.

⁹⁰ *Elwood & Co. St. R. Co. v. Ross*, 26 Ind. App. 258; s. c. 58 N. E. Rep. 535; *Warner v. St. Louis & Co. R. Co.*, 178 Mo. 125; s. c. 77 S. W. Rep. 67.

⁹¹ *Hoffman v. Syracuse Rapid Transit R. Co.*, 50 App. Div. (N. Y.) 83; s. c. 63 N. Y. Supp. 442.

⁹² *Holdridge v. Mendenhall*, 108 Wis. 1; s. c. 83 N. W. Rep. 1109.

⁹³ *Cosgrove v. Metropolitan St. R. Co.*, 74 App. Div. (N. Y.) 166; s. c. 77 N. Y. Supp. 624; s. c. aff'd, 173 N. Y. 628; 66 N. E. Rep. 1106 (forty-five feet); *Indianapolis St. R. Co. v. Bordenchecker*, 33 Ind. App. 138; s. c. 70 N. E. Rep. 995 (variously estimated from three rods to one hundred sixty feet).

⁹⁴ *Walker v. St. Paul City R. Co.*, 81 Minn. 404; s. c. 84 N. W. Rep. 222; 51 L. R. A. 632 (speed of forty-five miles an hour past a platform at the side of the track is excessive). Speed of two and a half miles an hour may be excessive in car equipped with defective appli-

ances for control: *Roberts v. Spokane St. R. Co.*, 23 Wash. 325; s. c. 63 Pac. Rep. 506. A speed of eight or ten miles an hour through a city does not amount to negligence as a matter of law: *Reid Ice Cream Co. v. Interurban St. R. Co.*, 89 N. Y. Supp. 968. A court will not say, as a matter of law, that a car that stops substantially at the place of collision with a vehicle crossing the track was driven at a negligent rate of speed: *Stafford v. Chippewa Val. Electric R. Co.*, 110 Wis. 331; s. c. 85 N. W. Rep. 1036.

⁹⁵ *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524; s. c. 85 S. W. Rep. 140; *Holden v. Missouri R. Co.*, 108 Mo. App. 665; s. c. 84 S. W. Rep. 133; *Kolb v. St. Louis Transit Co.*, 102 Mo. App. 143; s. c. 76 S. W. Rep. 1050; *McAndrew v. St. Louis & S. R. Co.*, 88 Mo. App. 97; *Myers v. St. Louis Transit Co.*, 99 Mo. App. 363; s. c. 73 S. W. Rep. 379; *Story v. St. Louis Transit Co.*, 108 Mo. App. 424; s. c. 83 S. W. Rep. 992; *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712; s. c. 81 S. W. Rep. 374. But see *Holwerson v. St. Louis & Co. R. Co.*, 157 Mo. 216;

injury complained of.⁹⁶ But the fact that an ordinance fixes the rate of speed will not justify a motorman in driving his car at that rate if conditions exist which render a less speed indispensable to the safety of the public.⁹⁷ The power delegated to a city to enact ordinances to regulate the speed of street cars must be reasonably exercised. In one case an ordinance limiting the speed of street cars to six miles an hour was held unreasonable and void on this ground.⁹⁸ Speed ordinances enacted prior to the adoption of electricity as a motive power are inapplicable to electric companies succeeding horse railway companies, though the electric company accepted the franchises of its predecessor subject to all the obligations imposed on it.⁹⁹

§ 1399. Collisions between Vehicles or Pedestrians and Street Cars at Street Crossings.—The common-law rule of equality of right of way at street crossings, heretofore adverted to,¹⁰⁰ may be superseded by statutes and ordinances providing a different rule of precedence; as for example, a city may prescribe that vehicles going in one direction may have precedence over vehicles going in another direction at a crossing, and such an ordinance will control.¹⁰¹

§ 1402. Collisions with Other Street Cars at Street Railway Crossings.—A Michigan statute providing that at all crossings of the tracks of two street railroads, when cars on the different lines approach the crossing at substantially the same time, the car on the first track laid shall have precedence, is construed with an ordinance of the city requiring cars to come to a full stop before making a crossing, and thus construed, a car cannot claim its right under this statute until it stops in accordance with the ordinance.¹⁰²

§ 1403. Collisions at Steam Railway Crossings.—It is held that the disobedience of a statute requiring street cars to be brought to a

s. c. 57 S. W. Rep. 770; 50 L. R. A. 850, a decision by one division of the supreme court of Missouri, which holds that an ordinance limiting the rate of speed of street cars, and imposing a penalty for its violation is a penal statute, providing a cumulative remedy, and unless accepted by the street railway company confers no right of action on third persons. The decision has not been followed by the other appellate courts of the State.

⁹⁶ Hays v. Tacoma R. & C. Co., 106 Fed. Rep. 48; Molyneux v. Southwest Missouri Electric R. Co., 81 Mo. App. 25.

⁹⁷ Fry v. St. Louis Transit Co.,

111 Mo. App. 324; s. c. 85 S. W. Rep. 960; Holden v. Missouri R. Co., 177 Mo. 456; s. c. 76 S. W. Rep. 973.

⁹⁸ Union T. Co. v. Watervliet, 35 Misc. (N. Y.) 392; s. c. 71 N. Y. Supp. 977.

⁹⁹ Bonham v. Citizens' St. R. Co., 158 Ind. 106; s. c. 62 N. E. Rep. 996. But see Lewis v. Cincinnati St. R. Co., 10 Ohio S. & C. P. Dec. 53.

¹⁰⁰ See *ante*, § 1376.

¹⁰¹ Kroder v. Interurban St. R. Co., 46 Misc. (N. Y.) 118; s. c. 91 N. Y. Supp. 341.

¹⁰² Becker v. Detroit Citizens' St. R. Co., 121 Mich. 580; s. c. 80 N. W. Rep. 581.

full stop and a man sent forward to see that the track is clear before crossing the track is not conclusive on the question of negligence, but regard must be had of the circumstances attending the failure to take these precautions.¹⁰³ A motorman will be justified in attempting to cross a track, where he is signaled to approach by servants of the railroad having authority to give such signals.¹⁰⁴ A Georgia statute, requiring trains to come to a full stop within a certain distance of the place of crossing, is held by the supreme court of that State not to apply to street railroads, so as to compel a car to stop before crossing a steam railroad track.¹⁰⁵

§ 1404. Collisions of Cars with Vehicles Going in the Same Direction.—Having in mind the situation of the parties, courts have difficulty in conceiving of a case where a vehicle is run down from behind by a street car without negligence or willful wrong on the part of the operator of the car.¹⁰⁶ This imputation of negligence is quite as strong where the motorman strikes a vehicle on the side of the track as where the vehicle is directly on the track.¹⁰⁷ The driver of a vehicle along a railroad track in front of an approaching street car is not a trespasser,¹⁰⁸ though the highway belongs to the street railway company, it has been thrown open to the public.¹⁰⁹ These rules do not require a motorman to stop his car when approaching a vehicle moving along the street in the same direction, but beyond the reach of the car, and with no indication that it is about to get on the track in front of him.¹¹⁰

§ 1405. Injuries from Running Horse Cars without Conductor.—The mere fact that a street car is run without a conductor is generally held not sufficient of itself to constitute negligence justifying a recovery for injuries received in a collision with a car, unless the motorman, at the time of the accident, was prevented from performing his duty as motorman by reason of acting as a conductor, and this was the proximate cause of the accident.¹¹¹

¹⁰³ *Phillip v. Heraty*, 135 Mich. 446; s. c. 97 N. W. Rep. 963; 11 Det. Leg. N. 171; 100 N. W. Rep. 186.

¹⁰⁴ *Snider v. Chicago & C. R. Co.*, 108 Mo. App. 234; s. c. 83 S. W. Rep. 530.

¹⁰⁵ *Georgia R. & C. Co. v. Joiner*, 120 Ga. 905; s. c. 48 S. E. Rep. 336.

¹⁰⁶ *Richmond Passenger & C. Co. v. Allen*, 103 Va. 532; s. c. 49 S. E. Rep. 656; *Vincent v. Norton & C. St. R. Co.*, 180 Mass. 104; s. c. 61 N. E. Rep. 822.

¹⁰⁷ *Holzman v. Metropolitan St. R. Co.*, 31 Misc. (N. Y.) 644; s. c. 64 N.

Y. Supp. 1120; *Warren v. Union R. Co.*, 46 App. Div. (N. Y.) 517; s. c. 61 N. Y. Supp. 1009.

¹⁰⁸ *Robinson v. Louisville R. Co.*, 112 Fed. Rep. 484; s. c. 50 C. C. A. 357.

¹⁰⁹ *Liekens v. Staten Island & C. R. Co.*, 64 App. Div. (N. Y.) 327; s. c. 72 N. Y. Supp. 162.

¹¹⁰ *Chicago City R. Co. v. Ahler*, 107 Ill. App. 397.

¹¹¹ *Di Prisco v. Wilmington City R. Co.*, — Del. —; s. c. 57 Atl. Rep. 906.

§ 1406. **Running over Dogs.**—The failure of a motorman to slacken the speed of his car in time to prevent injury to a dog on the track seen by him in time to have allowed this effort to save the dog's life will generally constitute negligence for which a recovery may be had.¹¹² In North Carolina it is held that the motorman owes to a dog on the track the same degree of care that he owes to a man working on or near the railroad track, and hence he may act on the belief that the dog will get out of the way, where he is apparently in the possession of his faculties.¹¹³ Under this rule a street-railway company will not be liable for the killing of a dog unless the killing was done under such circumstances as to justify the conclusion that it was either willful, wanton or reckless.¹¹⁴ In this jurisdiction a dog is not within the meaning of a statute making the killing of any cattle or other live stock by engines or cars *prima facie* evidence of negligence on the part of a railroad company.¹¹⁵ Evidence that a motorman saw a dog in time to have stopped the car, but proceeded on his way at a dangerous speed until he struck and killed him, and then continued on his way without giving the accident further notice, has been held sufficient to support a finding that the killing was actionable negligence, for which the owner of the dog might recover its value from the defendant.¹¹⁶

§ 1408. **When Street Railway Negligence a Question for the Jury and when not.**¹¹⁷

§ 1411. **Some Questions of Evidence in these Actions.**—There can be no recovery of damages for injuries unless the evidence shows the defendant's negligence and that this negligence was the proximate cause of the plaintiff's injury,¹¹⁸ and the plaintiff has the burden of

¹¹² West Chicago St. R. Co. v. Kliecka, 94 Ill. App. 346.

¹¹³ Moore v. Charlotte &c. R. &c. Co., 136 N. C. 554; s. c. 48 S. E. Rep. 822; 67 L. R. A. 470.

¹¹⁴ Moore v. Charlotte &c. R. &c. Co., 136 N. C. 554; s. c. 48 S. E. Rep. 822; 67 L. R. A. 470.

¹¹⁵ Moore v. Charlotte &c. R. &c. Co., 136 N. C. 554; s. c. 48 S. E. Rep. 822; 67 L. R. A. 470.

¹¹⁶ Smith v. St. Paul City R. Co., 79 Minn. 254; s. c. 82 N. W. Rep. 577.

¹¹⁷ Marchal v. Indianapolis St. R. Co., 28 Ind. App. 133; s. c. 62 N. E. Rep. 286 (whether negligence to run street cars on same track over public crossing in city at excessive rate of speed in close proximity to

one another and without giving signals); United Railways &c. Co. v. Seymour, 92 Md. 425; s. c. 48 Atl. Rep. 850 (whether negligence to propel car at full speed after dark over track along street heavily shaded on both sides of the street, and good view of track further prevented by diagonal rays of light from houses on each side of street); Campbell v. Consolidated Traction Co., 201 Pa. 167; s. c. 50 Atl. Rep. 829 (whether due care was exercised by motorman of car which slipped backwards after trolley wheel had escaped from wire and collision with vehicle in rear resulted).

¹¹⁸ Siacik v. Northern Cent. R. Co., 92 Md. 213; s. c. 48 Atl. Rep. 149.

proving these facts.¹¹⁹ Mere proof of the collision does not of itself create the presumption that the motorman was negligent.¹²⁰ A *prima facie* case of negligence is made and a presumption of negligence arises where it is shown that a car collided with a vehicle or person along the track and the car had its motive power turned on with no one in control of the apparatus.¹²¹ Where the issue is whether the track was in a defective condition at the place of the accident, evidence is inadmissible as to the condition of portions of the track at other places and at other times.¹²² On the question of speed, evidence is admissible to show the speed of the car immediately before the collision.¹²³ So, evidence of bruises to the person of the plaintiff is admissible to show the violence of the impact as bearing on the question of speed though these particular injuries are not specified in the bill of particulars.¹²⁴ Where the evidence is conflicting as to the rate of speed of the particular car which struck the plaintiff, evidence as to the speed of cars generally at the place in question for several days preceding the accident has been held admissible,¹²⁵ but not a long time after the accident unless it is shown that the conditions were not different from those existing at the time of the accident.¹²⁶ On the question of the contributory negligence of a person injured at a crossing, the evidence of a custom of the street cars to slacken their speed upon approaching this particular crossing, and that the injured person had often crossed such crossing, and must have been acquainted with the custom, has been held admissible.¹²⁷ Evidence of the speed of either the car or a vehicle is not shown by the speed capacity of the animal, and such evidence should not be received.¹²⁸ Nor is the question of negligence illuminated by evidence of a witness that he saw a car "coming down at a terrible speed," as this evidence at most conveys to the jury only the fact that the rate was one that the witness disapproved.¹²⁹ On such an inquiry the usual means of stopping such cars under given circumstances may be proved by witnesses familiar

¹¹⁹ *Foult v. Wilmington City R. Co.*, —Del. —; s. c. 60 Atl. Rep. 973.

¹²⁰ *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572; s. c. 82 S. W. Rep. 245; *Garvick v. United Rys. & C. Co.*, 101 Md. 239; s. c. 61 Atl. Rep. 138.

¹²¹ *Chicago City R. Co. v. Eick*, 111 Ill. App. 452; *Chicago City R. Co. v. Barker*, 209 Ill. 321; s. c. 70 N. E. Rep. 624.

¹²² *Perras v. United Traction Co.*, 88 App. Div. (N. Y.) 260; s. c. 84 N. Y. Supp. 992.

¹²³ *Portsmouth St. R. Co. v. Peed*, 102 Va. 662; s. c. 47 S. E. Rep. 850.

¹²⁴ *Greenbaum v. Interurban St. R. Co.*, 84 N. Y. Supp. 588.

¹²⁵ *Union T. Co. v. Vandercook*, 32 Ind. App. 621; s. c. 69 N. E. Rep. 486.

¹²⁶ *Hewlett v. Brooklyn Heights R. Co.*, 63 App. Div. (N. Y.) 423; s. c. 71 N. Y. Supp. 531.

¹²⁷ *Toledo R. & C. Co. v. Ward*, 25 Ohio Cir. Ct. R. 399.

¹²⁸ *Spargo v. West End St. R. Co.*, 175 Mass. 174; s. c. 55 N. E. Rep. 812.

¹²⁹ *Chicago City R. Co. v. Wall*, 93 Ill. App. 411.

with the operation of electric cars.¹³⁰ Indirectly the rate of speed may be shown by evidence as to the space covered after an attempt had been made to stop the car where evidence is admitted showing how soon cars running at different rates could be stopped;¹³¹ and so it may be shown whether the place where the accident occurred was thickly populated or otherwise.¹³² Though evidence of the failure to give warning by signals may not be available as a ground of liability, yet the failure to give them may be shown as a part of the *res gestae* and as bearing on the exercise of care by the plaintiff in remaining on the track while the car was approaching.¹³³ Ordinances relating to speed and signals¹³⁴ and ordinances governing precedence at crossings¹³⁵ are admissible, and this without showing their acceptance by the company.¹³⁶ An ordinance limiting the speed for riding or driving on the street is not admissible in an action for collision with a fire wagon, as the fire department of a city is not subject to ordinances of this character.¹³⁷ Evidence that a motorman charged with negligence in running his car was arrested by a policeman thereafter is clearly inadmissible.¹³⁸ A rule of the street railway company making it the duty of conductors to prevent boys from catching on cars is admissible to show that a conductor's assault on a boy attempting to get on a car was within the scope of the conductor's employment.¹³⁹

§ 1412. Some other Unclassified Matters.¹⁴⁰

¹³⁰ *Atlanta R. & C. Co. v. Monk*, 118 Ga. 449; s. c. 45 S. E. Rep. 494; *South Chicago City R. Co. v. Purvis*, 193 Ill. 454; s. c. 61 N. E. Rep. 1046.

¹³¹ *McDonald v. Brooklyn Heights R. Co.*, 51 App. Div. (N. Y.) 186; s. c. 64 N. Y. Supp. 480.

¹³² *Di Prisco v. Wilmington City R. Co.*, — Del. —; s. c. 57 Atl. Rep. 906; *Denison & C. R. Co. v. Powell*, 35 Tex. Civ. App. 454; s. c. 80 S. W. Rep. 1054; *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 414; s. c. 61 N. E. Rep. 936; *Indianapolis St. R. Co. v. Taylor*, 164 Ind. 155; s. c. 72 N. E. Rep. 1045.

¹³³ *Chicago General R. Co. v. Kriz*, 94 Ill. App. 277.

¹³⁴ *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524; s. c. 85 S. W. Rep. 140; *Meng v. St. Louis & C. R. Co.*, 108 Mo. App. 553; s. c. 84 S. W. Rep. 213; *Stiasny v. Metropolitan St. R. Co.*, 58 App. Div. (N. Y.) 172; s. c. 68 N. Y. Supp. 694. Ordinances requiring the use of reasonable care by street railway employés to stop cars on the appear-

ance of danger near the track, and to use proper care to prevent injury to teams, state merely general rules of law, and under the practice in Iowa are inadmissible as evidence: *Christy v. Des Moines City R. Co.*, 126 Iowa 428; s. c. 102 N. W. Rep. 194.

¹³⁵ *H. E. Taylor & Co. v. Metropolitan St. R. Co.*, 84 N. Y. Supp. 282.

¹³⁶ *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524; s. c. 85 S. W. Rep. 140.

¹³⁷ *Toledo R. & C. Co. v. Ward*, 25 Ohio Cir. Ct. R. 399.

¹³⁸ *Chicago City R. Co. v. Uhter*, 212 Ill. 174; s. c. 72 N. E. Rep. 195; *Seipp v. Dry-Dock & C. R. Co.*, 45 App. Div. (N. Y.) 489; s. c. 61 N. Y. Supp. 409.

¹³⁹ *Hewson v. Interurban St. R. Co.*, 95 App. Div. 112; s. c. 88 N. Y. Supp. 816.

¹⁴⁰ Generally the owner is liable for negligent operation of a street railway by his lessee (*Muntz v. Algiers & C. R. Co.*, 111 La. 423; s. c.

§ 1413. **Rules of Company Governing Operation.**—A rule of a street railroad company requiring cars, when passing fire engine houses, to slacken speed to four miles an hour, is construed to oblige the motorman to approach such an engine house at a reduced speed, and as not applying only to the space directly in front of the engine house.¹⁴¹ Violation of this rule is not negligence *per se*, but is evidence bearing on the question of negligence.¹⁴²

§ 1414. **Presumption from Head On Collisions.**¹⁴³

35 South. Rep. 624; 64 L. R. A. 222), unless the lease has been duly authorized by law, in which event the lessee only and not the lessor is liable (*Pinkerton v. Pennsylvania Traction Co.*, 193 Pa. St. 229; s. c. 44 Atl. Rep. 284). The lessee cannot be held liable for injuries the result of negligence prior to the execution of his lease (*Higgins v. Brooklyn*, 54 App. Div. (N. Y.) 69; s. c. 66 N. Y. Supp. 334). The non-observance of ordinances governing the movement of cars will not be excused on the ground that obedience would be difficult (*Craven v. International R. Co.*, 100 App. Div. (N. Y.) 157; s. c. 91 N. Y. Supp. 625). In Connecticut a notice of injuries by a married woman is sufficient to give her husband a right to maintain an action for the loss of her services (*Peck v. Fair Haven & C. R. Co.*, 77 Conn. 161; s. c. 58 Atl. Rep. 757). The mere fact that the public has used as a passway a portion of a private right of way of a street railroad does not make such right of way a public highway (*Floyd v. Paducah R. & C. Co.*, 64 S. W. Rep. 653; s. c. 23 Ky. L. Rep. 1077). A power given to commissioners having control and oversight of street railways to make exemptions from the provisions of the statute relating to safety appliances does not authorize the commission to suspend entirely the statute (*Henderson v. Durham Traction Co.*, 132 N. C. 779; s. c. 44 S. E. Rep. 598). An instruction that the motorman's use of the brake, instead of the reverse, was not negligence if caused by his excitement, was held an invasion of the province of the jury, as this one fact was only a circumstance from which to determine negligence, which was a question for the jury

(*Warren v. Manchester St. R. Co.*, 70 N. H. 352; s. c. 47 Atl. Rep. 735). Another instruction in an action for injuring an animal on the track that the defendant was not guilty of willful or wanton wrong if the car was being run at the rate of five or six miles an hour was properly refused because it did not limit the question of speed to the time of the injury (*Montgomery St. R. Co. v. Rice*, 142 Ala. 674; s. c. 38 South. Rep. 857). A statute giving members of the police force power to regulate the movement of teams and vehicles in streets has been held not to authorize a police officer to direct a street car motorman to use his car to push a vehicle out of the way, so as to make the street car company liable for injuries sustained by the officer, because of the motorman's negligence in the operation of the car (*Connelly v. Metropolitan St. R. Co.*, 84 N. Y. Supp. 305). The act of a defendant in allowing a case to go to the jury without objection at the close of the case has been held to amount to a tacit concession of the defendant of the sufficiency of the evidence to require submission to the jury of the questions of negligence and contributory negligence (*Scarangelo v. Interurban St. R. Co.*, 90 N. Y. Supp. 430).

¹⁴¹ *McKernan v. Detroit Citizens' St. R. Co.*, 138 Mich. 519; s. c. 101 N. W. Rep. 812; 11 Det. Leg. N. 685; 68 L. R. A. 347.

¹⁴² *McKernan v. Detroit Citizens' St. R. Co.*, 138 Mich. 519; s. c. 101 N. W. Rep. 812; 11 Det. Leg. N. 685; 68 L. R. A. 347.

¹⁴³ That negligence will be presumed in the absence of other evidence, see *Peterson v. Seattle Traction Co.*, 23 Wash. 615; s. c. 63 Pac. Rep. 539; 65 Pac. Rep. 543.

§ 1417. **Street Cars Frightening Horses.**—Generally speaking the operator of a street car is not required to take greater precautions against frightening horses on a highway than the drivers of other vehicles.¹⁴⁴ The law is satisfied where the motorman has acted as a person of ordinary prudence would have acted under the same circumstances; in other words, the right to recover in cases of this character depends on whether the motorman was negligent and this must be shown.¹⁴⁵ It is not the duty of the motorman to anticipate the fright of animals in the highway,¹⁴⁶ and he is not required to slow down his car merely by reason of seeing an untied animal in the street between the track and the gutter. In this situation he may assume that the horse is gentle and not afraid of street cars.¹⁴⁷ But the motorman should remain at his post of duty, and in a position to detect the presence of frightened horses in the highway, and a collision with a frightened animal, resulting from negligence in this respect, will render the company liable.¹⁴⁸

§ 1418. **Frightening Horses by Sounding the Gong.**—The case of negligence is plain where the motorman sees that the animal is frightened and adds to this fright by sounding the gong unnecessarily.¹⁴⁹ In a case of this kind a court has sustained a recovery where the frightened condition of the horse was noticed by the conductor and not the motorman, the conclusion being that it was the duty of the conductor making this discovery to notify the motorman to stop sounding the gong.¹⁵⁰

§ 1419. **Frightening Horses by Other Means.**—A street railway company may be liable for fright of an animal by negligence in other respects, as by the display of flapping banners on the side of cars,¹⁵¹

¹⁴⁴ *Adsit v. Catskill Electric R. Co.*, 88 App. Div. (N. Y.) 167; s. c. 84 N. Y. Supp. 393.

¹⁴⁵ *Klatt v. Houston Electric St. R. Co.* (Tex. Civ. App.), 57 S. W. Rep. 1112; *Harmon v. Pennsylvania Traction Co.*, 200 Pa. 311; s. c. 49 Atl. Rep. 755 (mules, never before intractable, became headstrong and notwithstanding the efforts of the driver, turned suddenly on track directly in front of moving car).

¹⁴⁶ *Myers v. Brantford St. R. Co.*, 27 Ont. App. 513.

¹⁴⁷ *Hoffman v. Syracuse Rapid Transit R. Co.*, 50 App. Div. (N. Y.) 83; s. c. 63 N. Y. Supp. 442.

¹⁴⁸ *Montgomery v. Johnson*, 58 S. W. Rep. 476; s. c. 22 Ky. L. Rep. 596 (motorman previous to and at

the time of collision was inside his car mending a seat).

¹⁴⁹ *Oates v. Metropolitan St. R. Co.*, 168 Mo. 535; s. c. 68 S. W. Rep. 906. So a street railway company was held liable where its motorman drove his car at full speed through a narrow street obstructed by building material, sounding his gong continuously, and thus caused the fright of a horse driven through the passage by a woman, and her injury when the horse ran away: *Springfield Consol. R. Co. v. Ankrum*, 93 Ill. App. 655.

¹⁵⁰ *Denison & Co. R. Co. v. Powell*, 35 Tex. Civ. App. 454; s. c. 80 S. W. Rep. 1054.

¹⁵¹ *Indianapolis & Co. T. Co. v. Haines*, 33 Ind. App. 63; s. c. 69 N. E. Rep. 187.

and by the sound produced by running a car over a highway at an excessive rate of speed.¹⁵²

§ 1420. What the Motorman should do when he Sees a Horse Taking Fright.—It is the duty of a motorman to do all that he reasonably can to diminish the fright of a horse, which he sees in the street in front of him.¹⁵³ He should bring his car under control, stop sounding the gong, and if necessary, bring his car to a full stop, whether at a usual stopping point or not.¹⁵⁴ After he has stopped his car, if that is necessary, he should use due care in starting the car that he may not again frighten the animal before he is removed from the point of danger, or gotten under control of the driver.¹⁵⁵

§ 1422. Contributory Negligence of the Driver whose Horse is Frightened.¹⁵⁶

§ 1424. Degree of Care to be Exercised to Avoid Injuring Children.—Here the degree of care demanded is that described as ordinary or reasonable care,¹⁵⁷ which is a care proportioned to the danger to be avoided,¹⁵⁸ and requires the exercise of greater vigilance and caution than in the case of adults.¹⁵⁹ In no event is a street railroad company an insurer of the safety of children, and an instruction that the motorman must "make sure" that a child is free of the track has been held open to the objection that it exacts too high a degree of care.¹⁶⁰ The motorman should maintain an effective lookout ahead

¹⁵² Georgia R. &c. Co. v. Blacknall, 122 Ga. 310; s. c. 50 S. E. Rep. 92; Georgia R. &c. Co. v. Joiner, 120 Ga. 905; s. c. 48 S. E. Rep. 336. For an example of a sufficient complaint held to set forth this ground of liability, see Denison &c. R. Co. v. Powell, 35 Tex. Civ. App. 454; s. c. 80 S. W. Rep. 1054.

¹⁵³ Myers v. Brantford St. R. Co. (Div. Ct.), 31 Ont. 209.

¹⁵⁴ Christy v. Des Moines City R. Co., 126 Iowa 428; s. c. 102 N. W. Rep. 194; O'Brien v. Blue Hill St. R. Co., 186 Mass. 446; s. c. 71 N. E. Rep. 951; McVean v. Detroit United R., 138 Mich. 263; s. c. 101 N. W. 527; 11 Det. Leg. N. 562; Cameron v. Jersey City &c. St. R. Co., 70 N. J. L. 633; s. c. 57 Atl. Rep. 417; Knoxville Traction Co. v. Mullins, 111 Tenn. 329; s. c. 76 S. W. Rep. 890; Danville R. &c. Co. v. Hodnett, 101 Va. 361; s. c. 43 S. E. Rep. 606.

¹⁵⁵ Obold v. United Traction Co., 19 Pa. Super. Ct. 326.

¹⁵⁶ Knoxville Traction Co. v. Mullins, 111 Tenn. 329; s. c. 76 S. W. Rep. 890 (whether person riding a

skittish horse, which showed fright on approaching a street car, was negligent in not turning off the street at once a question for the jury).

¹⁵⁷ Kube v. St. Louis Transit Co., 103 Mo. App. 582; s. c. 78 S. W. Rep. 55.

¹⁵⁸ Indianapolis St. R. Co. v. Schomberg, 164 Ind. 111; s. c. 72 N. E. Rep. 1041; aff'g s. c. 71 N. E. Rep. 237; Gorman v. Louisville R. Co., 72 S. W. Rep. 760; s. c. 24 Ky. L. Rep. 1938.

¹⁵⁹ West Chicago St. R. Co. v. Schwartz, 93 Ill. App. 387. But see Chicago City R. Co. v. O'Donnell, 114 Ill. App. 359, where it is held that a street railroad company is not required to exercise toward an infant not a passenger upon a crowded street crossing a greater degree of care than it is required to exercise toward a man of full age upon an unfrequented street.

¹⁶⁰ Indianapolis St. R. Co. v. Schomberg, 164 Ind. 111; s. c. 72 N. E. Rep. 1041.

of his car,¹⁶¹ and where he sees or ought to have seen the dangerous situation of a child of tender years, it is his duty immediately to put the car fully under control, slacken speed, and sound warning signals,¹⁶² and even stop the car if that is necessary to avoid striking the child.¹⁶³ But the fact that a car stopped within a few feet after striking a child on the track, though not within as short a distance as it was possible to stop it, has been held not material where the fatal result would not have been avoided even if the car had been stopped in that distance.¹⁶⁴ The duty to exercise a high degree of watchfulness is upon the motorman on approaching a point where he has reason to expect a gathering of children at play.¹⁶⁵

§ 1426. **Injuries Produced by Children Running in Front of the Cars.**¹⁶⁶—Where the motorman does everything in his power to stop a car to prevent running over a child after seeing him in a dangerous position, he will not be chargeable with negligence merely because he failed to sound signals.¹⁶⁷

§ 1427. **Cases of this kind where the Company was not Exonerated.**¹⁶⁸—It seems a proper holding that a motorman may not assume,

¹⁶¹ Koersen v. Newcastle &c. St. R. Co., 198 Pa. 26; s. c. 47 Atl. Rep. 850.

¹⁶² Chicago City R. Co. v. Tuohy, 95 Ill. App. 314; s. c. aff'd, 196 Ill. 410; 63 N. E. Rep. 997; South Chicago City R. Co. v. Kinnare, 96 Ill. App. 210; Galveston City R. Co. v. Hanna, 34 Tex. Civ. App. 608; s. c. 79 S. W. Rep. 639.

¹⁶³ Meeker v. Metropolitan St. R. Co., 178 Mo. 173; s. c. 77 S. W. Rep. 58.

¹⁶⁴ Miller v. St. Charles St. R. Co., 114 La. 409; s. c. 38 South. Rep. 401.

¹⁶⁵ Sample v. Consolidated Light &c. Co., 50 W. Va. 472; s. c. 40 S. E. Rep. 597; Forrestal v. Milwaukee &c. R. &c. Co., 119 Wis. 495; s. c. 97 N. W. Rep. 182.

¹⁶⁶ That a street railroad company will not be liable for injuries to children unexpectedly running across the street in front of approaching cars where the motorman has no opportunity to stop the car, but uses his utmost endeavors to prevent the accident, see *Di Prisco v. Wilmington City R. Co.*, — Del. —; s. c. 57 Atl. Rep. 906; *Pfeiffer v. Chicago City R. Co.*, 96 Ill. App. 10; *Campbell v. New Orleans City R. Co.*, 104 La. 183; s. c.

28 South. Rep. 985; *Miller v. St. Charles St. R. Co.*, 114 La. 409; s. c. 38 South. Rep. 401; *Coessens v. Rapid R. Co.*, 136 Mich. 481; s. c. 99 N. W. Rep. 751; 11 Det. Leg. N. 111; *Graham v. Consolidated Traction Co.*, 64 N. J. L. 10; s. c. 44 Atl. Rep. 964; *De Ioia v. Metropolitan St. R. Co.*, 37 App. Div. (N. Y.) 455; s. c. 56 N. Y. Supp. 22; s. c. aff'd, 165 N. Y. 664; 59 N. E. Rep. 1121; *Hirschman v. Dry-Dock &c. R. Co.*, 46 App. Div. (N. Y.) 621; s. c. 61 N. Y. Supp. 304; *Hunter v. Consolidated Traction Co.*, 193 Pa. St. 557; s. c. 44 Atl. Rep. 578; *Miller v. Union T. Co.*, 198 Pa. 639; s. c. 48 Atl. Rep. 864; *Holdridge v. Mendenhall*, 108 Wis. 1; s. c. 83 N. W. Rep. 1109; *Tishacek v. Milwaukee Electric R. &c. Co.*, 110 Wis. 417; s. c. 85 N. W. Rep. 971.

¹⁶⁷ *Frank v. Metropolitan St. R. Co.*, 44 App. Div. (N. Y.) 243; s. c. 60 N. Y. Supp. 616; *Graham v. Consolidated Traction Co.*, 64 N. J. L. 10; s. c. 44 Atl. Rep. 964.

¹⁶⁸ Street railway companies have been held liable for negligent injuries to children under these circumstances: Where the view of the track was unobstructed, and the child was in a dangerous position in plain sight, and the motorman

as in the case of an adult, that a child of tender years, approaching a track, will not go thereon in front of his car.¹⁶⁹

§ 1429. **Injuries to Children Climbing on Street Cars.**—The law does not impose upon street railway companies the duty so to construct or guard their cars as to prevent trespassing children from getting on or off while the car is in motion.¹⁷⁰ A street railway company is not liable for injuries to a child of tender years jumping or falling off a car where his presence on the car is unknown to the operatives of the car.¹⁷¹ But it will be liable for injuries to a child caused by his jumping from a rapidly moving car at the command or threat of the operatives of the car.¹⁷² A street railroad company, leaving trolley cars in a street with the brakes set in a manner sufficient to hold them unless loosened by some one, was held not liable for injury to a boy, one of a number playing with the cars after they had loosened

saw him in time to have stopped the car, but did not attempt to stop the car until it struck the child (*Elwood & Co. R. Co. v. Ross*, 26 Ind. App. 258; s. c. 58 N. E. Rep. 535; *Jones v. United Traction Co.*, 201 Pa. 344; s. c. 50 Atl. Rep. 826); where an inexperienced motorman saw a child approaching the track and neither sounded the gong, nor checked the speed, and did not reverse the motor, and the child stepped on the track when the car was within four or five feet of him and was killed (*Wills v. Ashland Light & Co.*, 108 Wis. 255; s. c. 84 N. W. Rep. 998); where the motorman, at the time the child ran onto the track in front of his car going down an incline, was looking backward and did not have his hand on the brake (*Goldstein v. Dry Dock & Co.*, 35 Misc. (N. Y.) 200; s. c. 71 N. Y. Supp. 477); where the motorman saw the child in a dangerous position when fifty feet from him, and failed to stop, though the car might have been stopped within ten or twelve feet (*McDonald v. Metropolitan St. R. Co.*, 93 App. Div. (N. Y.) 238; s. c. 87 N. Y. Supp. 699; *Colter v. Cincinnati St. R. Co.*, 18 Ohio C. C. R. 382).

¹⁶⁹ *Citizens' St. R. Co. v. Hamer*, 29 Ind. App. 426; s. c. 62 N. E. Rep. 658; 63 N. E. Rep. 778; *Indianapolis St. R. Co. v. Bordenchecker*, 33 Ind. App. 138; s. c. 70 N. E. Rep. 995 (child two and a half years old).

¹⁷⁰ *Goldstein v. People's R. Co.*, — Del. —; s. c. 60 Atl. Rep. 975.

¹⁷¹ *Goldstein v. People's R. Co.*, — Del. —; s. c. 60 Atl. Rep. 975. See also, *Siack v. Northern Cent. R. Co.*, 92 Md. 213; s. c. 43 Atl. Rep. 149.

¹⁷² *Goldstein v. People's R. Co.*, — Del. —; s. c. 60 Atl. Rep. 975. The question whether a child came to his death by the willful act of the conductor of a street car was held a question for the jury under these circumstances: The child, a newsboy, climbed on the car without intending to pay his fare and was concealed by a passenger standing on the platform; the car was running at a high rate of speed when the boy fell off and rolled onto the opposite track and was run over by a car coming in the opposite direction. The passenger concealing the boy said that the conductor told the boy to get off and raised his arm in a threatening manner and moved toward him, and the boy let go his hold and jumped off. The conductor said that he did not want the boy to get off and told him to hold on because he was afraid if the boy jumped off he would be injured by reason of the rate of speed of the car: *Chicago City R. Co. v. O'Donnell*, 207 Ill. 478; s. c. 69 N. E. Rep. 882; aff'g s. c. 109 Ill. App. 616.

the brakes, the danger not being hidden or concealed, but open to the observation of boys of average intelligence.¹⁷³

§ 1430. **Contributory Negligence of the Child.**—A child *non sui juris* is required to exercise such care in the presence of danger in the operation of street cars as should be reasonably expected of a child of his age and intelligence; he is not held to the exercise of the same degree of care as an adult.¹⁷⁴ But it is held that a child of sufficient age and capacity to be allowed to travel unattended in a street used in part by electric cars is imputable with contributory negligence if he unreasonably, intelligently and intentionally runs upon the track before an approaching car and suffers injuries.¹⁷⁵ Generally, the question whether a child has the capacity to care for its safety,¹⁷⁶ or has exercised ordinary care under the circumstances¹⁷⁷ is regarded as one of fact for the jury. In one case a child seven years old, somewhat familiar with street cars, and the danger of coming in contact with them, and that the crossing in question was dangerous, was not charged with negligence as a matter of law, where his attention while crossing the street was attracted by a car coming toward him, which he hurried to avoid, and was struck and injured by a car on another track going in the opposite direction.¹⁷⁸

¹⁷³ *George v. Los Angeles R. Co.*, 126 Cal. 357; s. c. 58 Pac. Rep. 819; 46 L. R. A. 829.

¹⁷⁴ *Di Prisco v. Wilmington City R. Co.*, — Del. —; s. c. 57 Atl. Rep. 906 (child eight years old); *Chicago City R. Co. v. Tuohy*, 95 Ill. App. 314; s. c. aff'd, 196 Ill. 410; 63 N. E. Rep. 997 (child six years old); *Indianapolis St. R. Co. v. Schomberg*, 164 Ind. 111; s. c. 72 N. E. Rep. 1041; *Citizens' St. R. Co. v. Hamer*, 29 Ind. App. 426; s. c. 62 N. E. Rep. 658; 63 N. E. Rep. 778 (child seven years old); *Ruschenberg v. Southern Electric R. Co.*, 161 Mo. 70; s. c. 61 S. W. Rep. 626; *West v. Metropolitan St. R. Co.*, 105 App. Div. (N. Y.) 373; s. c. 94 N. Y. Supp. 250 (child ten years old); *Dempsey v. Brooklyn Heights R. Co.*, 98 App. Div. (N. Y.) 182; s. c. 90 N. Y. Supp. 639 (child nine years and three months old); *Dubiver v. City & C. R. Co.*, 44 Or. 227; s. c. 74 Pac. Rep. 915; 75 Pac. Rep. 693; *Roberts v. Spokane St. R. Co.*, 23 Wash. 325; s. c. 63 Pac. Rep. 506 (boy eleven years old).

¹⁷⁵ *Murphy v. Boston Elevated R. Co.*, 188 Mass. 8; s. c. 73 N. E. Rep. 1018.

¹⁷⁶ *Citizens' St. R. Co. v. Hamer*, 29 Ind. App. 426; s. c. 62 N. E. Rep. 658; 63 N. E. Rep. 778; *Markey v. Consolidated Traction Co.*, 65 N. J. L. 82; s. c. 46 Atl. Rep. 573; s. c. aff'd, 65 N. J. L. 682; 48 Atl. Rep. 1117; *Pinkelstein v. Brooklyn Heights R. Co.*, 51 App. Div. (N. Y.) 287; s. c. 64 N. Y. Supp. 915.

¹⁷⁷ *Citizens' St. R. Co. v. Hamer*, 29 Ind. App. 426; s. c. 62 N. E. Rep. 658; 63 N. E. Rep. 778; *Costello v. Third Ave. R. Co.*, 161 N. Y. 317; s. c. 55 N. E. Rep. 897; rev'g s. c. 26 App. Div. 48; 49 N. Y. Supp. 868; *Dorsch v. Brooklyn Heights R. Co.*, 68 App. Div. (N. Y.) 222; s. c. 74 N. Y. Supp. 257; *Kinkelstein v. Brooklyn Heights R. Co.*, 51 App. Div. (N. Y.) 287; s. c. 64 N. Y. Supp. 915; *Griffiths v. Metropolitan St. R. Co.*, 63 App. Div. (N. Y.) 86; s. c. 71 N. Y. Supp. 406; *Sullivan v. Union R. Co.*, 81 App. Div. (N. Y.) 596; s. c. 81 N. Y. Supp. 449; s. c. aff'd, 177 N. Y. 525; 69 N. E. Rep. 1131; *Pinder v. Brooklyn Heights R. Co.*, 65 App. Div. (N. Y.) 521; s. c. 72 N. Y. Supp. 1082.

¹⁷⁸ *Citizens' St. R. Co. v. Hamer*, 29 Ind. App. 426; s. c. 62 N. E. Rep. 658; 63 N. E. Rep. 778.

§ 1431. Circumstances under which Contributory Negligence has been Imputed to Children as Matter of Law.¹⁷⁹

§ 1432. Contributory Negligence of Parents, etc., in Allowing Children to be on the Street.—The parent of a child killed by a street car was held not guilty of contributory negligence in letting the child go on the street unattended, where it was shown that the child had gone to school unattended for a year, and was at the time on his return from school.¹⁸⁰ In another case it was held a question for the jury whether a girl nine years old, having charge of an injured child, was herself *sui juris* and negligent.¹⁸¹

§ 1434. Various Other Holdings.—In an action by a parent for the wrongful killing of a child of tender years in a street railroad accident, the failure to show that the child was unmarried is not fatal to the father's action.¹⁸² The fact that the injured person was *non sui juris* at the time of the accident should be averred in the complaint.¹⁸³

¹⁷⁹ Courts have imputed contributory negligence to children as a matter of law under these circumstances: Where a child between eight and nine years of age was injured while attempting to cross a city street in the middle of a block without looking for an approaching street car, or in heedless disregard of its rapid approach (*Finley v. West Chicago St. R. Co.*, 90 Ill. App. 368; *Weiss v. Metropolitan St. R. Co.*, 33 App. Div. (N. Y.) 221; s. c. 53 N. Y. Supp. 449; s. c. aff'd, 165 N. Y. 665; 59 N. E. Rep. 1132); where a boy thirteen years old walked from one side of the street on which there were double tracks, toward the other side without stopping and was struck by a car mov-

ing at the rate of six miles an hour at a point where there was nothing to prevent him from both seeing and hearing the approaching car (*Kaiser v. New Orleans &c. R. Co.*, 107 La. 539; s. c. 32 South Rep. 75).

¹⁸⁰ *Sullivan v. Union R. Co.*, 81 App. Div. (N. Y.) 596; s. c. 81 N. Y. Supp. 449; s. c. aff'd, 177 N. Y. 525; 69 N. E. Rep. 1131.

¹⁸¹ *Goldstein v. Dry Dock &c. R. Co.*, 35 Misc. (N. Y.) 200; s. c. 71 N. Y. Supp. 477.

¹⁸² *Jett v. Central Electric R. Co.*, 178 Mo. 664; s. c. 77 S. W. Rep. 738 (child eleven years old).

¹⁸³ *Citizens' St. R. Co. v. Hamer*, 29 Ind. App. 462; s. c. 62 N. E. Rep. 658; 63 N. E. Rep. 778.

PART TWO.

CONTRIBUTORY NEGLIGENCE OF THE TRAVELLER.

[§§ 1437-1482.]

§ 1437. **General Considerations: Degree of Care—Proximate and Remote Cause.**—Here, as throughout the law of negligence, there can be no recovery by a traveller for injuries to which his negligence proximately contributed, though the defendant was likewise negligent.¹⁸⁴ The obligation to use care to prevent injury is a reciprocal obligation.¹⁸⁵ This care is that known as reasonable or ordinary care;¹⁸⁶ that is, such care as an ordinarily prudent person in the traveller's situation would exercise for his own safety.¹⁸⁷ It is not required that he should have actual knowledge of the danger causing the injury. It is enough that he could have acquired such knowledge

¹⁸⁴ *Cox v. Wilmington City R. Co.*, — Del. —; s. c. 53 Atl. Rep. 569; *Di Prisco v. Wilmington City R. Co.*, — Del. —; s. c. 57 Atl. Rep. 906; *Butler v. Rockland &c. St. R.*, 99 Me. 149; s. c. 58 Atl. Rep. 775; *Ries v. St. Louis Transit Co.*, 179 Mo. 1; s. c. 77 S. W. Rep. 734; *Memphis St. R. Co. v. Wilson*, 108 Tenn. 618; s. c. 69 S. W. Rep. 265; *Cawley v. La Crosse City R. Co.*, 106 Wis. 239; s. c. 82 N. W. Rep. 197. The driving upon a street car track, if contributory negligence, is not the proximate cause of injuries resulting from being struck by a street car running with its power on and without an attendant: *Chicago City R. Co. v. Eick*, 111 Ill. App. 452. The defendant in an action for street railway injuries, is entitled to a clear and concise instruction that if the plaintiff's injuries resulted from the concurrent and mutual negligence of both himself and the defendant, the defendant was not responsible therefor: *McLeland v. St. Louis Transit Co.*, 105 Mo. App. 473; s. c. 80 S. W. Rep. 30.

¹⁸⁶ *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572; s. c. 82 S. W. Rep. 245; *Central R. Co. v. Knowles*, 93 Ill. App. 581; s. c. aff'd, 191 Ill. 241; 60 N. E. Rep. 829; *Moore v.*

Charlotte Electric St. R. Co., 128 N. C. 455; s. c. 39 S. E. Rep. 57.

¹⁸⁶ *Kernan v. Market St. R. Co.*, 137 Cal. 326; s. c. 70 Pac. Rep. 81; *Cox v. Wilmington City R. Co.*, — Del. —; s. c. 53 Atl. Rep. 569; *Chicago City R. Co. v. O'Donnell*, 208 Ill. 267; s. c. 70 N. E. Rep. 294, 477; rev'g s. c. 108 Ill. App. 385; *Haas v. New Orleans R. Co.*, 112 La. 747; s. c. 36 South. Rep. 670; *Conrad v. Elizabeth &c. R. Co.*, 70 N. J. L. 676; s. c. 58 Atl. Rep. 376; *Roberts v. Spokane St. R. Co.*, 23 Wash. 325; s. c. 63 Pac. Rep. 506.

¹⁸⁷ *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572; s. c. 82 S. W. Rep. 245; *Chicago U. T. Co. v. Chugren*, 110 Ill. App. 545; s. c. aff'd, 209 Ill. 429; 70 N. E. Rep. 573; *Chicago City R. Co. v. O'Donnell*, 208 Ill. 267; s. c. 70 N. E. Rep. 294, 477; rev'g s. c. 108 Ill. App. 385; *West Chicago St. R. Co. v. Dougherty*, 89 Ill. App. 362; *Kansas City Leavenworth R. Co. v. Gallagher*, 68 Kan. 292; s. c. 75 Pac. Rep. 469; *Buckley v. New York &c. R. Co.*, 73 App. Div. (N. Y.) 587; s. c. 77 N. Y. Supp. 128; *Du Frane v. Metropolitan St. R. Co.*, 83 App. Div. (N. Y.) 298; s. c. 82 N. Y. Supp. 1; *Citizens' R. Co. v. Gossett*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 35.

by the exercise of reasonable care. If ignorant of the danger, and the exercise of reasonable diligence would have made it known, and he failed to use such care, the traveller will be charged with negligence to the same extent as though he was familiar with the location and the danger.¹⁸⁸ If the negligence of the street railroad company alone was the proximate cause of the injury, and the negligence of the traveller did not enter into the accident at the time thereof, the traveller may recover for injuries received though there may have been some previous negligence on his part.¹⁸⁹ It is plain that there can be no recovery for injuries where the evidence shows that the motorman did not act willfully and the negligent acts of the traveller and the motorman at the time of the accident were so substantially concurrent that it would be impossible to separate the conduct of the injured person from the injury itself.¹⁹⁰ The traveller, though not a trespasser, should leave the track whenever his presence serves to impede the progress of the street cars.¹⁹¹ Where the negligence of the plaintiff is the proximate cause of his injuries, it is not material that the street car was run at an excessive speed.¹⁹² But the negligence of the traveller will be regarded as the proximate cause of his injuries, where it does not appear from the evidence that the consequences of his neglect could have been avoided by the use of ordinary care by the motorman.¹⁹³

§ 1438. Duty of Traveller to Look and Listen on Approaching a Street Railway Track.¹⁹⁴—The rule is to be sensibly construed and

¹⁸⁸ *Russell v. Minneapolis St. R. Co.*, 83 Minn. 304; s. c. 86 N. W. Rep. 346.

¹⁸⁹ *Cox v. Wilmington City R. Co.*, — Del. —; s. c. 53 Atl. Rep. 569; *Roberts v. Spokane St. R. Co.*, 23 Wash. 325; s. c. 63 Pac. Rep. 506.

¹⁹⁰ *Rider v. Syracuse Rapid Transit R. Co.*, 171 N. Y. 139; s. c. 63 N. E. Rep. 836; rev'g s. c. 72 N. Y. Supp. 1125.

¹⁹¹ *North Chicago Electric R. Co. v. Peuser*, 190 Ill. 67; s. c. 60 N. E. Rep. 78; *Wilman v. People's R. Co.* — Del. —; s. c. 55 Atl. Rep. 332.

¹⁹² *Bennett v. Detroit Citizens' St. R. Co.*, 123 Mich. 692; s. c. 82 N. W. Rep. 518; *Aldrich v. St. Louis Transit Co.*, 101 Mo. App. 77; s. c. 74 S. W. Rep. 141; *Fanning v. St. Louis Transit Co.*, 103 Mo. App. 151; s. c. 78 S. W. Rep. 62; *Heebe v. New Orleans & C. L. & C. Co.*, 110 La. 970; s. c. 35 South. Rep. 251.

¹⁹³ *Warren v. Bangor & C. R. Co.*, 95 Me. 115; s. c. 49 Atl. Rep. 609.

¹⁹⁴ That the failure of a traveller to look and listen for the approach of cars before attempting to cross a street railway imputes him with negligence unless excused by special circumstances, see generally: *Birmingham R., L. & P. Co. v. Oldham*, 141 Ala. 195; s. c. 37 South. Rep. 452; *Adams v. Wilmington & C. Elec. R. Co.*, 3 Pen. (Del.) 512; s. c. 52 Atl. Rep. 264; *Farley v. Wilmington & C. Elec. R. Co.*, 3 Pen. (Del.) 581; s. c. 52 Atl. Rep. 543; *Wilman v. People's R. Co.*, — Del. —; s. c. 55 Atl. Rep. 332; *Harpham v. Northern Ohio Traction Co.*, 26 Ohio Cir. Ct. R. 253; *Garvick v. United Rys. & C. Co.*, 101 Md. 239; s. c. 61 Atl. Rep. 138; *Chicago City R. Co. v. O'Donnell*, 208 Ill. 267; s. c. 70 N. E. Rep. 294, 477; rev'g s. c. 108 Ill. App. 385; *Kansas City-Leavenworth R. Co. v. Gallagher*, 68 Kan. 424; s. c. 75 Pac. Rep. 469; *Burns v. Metropolitan St. R. Co.*, 66 Kan. 188; s. c. 71 Pac. Rep. 244;

applied. It does not require a traveller to look the whole length of the visible track to see if a car is coming, but only far enough to warrant an ordinarily prudent man under the circumstances to conclude that no car is so near as to endanger his safety.¹⁹⁵

§ 1439. **This Duty Demanded both of Drivers and Pedestrians.—**

The traveller should look and listen attentively both ways for a coming car at places where these acts will be reasonably certain to effect their purpose, and this duty is not performed by a traveller who looks

Cowden v. Shreveport Belt R. Co., 106 La. 236; s. c. 30 South. 747; Warren v. Bangor &c. R. Co., 95 Me. 115; s. c. 49 Atl. Rep. 609; Quinn v. Boston Elevated R. Co., 188 Mass. 473; s. c. 74 N. E. Rep. 687; Hurley v. West End St. R. Co., 180 Mass. 370; s. c. 62 N. E. Rep. 263; Riska v. Union Depot R. Co., 180 Mo. 168; s. c. 79 S. W. Rep. 445; Davies v. People's R. Co., 159 Mo. 1; s. c. 59 S. W. Rep. 982; J. F. Conrad Grocer Co. v. St. Louis &c. R. Co., 89 Mo. App. 534; Barrie v. St. Louis Transit Co., 102 Mo. App. 87; s. c. 76 S. W. Rep. 706; Fanning v. St. Louis Transit Co., 103 Mo. App. 151; s. c. 78 S. W. Rep. 62; Rissler v. St. Louis Transit Co., 113 Mo. App. 120; s. c. 87 S. W. Rep. 578; Waddell v. Metropolitan St. R. Co., 113 Mo. App. 680; s. c. 88 S. W. Rep. 765; Hennessey v. Forty-Second St. &c. R. Co., 103 App. Div. (N. Y.) 384; s. c. 92 N. Y. Supp. 1058 (person building fence around street improvement about thirty inches from the track over which cars were constantly running guilty of contributory negligence, where he stooped over the track while nailing a board on the fence without looking for an approaching car, and was struck and injured); Lynch v. Third Ave. R. Co., 88 App. Div. (N. Y.) 604; s. c. 85 N. Y. Supp. 180; Solatinow v. Jersey City &c. St. R. Co., 70 N. J. L. 154; s. c. 56 Atl. Rep. 235; Monahan v. Interurban St. R. Co., 87 N. Y. Supp. 537; Vonelling v. Metropolitan St. R. Co., 35 Misc. (N. Y.) 301; s. c. 71 N. Y. Supp. 751; McGrath v. North Jersey St. R. Co., 66 N. J. L. 312; s. c. 49 Atl. Rep. 520; Cushing v. Metropolitan St. R. Co., 92 App. Div. (N. Y.) 510; s. c. 87 N. Y. Supp. 314; Little v. Third Ave. R. Co., 83 App. Div. (N. Y.) 330; s. c. 82 N. Y. Supp. 55; Schmidt v. Interurban St. R.

Co., 82 App. Div. (N. Y.) 453; s. c. 81 N. Y. Supp. 832; Harpham v. Northern Ohio Traction Co., 26 Ohio Cir. Ct. R. 253; Wolf v. City &c. R. Co., 45 Or. 446; s. c. 72 Pac. Rep. 329; 78 Pac. Rep. 668; Beerman v. Union R. Co., 24 R. I. 275; s. c. 52 Atl. Rep. 1090; Richmond Passenger &c. Co. v. Gordon, 102 Va. 498; s. c. 46 S. E. Rep. 772; Helber v. Spokane St. R. Co., 22 Wash. 319; s. c. 61 Pac. Rep. 40; Coats v. Seattle Electric Co., 39 Wash. 386; s. c. 81 Pac. Rep. 830; Criss v. Seattle Electric Co., 38 Wash. 320; s. c. 80 Pac. Rep. 525; Dummer v. Milwaukee Elec. R. &c. Co., 108 Wis. 589; s. c. 84 N. W. Rep. 853; Stafford v. Chippewa Val. Electric R. Co., 110 Wis. 331; s. c. 85 N. W. Rep. 1036.
¹⁹⁵ Marden v. Portsmouth &c. St. R., 100 Me. 41; s. c. 60 Atl. Rep. 530; 69 L. R. A. 300. If a driver of a vehicle approaching a street railway track to cross it at an intersection with another street looks and listens and sees and hears no car approaching for such a distance as to render his attempt to cross unsafe, he is not guilty of contributory negligence, as a matter of law, if, while attempting to cross, the car strikes his vehicle: Smith v. Minneapolis St. R. Co., 95 Minn. 254; s. c. 104 N. W. Rep. 16. Where a person attempted to cross tracks without looking or listening but at a time when he could have safely crossed had not his progress been prevented by an excavation of which he had no knowledge and which compelled him to stop so that he was struck by the car, it was held that his failure to look and listen was not necessarily the proximate cause of the accident and would not preclude a recovery: Frank v. St. Louis Transit Co., 112 Mo. App. 496; s. c. 87 S. W. Rep. 88.

when he first enters on a street, but not thereafter until he is on the track.¹⁹⁶ The non-performance of this duty will not be excused by misconduct on the part of the street railway company in running its cars at an excessive and unusual rate of speed,¹⁹⁷ or without ringing the gong.¹⁹⁸ This duty is not limited to travellers on city streets, but rests upon travellers on country roads,¹⁹⁹ and on streets in suburban and thinly-settled districts of a city traversed by electric cars.²⁰⁰

§ 1440. **This Rule Applied even to Children.**—The rule requiring travellers in crossing street railways to look and listen is binding upon a child who is *sui juris*.²⁰¹ Children of nine²⁰² and eleven years²⁰³ of age have been held amenable to the rule and imputed with contributory negligence for failure to take this precaution. In these cases it is proper to instruct the jury that it is the duty of children to exercise such caution as may be reasonably expected of persons of their age under the circumstances.²⁰⁴ Where the evidence puts it beyond dispute that a child *sui juris* entirely disregarded this rule of prudence, and thereby contributed to his own injury, the question of

¹⁹⁶ See generally: *Jordan v. Old Colony Street R. Co.*, 188 Mass. 124; s. c. 74 N. E. Rep. 315; *Merritt v. Foote*, 128 Mich. 367; s. c. 87 N. W. Rep. 262; 8 Det. Leg. N. 678; *Barrie v. St. Louis Transit Co.*, 102 Mo. App. 87; s. c. 76 S. W. Rep. 706; *Ross v. Metropolitan St. R. Co.*, 113 Mo. App. 600; s. c. 88 S. W. Rep. 144; *Cosgrove v. Interurban St. R. Co.*, 84 N. Y. Supp. 885; *Groening v. Interurban St. R. Co.*, 88 N. Y. Supp. 355; *Keough v. Interurban St. R. Co.*, 92 N. Y. Supp. 733; *Knapp v. Metropolitan St. R. Co.*, 103 App. Div. (N. Y.) 252; s. c. 92 N. Y. Supp. 1071; *Madigan v. Third Ave. R. Co.*, 68 App. Div. (N. Y.) 123; s. c. 74 N. Y. Supp. 143; *Burke v. Union T. Co.*, 198 Pa. 497; s. c. 48 Atl. Rep. 470; *Brown v. Pittsburg & C. T. Co.*, 14 Pa. Super. Ct. 594; *Gilmore v. United Traction Co.*, 26 Pa. Super. Ct. 97; *Keenan v. Union T. Co.*, 202 Pa. 107; s. c. 51 Atl. Rep. 742; *Moser v. Union T. Co.*, 205 Pa. 481; s. c. 55 Atl. Rep. 15; *Pieper v. Union T. Co.*, 202 Pa. 100; s. c. 51 Atl. Rep. 739; *Tesch v. Milwaukee Elec. R. & C. Co.*, 108 Wis. 593; s. c. 84 N. W. Rep. 823; *O'Hearn v. Port Arthur (Div. Ct.)*, 4 Ont. Law Rep. 209.

¹⁹⁷ *Cupps v. Consolidated T. Co.*, 13 Pa. Super. Ct. 630; *Wolf v. City*

& C. R. Co., 45 Or. 446; s. c. 72 Pac. Rep. 329; 78 Pac. Rep. 668.

¹⁹⁸ *McNab v. United Railways & Co.*, 94 Md. 719; s. c. 51 Atl. Rep. 421.

¹⁹⁹ *Keenan v. Union T. Co.*, 202 Pa. 107; s. c. 51 Atl. Rep. 742.

²⁰⁰ *Wosika v. St. Paul City R. Co.*, 80 Minn. 364; s. c. 83 N. W. Rep. 386.

²⁰¹ *Fitzhenry v. Consolidated Traction Co.*, 64 N. J. L. 674; s. c. 46 Atl. Rep. 698; *Levine v. Metropolitan St. R. Co.*, 78 App. Div. (N. Y.) 426; s. c. 80 N. Y. Supp. 48; s. c. aff'd, 177 N. Y. 523; 69 N. E. Rep. 1125 (a question for the jury whether child was negligent in failing to look a second time for a car which approached at a high and negligent rate of speed); *Pinder v. Brooklyn Heights R. Co.*, 173 N. Y. 519; s. c. 66 N. E. Rep. 405; rev'g s. c. 72 N. Y. Supp. 1082; *Wills v. Ashland Light & C. R. Co.*, 108 Wis. 255; s. c. 84 N. W. Rep. 998.

²⁰² *Ryan v. La Crosse City R. Co.*, 108 Wis. 122; s. c. 83 N. W. Rep. 770.

²⁰³ *Jett v. Central Electric R. Co.*, 178 Mo. 664; s. c. 77 S. W. Rep. 738.

²⁰⁴ *Louisville R. Co. v. Phillips*, 58 S. W. Rep. 995; s. c. 22 Ky. L. Rep. 842.

contributory negligence is no longer one for the jury, but becomes one of law for the court.²⁰⁵

§ 1441. **Duty to "Stop, Look and Listen."**²⁰⁶—The presumption that a person killed at a crossing stopped, looked and listened before attempting to cross applies only where there is a total absence of evidence on that issue. It is without application where the surrounding circumstances and conditions contradict the presumption.²⁰⁷

§ 1442. **Look from What Place: at What Point of View.**—A person approaching a street railroad track obstructed by trees or otherwise for a portion of the distance to the place of crossing is guilty of contributory negligence if he fails to look and listen at the crossing. It is not enough that he looked from a point that commanded a view of the further end of the obstructing objects and saw no approaching cars, if collision were possible with cars already within the obstructed part of the track.²⁰⁸

§ 1443. **Doctrine that Failure to Look and Listen not Negligence per se.**—In other jurisdictions the courts do not impose upon travelers the same strict rule as to the crossing of electric railroads that they do to the crossing of steam railroads,²⁰⁹ and do not hold that the failure to look and listen is negligence *per se*. Whether the failure to use this precaution amounts to negligence is to be determined from a consideration of all the facts and circumstances in the case.²¹⁰ Here

²⁰⁵ *Fitzhenry v. Consolidated Traction Co.*, 64 N. J. L. 674; s. c. 46 Atl. Rep. 698.

²⁰⁶ In Missouri the traveller is under no absolute duty to stop as well as to look and listen: *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524; s. c. 85 S. W. Rep. 140; *Frank v. St. Louis Transit Co.*, 99 Mo. App. 323; s. c. 73 S. W. Rep. 239. In Pennsylvania it is the duty of a person crossing the track of an electric street railway to stop if necessary in addition to looking and listening: *McCauley v. Philadelphia Traction Co.*, 13 Pa. Super. Ct. 354; *McCartney v. Union T. Co.*, 27 Pa. Super. Ct. 222; *Potter v. Scranton R. Co.*, 19 Pa. Super. Ct. 444; *Trout v. Altoona & Elec. R. Co.*, 13 Pa. Super. Ct. 17. Whether it was negligence not to stop under the circumstances is a question of fact for the determination of the jury: *Columbus R. Co. v. Peddy*, 120 Ga. 589; s. c. 48 S. E. Rep. 149.

²⁰⁷ *Los Angeles Traction Co. v.*

Conneally, 136 Fed. Rep. 104; s. c. 69 C. C. A. 92.

²⁰⁸ *Kelley v. Wakefield & Co. St. R. Co.*, 175 Mass. 331; s. c. 56 N. E. Rep. 285.

²⁰⁹ *Marden v. Portsmouth & Co. St. R.*, 100 Me. 41; s. c. 60 Atl. Rep. 530; 69 L. R. A. 300; *Smith v. Minneapolis St. R. Co.*, 95 Minn. 254; s. c. 104 N. W. Rep. 16.

²¹⁰ *Columbus R. Co. v. Peddy*, 120 Ga. 589; s. c. 48 S. E. Rep. 149; *McCoy v. Kokomo R. & Co.*, 158 Ind. 658; s. c. 64 N. E. Rep. 92; *Indianapolis St. R. Co. v. Schmidt*, 35 Ind. App. 202; s. c. 71 N. E. Rep. 663; 72 N. E. Rep. 478; *Stanley v. Cedar Rapids & Co. R. Co.*, 119 Iowa 526; s. c. 93 N. W. Rep. 489; *Fairbanks v. Bangor & Co. R. Co.*, 95 Me. 78; s. c. 49 Atl. Rep. 421; *Tunison v. Weadock*, 130 Mich. 141; s. c. 89 N. W. Rep. 703; 8 Det. Leg. N. 1183; *Riley v. Minneapolis St. R. Co.*, 80 Minn. 424; s. c. 83 N. W. Rep. 376; *Priesmeyer v. St. Louis Transit Co.*, 102 Mo. App. 518; s. c. 77 S. W.

the question is whether the attendant conditions were such that reasonable care and prudence would require the traveller to take these precautionary measures.²¹¹ Thus, the failure to prove that a person killed by collision with a street car did not look in the direction of the car by which he was struck before he attempted to cross the track, was held not material, where the evidence showed that the car at this time was approaching at such a distance as to warrant him in assuming that the track could be passed in safety.²¹²

§ 1444. Traveller Bound to Make a Fair Use of his Faculties According to his Circumstances.—It is the rule of this section that the traveller approaching a street railway track must make a vigilant use of his sight and hearing.²¹³ "Due care in approaching a railway track can be satisfied only by the full use of the senses of sight and hearing at the last moment of opportunity before passing the line between safety and peril. * * * Reasoning, however, is not due care when opportunity for observation exists. It is only when deprived in some degree of such opportunity that one may consistently with due care rely on his judgment as to chances."²¹⁴

§ 1445. Rule where Traveller could have seen Car if he had Looked.²¹⁵

Rep. 313; *Dennis v. North Jersey St. R. Co.*, 64 N. J. L. 439; s. c. 45 Atl. Rep. 807; *Vitelli v. Nassau Electric R. Co.*, 53 App. Div. (N. Y.) 639; s. c. 65 N. Y. Supp. 1027; *Bullman v. Metropolitan St. R. Co.*, 85 N. Y. Supp. 325; *Mitchell v. Third Ave. R. Co.*, 62 App. Div. (N. Y.) 371; s. c. 70 N. Y. Supp. 1118; *Lewis v. Cincinnati St. R. Co.*, 10 Ohio S. & C. P. Dec. 53; *Roberts v. Spokane St. R. Co.*, 23 Wash. 325; s. c. 63 Pac. Rep. 506; *Traver v. Spokane St. R. Co.*, 25 Wash. 225; s. c. 65 Pac. Rep. 284; *Chisholm v. Seattle Electric Co.*, 27 Wash. 237; s. c. 67 Pac. Rep. 601.

²¹¹ *Tacoma R. & C. Co. v. Hays*, 110 Fed. Rep. 496; s. c. 49 C. C. A. 115; *Chicago City R. Co. v. Barnes*, 114 Ill. App. 495; *Marden v. Portsmouth & C. St. R.*, 100 Me. 41; s. c. 60 Atl. Rep. 530; 69 L. R. A. 300; *Warren v. Bangor & C. R. Co.*, 95 Me. 115; s. c. 49 Atl. Rep. 609; *Woodland v. North Jersey St. R. Co.*, 66 N. J. L. 455; s. c. 49 Atl. Rep. 479; *Wilson v. Memphis St. R. Co.*, 105 Tenn. 74; s. c. 58 S. W. Rep. 334; *Richmond Passenger & C. Co. v. Gordon*, 102 Va. 498; s. c. 46 S. E. Rep. 772;

Portsmouth St. R. Co. v. Peed, 102 Va. 662; s. c. 47 S. E. Rep. 850.

²¹² *Lane v. Brooklyn Heights R. Co.*, 85 App. Div. (N. Y.) 85; s. c. 82 N. Y. Supp. 1057; s. c. aff'd, 178 N. Y. 623; 70 N. E. Rep. 1101.

²¹³ *Honick v. Metropolitan St. R. Co.*, 66 Kan. 124; s. c. 71 Pac. Rep. 265.

²¹⁴ *Dodge, J.*, in *Goldmann v. Milwaukee Electric R. & C. Co.*, 123 Wis. 168; s. c. 101 N. W. Rep. 384. See also *Tesch v. Milwaukee Electric R. & C. Co.*, 108 Wis. 593; s. c. 84 N. W. Rep. 823; *Schwanewede v. North Hudson Co. R. Co.*, 67 N. J. L. 449; s. c. 51 Atl. Rep. 696.

²¹⁵ That the traveller will be held to have seen that which was obvious, see: *Indianapolis St. R. Co. v. Zaring*, 33 Ind. App. 297; s. c. 71 N. E. Rep. 270, 501; *Doherty v. Detroit Citizens' St. R. Co.*, 118 Mich. 209; s. c. 76 N. W. Rep. 377; 80 N. W. Rep. 36; *Russell v. Minneapolis St. R. Co.*, 83 Minn. 304; s. c. 86 N. W. Rep. 346; *Ries v. St. Louis Transit Co.*, 179 Mo. 1; s. c. 77 S. W. Rep. 734; *Fellenz v. St. Louis & C. R. Co.*, 106 Mo. App. 154; s. c. 80 S. W. Rep. 49; *Kappus v.*

§ 1446. **Rule where a Traveller Voluntarily Disables himself from using his Faculties.**²¹⁶

§ 1447. **Rule where the View and Hearing of the Traveller are Obstructed.**—It is manifestly the duty of a traveller approaching a street railway crossing, where his view of the track is obstructed, to use increased care and caution to avoid collision, and if he fails to do so, and for this reason does not become aware of an approaching car until it is too late to avoid a collision, he is guilty of negligence precluding a recovery for the injuries sustained.²¹⁷ But negligence *per se* will not be predicated on the mere fact that the curtains of the vehicle were drawn,²¹⁸ or the vehicle was so loaded as to make it difficult to see the track.²¹⁹

§ 1448. **Right of Traveller to Act on the Presumption that the Railway Company will Act without Negligence.**—A traveller on the tracks of a street railway laid in the highway is not a trespasser, and has a right to presume, unless he has knowledge to the contrary, that the cars will be run with a proper regard for the rights of persons lawfully using the streets. Where his conduct under the circumstances is consistent with ordinary prudence, he is entitled to the presumption that the car will be moved under a reasonable state of control,²²⁰

Metropolitan St. R. Co., 82 App. Div. (N. Y.) 13; s. c. 81 N. Y. Supp. 442; Newcomb v. Metropolitan St. R. Co., 36 Misc. (N. Y.) 787; s. c. 74 N. Y. Supp. 858; Boehmer v. Pittsburg & c. Traction Co., 194 Pa. St. 313; s. c. 45 Atl. Rep. 126. Traveller struck by car that was large and lighted by electricity and carried a headlight, and the track was in line of his vision for twelve hundred feet before the car could reach the place of collision: Petty v. St. Louis & c. R. Co., 179 Mo. 666; s. c. 78 S. W. Rep. 1003. That he will not be heard to say that he looked for a car that was plainly in view and did not see or hear it, see: Metropolitan St. R. Co. v. Agnew, 65 Kan. 478; s. c. 70 Pac. Rep. 345; Reno v. St. Louis & S. R. Co., 180 Mo. 469; s. c. 79 S. W. Rep. 464; Barrie v. St. Louis Transit Co., 102 Mo. App. 87; s. c. 76 S. W. Rep. 706; Brady v. Consolidated Traction Co., 64 N. J. L. 373; s. c. 45 Atl. Rep. 805; McKinley v. Metropolitan St. R. Co., 91 App. Div. (N. Y.) 153; s. c. 86 N. Y. Supp. 461; Stafford v. Chippewa Val. Electric R. Co., 110 Wis. 331; s. c. 85 N. W. Rep. 1036.

²¹⁶ Driver of vehicle injured by col-

lision unable to hear because his ears were muffled in a heavy cap and coat: Cawley v. La Crosse City R. Co., 106 Wis. 239; s. c. 82 N. W. Rep. 197. Child struck by street car had head wrapped in heavy shawl: Biederman v. Dry Dock & c. R. Co., 54 App. Div. (N. Y.) 291; s. c. 66 N. Y. Supp. 594.

²¹⁷ Dungan v. Wilmington City R. Co., 4 Pen. (Del.) 458; s. c. 58 Atl. Rep. 868; Snyder v. People's R. Co., — Del. —; s. c. 53 Atl. Rep. 433; Di Prisco v. Wilmington City R. Co., — Del. —; s. c. 57 Atl. Rep. 906; Kelly v. Wakefield & c. St. R. Co., 179 Mass. 542; s. c. 61 N. E. Rep. 139 (driver not charged with negligence *per se* in not getting down from his wagon and going forward in advance of his horse to see if the car was coming along the track where his line of vision was obstructed).

²¹⁸ Richmond Passenger & c. Co. v. Allen, 103 Va. 532; s. c. 49 S. E. Rep. 656.

²¹⁹ Vincent v. Norton & c. St. R. Co., 180 Mass. 104; s. c. 61 N. E. Rep. 822.

²²⁰ Chicago General R. Co. v. Carroll, 91 Ill. App. 356; s. c. aff'd, 189

with proper lookouts,²²¹ and at a rate of speed not exceeding that fixed by law.²²² Where, however, the traveller sees that the operator of the car is not going to respect his right to cross the street first, it is his duty to wait until the car has passed, and he may be imputed with contributory negligence if he fails to do so.²²³

§ 1449. Care Required of Travellers in other Respects on Approaching Street Railway Crossings.—It is not negligence *per se* to attempt to cross a street railroad track on which a car is approaching. The question in all cases must depend upon the apparent distance of the approaching car from the crossing and the other surrounding circumstances.²²⁴

§ 1450. Contributory Negligence not Imputable to an Error of Judgment as to the Distance, Speed, etc.—The supreme court of Wisconsin thus states the doctrine: "A person desiring to cross a street-car track in advance of an approaching car has the right of way if,

Ill. 273; 59 N. E. Rep. 551; Chicago City R. Co. v. Martensen, 100 Ill. App. 306; s. c. *aff'd*, 198 Ill. 511; 64 N. E. Rep. 1017; Union T. Co. v. Vandercook, 32 Ind. App. 621; s. c. 69 N. E. Rep. 486; R. F. Stevens Co. v. Brooklyn Heights R. Co., 59 App. Div. (N. Y.) 23; s. c. 68 N. Y. Supp. 1088; Cohen v. Metropolitan St. R. Co., 34 Misc. (N. Y.) 186; s. c. 68 N. Y. Supp. 830; Polacci v. Interurban St. R. Co., 90 N. Y. Supp. 341; Robinson v. New York City R. Co., 90 N. Y. Supp. 368; Bertsch v. Metropolitan St. R. Co., 68 App. Div. (N. Y.) 228; s. c. 74 N. Y. Supp. 238; s. c. *aff'd*, 173 N. Y. 634; 66 N. E. Rep. 1104 (driver of a vehicle had right to presume that excessive speed of car would be checked on approach to street crossing); Reilly v. Brooklyn Heights R. Co., 65 App. Div. (N. Y.) 453; s. c. 72 N. Y. Supp. 1080; Toledo & C. R. Co. v. Gilbert, 24 Ohio Cir. Ct. R. 181.

²²¹ Greene v. Louisville R. Co., — Ky. —; s. c. 84 S. W. Rep. 1154; 27 Ky. L. Rep. 316.

²²² Deitring v. St. Louis Transit Co., 109 Mo. App. 524; s. c. 85 S. W. Rep. 140; Meng v. St. Louis & C. R. Co., 108 Mo. App. 553; s. c. 84 S. W. Rep. 213; Vrooman v. North Jersey St. R. Co., 70 N. J. L. 818; s. c. 59 Atl. Rep. 459; Frank v. Metropolitan St. R. Co., 58 App. Div. (N. Y.) 100; s. c. 68 N. Y. Supp. 537; s. c. *aff'd*, 171 N. Y. 666; 64 N. E. Rep. 1121.

²²³ Schwanewede v. North Hudson Co. R. Co., 67 N. J. L. 449; s. c. 51 Atl. Rep. 696; Earle v. Consolidated Traction Co., 64 N. J. L. 573; s. c. 46 Atl. Rep. 613.

²²⁴ West Chicago St. R. Co. v. Dedloff, 92 Ill. App. 547; Fisher v. Chicago City R. Co., 114 Ill. App. 217; Krintzman v. Interurban St. R. Co., 84 N. Y. Supp. 243 (driver of a vehicle charged with contributory negligence where he drove on the track when a car twenty feet away was approaching rapidly). In these cases the drivers of vehicles were charged with contributory negligence in driving on track where the approaching car was one block away and moving at full speed: Steinman v. Interurban St. R. Co., 84 N. Y. Supp. 231; Goodman v. West Chicago St. R. Co., 101 Ill. App. 474; Seggerman v. Metropolitan St. R. Co., 82 App. Div. (N. Y.) 637; s. c. 80 N. Y. Supp. 1147; *aff'g* s. c. 38 Misc. (N. Y.) 374; 77 N. Y. Supp. 905 (motorman at time car was discovered one block away was not looking ahead). But see *contra* Carter v. Interurban St. R. Co., 84 N. Y. Supp. 134. In one case it was held that the driver was not negligent in attempting to drive across a track at a street crossing when an approaching car was seventy-five feet away: Schoener v. Metropolitan St. R. Co., 72 App. Div. (N. Y.) 23; s. c. 76 N. Y. Supp. 157.

calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without interfering with the movement of the car to and past the point of crossing, assuming that it is moving at a reasonable and lawful rate of speed. If a person, exercising his judgment as indicated, attempts to cross the track, and it turns out that he has miscalculated, he cannot be held guilty of a breach of duty to exercise ordinary care. If in the circumstances stated, other than the speed of the car, the car is approaching at an unlawful rate of speed, and it is observable by the person about to cross the track, by the exercise of ordinary care, he must take that into consideration in determining whether there is time to safely clear the track, the duty to exercise ordinary care for his own protection not being excused by the fault of anybody else."²²⁵ The doctrine implies an honest mistake of judgment. It cannot be invoked in cases where the injuries result from reckless or foolhardy attempts to beat a street car over a crossing.²²⁶ Where both the motorman and a traveller are at fault in the judgment that the traveller can clear the track without risk, the negligence, if the miscalculation is negligent, is the joint negligence of both parties, and the traveller cannot recover for injuries the result of this miscalculation.²²⁷

²²⁵ Marshall, J., in *Tesch v. Milwaukee Electric R. & C. Co.*, 108 Wis. 593; s. c. 84 N. W. Rep. 823. See also *Kane v. Worcester Consol. St. R.*, 182 Mass. 201; s. c. 65 N. E. Rep. 54; *McVean v. Detroit United R.*, 138 Mich. 263; s. c. 101 N. W. 527; 11 Det. Leg. N. 562; *Murray v. St. Louis Transit Co.*, 108 Mo. App. 501; s. c. 83 S. W. Rep. 995; *Blate v. Third Ave. R. Co.*, 44 App. Div. (N. Y.) 163; s. c. 60 N. Y. Supp. 732; *Doherty v. Metropolitan St. R. Co.*, 91 N. Y. Supp. 19; *Lawson v. Metropolitan St. R. Co.*, 40 App. Div. (N. Y.) 307; s. c. 57 N. Y. Supp. 997; s. c. aff'd, 166 N. Y. 589; 59 N. E. Rep. 1124; *Mauer v. Brooklyn Heights R. Co.*, 87 App. Div. (N. Y.) 119; s. c. 84 N. Y. Supp. 76.

²²⁶ The principle is illustrated by these cases: *Heebe v. New Orleans & C. L. & P. Co.*, 110 La. 970; s. c. 35 South. Rep. 251; *Heying v. United R. & C. Co.*, 100 Md. 281; s. c. 59 Atl. Rep. 667; *State v. United R. & C. Co.*, 97 Md. 73; s. c. 54 Atl. Rep. 612; *Hilts v. Foote*, 125 Mich. 241; s. c. 84 N. W. Rep. 139; 7 Det. Leg. N. 489; *Cogan v. Cass Ave. & C.*

R. Co., 101 Mo. App. 179; s. c. 73 S. W. Rep. 738; *Rider v. Syracuse Rapid Transit R. Co.*, 171 N. Y. 139; s. c. 63 N. E. Rep. 836; rev'g s. c. 72 N. Y. Supp. 1125; *Sullivan v. New York City R. Co.*, 91 N. Y. Supp. 325; *Toohey v. Interurban St. R. Co.*, 102 App. Div. (N. Y.) 296; s. c. 92 N. Y. Supp. 427; *Thompson v. Metropolitan St. R. Co.*, 89 App. Div. (N. Y.) 10; s. c. 85 N. Y. Supp. 181; *Goldkranz v. Metropolitan St. R. Co.*, 89 App. Div. (N. Y.) 590; s. c. 85 N. Y. Supp. 667; *Tyson v. Union T. Co.*, 199 Pa. 264; s. c. 48 Atl. Rep. 1078; *Goldmann v. Milwaukee Electric R. & C. Co.*, 123 Wis. 168; s. c. 101 N. W. Rep. 384. A teamster driving slowly across a track in front of a rapidly approaching street car, relying for his safety on a supposition that the car will stop at an intervening crossing before it reaches him, is guilty of contributory negligence: *Chicago City R. Co. v. Strampel*, 110 Ill. App. 482.

²²⁷ *Gass v. New York City R. Co.*, 88 N. Y. Supp. 950; *Kaufman v. Interurban St. R. Co.*, 43 Misc. (N. Y.) 634; s. c. 88 N. Y. Supp. 382.

§ 1453. **Driving or Walking along a Street Railway Track.**—It is not negligence, as a matter of law, for a traveller to drive his vehicle on and along street car tracks.²²⁸ The question whether the driver was negligent to an extent that would prevent a recovery for his injuries is one of fact for the jury to be determined on consideration of all evidence as to the surrounding conditions.²²⁹ A person driving along a street railway track to avoid an obstacle in the highway may continue on the track, and is not required to turn off to avoid a car coming from behind until he has passed the obstacle.²³⁰ So a person driving upon the side of a street has a right to turn and drive upon the street railroad track in order to pass another vehicle standing between the curb and the track.²³¹

§ 1457. **Driver or Foot-Passenger on Street Railway Track Bound to Keep a Lookout Behind.**—A driver or foot-passenger on a street railroad track should not only look along the track for approaching cars at the time he goes on the track,²³² but keeping in mind the fact that cars are likely to follow and overtake him, he should maintain such a reasonable watchfulness for the approach of a car from the rear as under the circumstances of the particular case an ordinarily prudent person would have used. It is not required that he should be constantly looking back.²³³ Whether the party looked back with sufficient frequency is a question of fact for the determination of the

²²⁸ *Vincent v. Norton & Co.*, 180 Mass. 104; s. c. 61 N. E. Rep. 822; *Ablard v. Detroit United R. Co.*, 139 Mich. 248; s. c. 102 N. W. Rep. 741; 11 Det. Leg. N. 832.

²²⁹ *Buren v. St. Louis Transit Co.*, 104 Mo. App. 224; s. c. 78 S. W. Rep. 680; *Mertz v. Detroit Electric R. Co.*, 125 Mich. 11; s. c. 83 N. W. Rep. 1036; 7 Det. Leg. N. 393; *Indianapolis St. R. Co. v. Slifer*, 35 Ind. App. 700; s. c. 74 N. E. Rep. 19; rev'g s. c. 72 N. E. Rep. 1055. In a case where plaintiff and a companion were driving on a street car track and the companion looking back, told the driver that a car was approaching from the rear and the driver immediately commenced to turn out and was struck before he got off the track by a car going at an excessive rate of speed, it was held that contributory negligence as a matter of law was not shown; *United Railways & Co. v. Seymour*, 92 Md. 425; s. c. 48 Atl. Rep. 850.

²³⁰ *Sullivan v. Boston Elevated R.*

Co., 185 Mass. 602; s. c. 71 N. E. Rep. 90.

²³¹ *Goodson v. New York City R. Co.*, 94 N. Y. Supp. 10.

²³² *McClellan v. Chipewa Val. Elec. R. Co.*, 110 Wis. 326; s. c. 85 N. W. Rep. 1018; *Cicardi v. St. Louis Transit Co.*, 108 Mo. App. 462; s. c. 83 S. W. Rep. 980; *Sullivan v. Boston Elevated R. Co.*, 185 Mass. 602; s. c. 71 N. E. Rep. 90.

²³³ *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572; s. c. 82 S. W. Rep. 245; *Indianapolis St. R. Co. v. Darnell*, 32 Ind. App. 687; s. c. 68 N. E. Rep. 609; *Vincent v. Norton & Co.*, 180 Mass. 104; s. c. 61 N. E. Rep. 822; *Ablard v. Detroit United R.*, 139 Mich. 248; s. c. 102 N. W. Rep. 741; 11 Det. Leg. N. 832; *Rouse v. Detroit & Co. R. Co.*, 135 Mich. 545; s. c. 98 N. W. Rep. 258; 10 Det. Leg. N. 866; 100 N. W. Rep. 404; *Union Biscuit Co. v. St. Louis Transit Co.*, 108 Mo. App. 297; s. c. 83 S. W. Rep. 288; *Belford v. Brooklyn Heights R. Co.*, 86 App. Div. (N. Y.) 388; s. c. 83 N. Y. Supp. 836.

jury.²³⁴ In this situation, the traveller, to a limited extent, may rely on the motorman of an approaching car, having a plain view of the traveller's danger, to give some warning of the approaching car.²³⁵ Drivers of vehicles have been charged with contributory negligence in driving along street railway tracks without looking back until they have driven such distances as three-quarters of a mile,²³⁶ three blocks,²³⁷ three hundred feet,²³⁸ and in one case where the driver had driven only two hundred feet.²³⁹

§ 1459. Driving Too Near Street Railway Track.—Under the doctrine that a traveller on a city street is entitled to its use throughout its entire width, the driver of a vehicle in a street is not imputed with contributory negligence, as a matter of law, precluding a recovery for injuries sustained in a collision with a street car by the fact alone that he drives along the street in close proximity to a street car track.²⁴⁰ In one case, however, the driver of a wagon loaded with lumber projecting beyond the sides of the wagon, who allowed his team to wander toward the track instead of driving them further to one side in a street wide enough for this purpose, was held so negligent as to defeat a recovery for his injuries from a collision with a passing trolley car.²⁴¹

§ 1460. Walking Too Near Street Railway Track.—Where the curve around a street corner is such that ordinary cars will overlap a portion of the sidewalk, one on the sidewalk is required to exercise reasonable care to avoid contact with the car, though he is on a portion of the highway intended exclusively for pedestrians.²⁴²

²³⁴ *Kimble v. St. Louis & S. R. Co.*, 108 Mo. App. 78; s. c. 82 S. W. Rep. 1096; *Chicago U. T. Co. v. Dybvig*, 107 Ill. App. 644; *Cohen v. Metropolitan St. R. Co.*, 34 Misc. (N. Y.) 186; s. c. 68 N. Y. Supp. 830.

²³⁵ *Indianapolis St. R. Co. v. Darnell*, 32 Ind. App. 687; s. c. 68 N. E. Rep. 609; *J. F. Conrad Grocer Co. v. St. Louis & C. R. Co.*, 89 Mo. App. 391; *Noll v. St. Louis Transit Co.*, 100 Mo. App. 367; s. c. 73 S. W. Rep. 907.

²³⁶ *Seele v. Boston & C. St. R. Co.*, 187 Mass. 248; s. c. 72 N. E. Rep. 971.

²³⁷ *McGauley v. St. Louis Transit Co.*, 179 Mo. 583; s. c. 79 S. W. Rep. 461.

²³⁸ *McClellan v. Chippewa Val. Electric R. Co.*, 110 Wis. 326; s. c. 85 N. W. Rep. 1018; *Hill v. Metro-*

politan St. R. Co., 30 Misc. (N. Y.) 440; s. c. 62 N. Y. Supp. 596.

²³⁹ *Schleicher v. Interurban St. R. Co.*, 91 N. Y. Supp. 356.

²⁴⁰ *Montgomery St. R. v. Hastings*, 138 Ala. 432; s. c. 35 South. Rep. 412; *Lake Shore Electric R. Co. v. Majewski*, 25 Ohio Cir. Ct. R. 55; *Barringer v. United T. Co.*, 101 App. Div. (N. Y.) 330; s. c. 91 N. Y. Supp. 386, 998; *Rouse v. Detroit Electric R.*, 128 Mich. 149; s. c. 87 N. W. Rep. 68; 8 Det. Leg. N. 577.

²⁴¹ *Morrow v. Delaware Co. & C. Elec. R. Co.*, 199 Pa. St. 156; s. c. 48 Atl. Rep. 974.

²⁴² *Hayden v. Fair Haven & C. R. Co.*, 76 Conn. 355; s. c. 56 Atl. Rep. 613; *Matulewicz v. Metropolitan St. R. Co.*, 107 App. Div. (N. Y.) 230; s. c. 95 N. Y. Supp. 7.

§ 1461. Contributory Negligence where Cars Approach Each Other on Parallel Tracks.²⁴³—A street railway company operating a double-track railroad is not constrained by any rule that requires the use of the right-hand track for the running of the cars in one direction, and the left-hand track for the running of cars in the reverse direction. The company may run its cars on both tracks in either direction as the needs of the business may require.²⁴⁴

§ 1462. Circumstances under which it was not Contributory Negligence to Leave one Track and Encounter a Car Coming on Another.²⁴⁵

²⁴³ That it is contributory negligence as a matter of law to attempt to cross a street railroad track immediately behind a car which has just passed without looking to see if a car is approaching on the adjoining track, see: *Indianapolis St. R. Co. v. Tenner*, 32 Ind. App. 311; s. c. 67 N. E. Rep. 1044 (alighting passenger); *Marchal v. Indianapolis St. R. Co.*, 28 Ind. App. 133; s. c. 62 N. E. Rep. 286 (a question for the jury); *Schutt v. Shreveport Belt R. Co.*, 109 La. 500; s. c. 33 South. Rep. 577 (mounted newsboy); *Saltman v. Boston Elevated R. Co.*, 187 Mass. 243; s. c. 72 N. E. Rep. 950; *Doty v. Detroit Citizens' St. R. Co.*, 129 Mich. 464; s. c. 88 N. W. Rep. 1050; 8 Det. Leg. N. 1001 (alighting passenger); *Giardina v. St. Louis & C. R. Co.*, 185 Mo. 330; s. c. 84 S. W. Rep. 928; *Asphalt & Const. Co. v. St. Louis Transit Co.*, 102 Mo. App. 469; s. c. 80 S. W. Rep. 741; *Hanselman v. St. Louis & C. R. Co.*, 88 Mo. App. 123; *Jackson v. Union R. Co.*, 77 App. Div. (N. Y.) 161; s. c. 78 N. Y. Supp. 1096; *Johnson v. Third Ave. R. Co.*, 69 App. Div. (N. Y.) 247; s. c. 74 N. Y. Supp. 599 (alighting passenger); *Little v. Third Ave. R. Co.*, 83 App. Div. (N. Y.) 330; s. c. 82 N. Y. Supp. 55; s. c. aff'd, 178 N. Y. 591; 70 N. E. Rep. 1102; *Reed v. Metropolitan St. R. Co.*, 180 N. Y. 315; s. c. 73 N. E. Rep. 41; rev'g s. c. 87 App. Div. (N. Y.) 427; 84 N. Y. Supp. 454; *Schroder v. Metropolitan St. R. Co.*, 87 App. Div. (N. Y.) 624; s. c. 84 N. Y. Supp. 371; *Lyons v. Union Traction Co.*, 209 Pa. 72; s. c. 58 Atl. Rep. 118 (driver drove safely over one track on which one car was approaching and pulled on to another

track in time to meet another car moving at a moderate speed head on and was injured by the collision); *Bass v. Norfolk R. & C. Co.*, 100 Va. 1; s. c. 40 S. E. Rep. 100; 3 Va. Sup. Ct. Rep. 571 (alighting passenger). Contributory negligence was imputed to a traveller in an unlighted wagon who drove on to the downtown track of a street railway at the time both the downtown and uptown cars were each about a half block away and waited until the uptown car passed, but before he could cross the uptown track, and as he was starting to do so, a rapidly running downtown car struck his wagon. The particular negligence noted against plaintiff was in waiting on the track: *Vogts v. Metropolitan St. R. Co.*, 36 Misc. (N. Y.) 799; s. c. 74 N. Y. Supp. 844. That it is the duty of a traveller approaching parallel tracks to look both ways along these tracks before crossing and that a failure to do so is contributory negligence, see: *Dunn v. Old Colony St. R. Co.*, 186 Mass. 316; s. c. 71 N. E. Rep. 557; *Trauber v. Third Ave. R. Co.*, 80 App. Div. (N. Y.) 37; s. c. 80 N. Y. Supp. 231. But see, *Pelletreau v. Metropolitan St. R. Co.*, 74 App. Div. (N. Y.) 192; s. c. 77 N. Y. Supp. 386; *Binns v. Brooklyn Heights R. Co.*, 89 App. Div. (N. Y.) 359; s. c. 85 N. Y. Supp. 874.

²⁴⁴ *Stewart v. Washington & Electric R. Co.*, 22 App. (D. C.) 496.

²⁴⁵ A traveller will not be imputed with contributory negligence as a matter of law where he looks both ways for other cars before crossing behind a passing car: *Chauvin v. Detroit United R.*, 135 Mich. 85;

§ 1463. **Contributory Negligence of Persons Working on the Streets.**—The law does not require the same degree of care of persons engaged in street work in watching for approaching cars that it does in the case of ordinary travellers.²⁴⁶ Where the company has observed the custom of giving signals to persons at work in the streets, though under no legal obligation to do so, the question whether it was negligent in failing to do so at the time under investigation will become a question of fact for the jury.²⁴⁷ In one case where a laborer in a ditch in a street beside a street railroad track was killed while standing on the track beside the ditch, he having stepped on the track within eight or ten feet of the car, and the evidence showed that he had been looking in the direction of the approaching car just before stepping on the track, it was held proper to direct a verdict for the defendant because of the insufficient evidence of reasonable care by the deceased.²⁴⁸

§ 1464. **Running over Drunken Persons.**²⁴⁹

s. c. 97 N. W. Rep. 160; 10 Det. Leg. N. 683; *Beers v. Metropolitan St. R. Co.*, 88 App. Div. (N. Y.) 9; s. c. 84 N. Y. Supp. 785; *Pelletreau v. Metropolitan St. R. Co.*, 74 App. Div. (N. Y.) 192; s. c. 77 N. Y. Supp. 386; s. c. aff'd, 174 N. Y. 503; 66 N. E. Rep. 1113; *Reed v. Metropolitan St. R. Co.*, 87 App. Div. (N. Y.) 427; s. c. 84 N. Y. Supp. 454; *Schwartzbaum v. Third Ave. R. Co.*, 69 App. Div. (N. Y.) 274; s. c. 69 N. Y. Supp. 1095; *Sesselmann v. Metropolitan St. R. Co.*, 65 App. Div. (N. Y.) 484; s. c. 72 N. Y. Supp. 1010; *Tupper v. Metropolitan St. R. Co.*, 36 Misc. (N. Y.) 819; s. c. 74 N. Y. Supp. 868; *Swanson v. Union R. Co.*, 22 R. I. 122; s. c. 46 Atl. Rep. 402; *Tesch v. Milwaukee Electric R. & C. Co.*, 108 Wis. 593; s. c. 84 N. W. Rep. 823. Passenger alighting and passing behind his car and seeing a car approaching about fifty feet away on an adjoining track is not to be imputed with contributory negligence as a matter of law in assuming that the car would be controlled, especially where the car could be stopped in twenty-five feet: *Cohen v. Metropolitan St. R. Co.*, 63 App. Div. (N. Y.) 165; s. c. 71 N. Y. Supp. 268. In a case where a traveller on street car tracks, signaled by a car at the rear to leave the track, turned onto a parallel track because a wagon was standing on the outside of his track, and

was struck by a car on this track before he had time to turn back, it was held that the question of the negligence of the defendant should have been submitted to the jury: *Pritchard v. Brooklyn Heights R. Co.*, 89 App. Div. (N. Y.) 269; s. c. 85 N. Y. Supp. 898.

²⁴⁶ *McGrath v. Metropolitan St. R. Co.*, 47 Misc. Rep. (N. Y.) 104; s. c. 93 N. Y. Supp. 519; *Dipaolo v. Third Ave. R. Co.*, 55 App. Div. (N. Y.) 566; s. c. 67 N. Y. Supp. 421 (street sweeper); *O'Connor v. Union R. Co.*, 67 App. Div. (N. Y.) 99; s. c. 73 N. Y. Supp. 606 (street sweeper).

²⁴⁷ *Daum v. North Jersey St. R. Co.*, 69 N. J. L. 1; s. c. 57 Atl. Rep. 1132; aff'g s. c. 54 Atl. Rep. 221.

²⁴⁸ *Gleason v. Worcester Consol. St. R. Co.*, 184 Mass. 290; s. c. 68 N. E. Rep. 225.

²⁴⁹ Damages for injuries from a collision with a street car cannot be recovered where the negligence of the street railroad in running over a drunken pedestrian, and his negligence in stepping so close in front of the car that he could not move from the place on the track that he first reached before the car struck him, are so substantially concurrent that it is impossible to separate the conduct of the pedestrian from the injury itself: *Richmond Traction Co. v. Martin*, 102 Va. 209; s. c. 45 S. E. Rep. 886.

§ 1465. **Running Over Blind, Deaf and Aged Persons.**²⁵⁰—A person with impaired hearing has imposed upon him the duty of a vigilant use of his eyesight to learn whether he may safely cross a track,²⁵¹ and where he walks along the track the duty to look back at short intervals is a duty of such obvious prudence that its neglect will charge him with contributory negligence.²⁵²

§ 1466. **Leaving Team Standing in the Vicinity of Street Railway Tracks.**²⁵³—The driver of a vehicle backing it against a curb to unload, and heedlessly leaving the horse standing over the track, and paying no further attention to him and using no efforts to avert a collision with an approaching car, was charged with contributory negligence, defeating a recovery of damages for injuries to the horse so received.²⁵⁴ In another case it was held that the driver of a delivery wagon was not to be imputed with contributory negligence, as a matter of law, by reason of backing up against a curb in the position just described, where, owing to obstructions in the street, it was impossible to place his horse and wagon longitudinally opposite the place, and it did not appear that the driver saw the approach of the car when he placed his wagon or had any reason to apprehend the approach of a car before he could unload his wagon.²⁵⁵

§ 1467. **No Duty on the Part of the Traveller to "Turn to the Right."**—A street railroad company operating a double-track system is bound to take notice of the requirement of the law that vehicles meeting cars coming from an opposite direction shall turn to the right, and with this knowledge should so control overtaking cars on the other track that a vehicle, obeying this rule and turning to the right, will not suffer from collision, and the driver of the vehicle will not be charged with negligence *per se* in turning to the right, though

²⁵⁰ The court refused to say, as a matter of law, that the negligence of the injured person was the proximate cause of his injury where the motorman, seeing this person in his dangerous position, used only the brake to stop the car, and did not reverse the car, and the car passed over a distance of about forty-six feet before coming to a stop, and it further appeared that the eyesight of the injured person was bad and the car approaching in the dark sounded no bell or gong to warn approaching travellers of its presence upon the highway: *Schneider v. Market St. R. Co.*, 134 Cal. 482; s. c. 66 Pac. Rep. 734.

²⁵¹ *Aldrich v. St. Louis Transit*

Co., 101 Mo. App. 77; s. c. 74 S. W. Rep. 141.

²⁵² *Shanks v. Springfield Traction Co.*, 101 Mo. App. 702; s. c. 74 S. W. Rep. 386.

²⁵³ An ordinance declaring that leaving any "horse unhitched" within the street is a nuisance is not open to the construction that it merely prohibits negligently leaving a horse unhitched in the street: *Munroe v. Hartford St. R. Co.*, 76 Conn. 201; s. c. 56 Atl. Rep. 498.

²⁵⁴ *Gass v. New York City R. Co.*, 88 N. Y. Supp. 950; *Silz v. Interurban St. R. Co.*, 92 N. Y. Supp. 302.

²⁵⁵ *Fenner v. Wilkesbarre & C. T. Co.*, 202 Pa. 365; s. c. 51 Atl. Rep. 1034.

by turning to the left he might have avoided both the meeting and the overtaking car.²⁵⁶

§ 1468. **Contributory Negligence of Bicyclist.**—A bicyclist is imputed with contributory negligence where he fails to exercise ordinary care for his own safety.²⁵⁷ In common with other users of the highway it is his duty to look and listen before crossing street railway tracks,²⁵⁸ and to look back for overtaking cars where he rides between the rails,²⁵⁹ or dangerously near the side of the track.²⁶⁰ So a bicyclist may not recover on the ground of contributory negligence, where without looking or listening, he leaves one track and encounters a car on an adjacent track.²⁶¹ Again, a bicyclist may be imputed with contributory negligence, as a matter of law, where the proximate cause of his collision with a street car is a violation of an ordinance limiting the rate of speed of bicyclists in the city.²⁶²

§ 1470. **Turning a Vehicle Suddenly in Front of a Moving Car.**²⁶³—The case of contributory negligence is clear where the driver suddenly and without warning, and without looking, turns his horse across a street railway track directly in front of an approaching car.²⁶⁴ A street railway company will not be charged with actionable

²⁵⁶ *Adams v. Camden &c. R. Co.*, 69 N. J. L. 424; s. c. 55 Atl. Rep. 254.

²⁵⁷ *South Chicago City R. Co. v. Kinnare*, 96 Ill. App. 210; *Harrington v. Los Angeles R. Co.*, 140 Cal. 514; s. c. 74 Pac. Rep. 15; 63 L. R. A. 238. The reasonableness of the efforts of a bicyclist to escape injury after discovering the danger in which he was placed is a question for the jury: *Harrington v. Los Angeles R. Co.*, 140 Cal. 514; s. c. 74 Pac. Rep. 15; 63 L. R. A. 238.

²⁵⁸ *McCracken v. Consol. T. Co.*, 201 Pa. 378; s. c. 50 Atl. Rep. 830.

²⁵⁹ *Baldwin v. Heraty*, 136 Mich. 15; s. c. 98 N. W. Rep. 739; 10 Det. Leg. N. 929; *Bacon v. Consol. T. Co.*, 30 Pittsb. Leg. J. (N. S.) 431; *Cleveland &c. R. Co. v. Nixon*, 21 Ohio Cir. Ct. R. 736; s. c. 12 Ohio C. D. 79.

²⁶⁰ *Robards v. Indianapolis St. R. Co.*, 32 Ind. App. 297; s. c. 66 N. E. Rep. 66; 67 N. E. Rep. 953; *Bedell v. Detroit &c. R.*, 131 Mich. 668; s. c. 92 N. W. Rep. 349; 9 Det. Leg. N. 479 (carelessness in this regard will excuse negligence of the motorman in management of car).

²⁶¹ *Barrett v. Columbia R. Co.*, 20

App. (D. C.) 391; *Medcalf v. St. Paul City R. Co.*, 82 Minn. 18; s. c. 84 N. W. Rep. 633.

²⁶² *Harrington v. Los Angeles R. Co.*, 140 Cal. 514; s. c. 74 Pac. Rep. 15; 63 L. R. A. 238.

²⁶³ That one driving a team directly across tracks in front of a rapidly approaching car is guilty of contributory negligence, see: *Moran v. Leslie*, 33 Ind. 80; s. c. 70 N. E. Rep. 162; *Riley v. Shreveport Traction Co.*, 114 La. 135; s. c. 38 South. Rep. 83; *Markowitz v. Metropolitan St. R. Co.*, 186 Mo. 350; s. c. 85 S. W. Rep. 351; *Bernstein v. New York City R. Co.*, 92 N. Y. Supp. 228; *Bornscheuer v. Consol. T. Co.*, 198 Pa. 332; s. c. 47 Atl. Rep. 872; *Hogan v. Winnebago Traction Co.*, 121 Wis. 123; s. c. 98 N. W. Rep. 928; *Watermolen v. Fox River Elec. R. &c. Co.*, 110 Wis. 153; s. c. 85 N. W. Rep. 663.

²⁶⁴ *Indianapolis St. R. Co. v. Marschke*, — Ind. App. —; s. c. 70 N. E. Rep. 494; *Indianapolis St. R. Co. v. Schmidt*, 35 Ind. App. 202; s. c. 71 N. E. Rep. 663; 72 N. E. Rep. 478; *Fairbanks v. Bangor &c. R. Co.*, 95 Me. 78; s. c. 49 Atl. Rep. 421; *Hannon v. North Jersey St. R.*

negligence with reference to vehicles on the side of the track proceeding in the same direction as the car, because of the failure of the motorman to stop or slacken his speed if he has sounded warning signals and the vehicle is sufficiently distant from the track to permit the car to pass in safety,²⁶⁵ and the injury is caused by the driver suddenly and without warning swerving his team onto the track.²⁶⁶

§ 1471. **Pedestrians Suddenly Thrusting Themselves in Front of Moving Cars.**²⁶⁷—The mere fact that a person attempts to cross in front of an approaching car does not of itself, without more, show contributory negligence, as a matter of law. The question is to be determined by the surrounding circumstances,²⁶⁸ and it is certainly not negligence *per se* for a person to attempt to cross the track at night seventy-five feet in front of an approaching car.²⁶⁹ Contributory negligence has been imputed to pedestrians in these cases:—Where a woman, crossing a street covered with snow at a crosswalk, was struck while midway the tracks by a street car approaching at its ordinary speed of fifteen to eighteen miles an hour with the gong sounding;²⁷⁰ where a pedestrian in the face of an approaching car in plain view stopped in the middle of the track, turned around and attempted to retrace her steps, and was struck—this more especially where she was crossing the track in the middle of a block;²⁷¹ where a woman was

Co., 65 N. J. L. 547; s. c. 47 Atl. Rep. 803; *McHugh v. North Jersey St. R. Co.* (N. J. L.), 46 Atl. Rep. 782; *Reichenberg v. Interurban St. R. Co.*, 84 N. Y. Supp. 523; *Reed v. Metropolitan St. R. Co.*, 58 App. Div. (N. Y.) 87; s. c. 68 N. Y. Supp. 539; *Cincinnati St. R. Co. v. Jenkins*, 20 Ohio Cir. Ct. R. 256; s. c. 11 O. C. D. 130.

²⁶⁵ *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572; s. c. 82 S. W. Rep. 245.

²⁶⁶ *Chicago & Co. v. Browdy*, 206 Ill. 615; s. c. 69 N. E. Rep. 570; *rev'd* s. c. 108 Ill. App. 177.

²⁶⁷ The principle which refuses a recovery where a pedestrian suddenly and needlessly thrusts himself in front of a moving car is illustrated by these cases: *Webb v. Chicago City R. Co.*, 83 Ill. App. 565; *Canedo v. New Orleans & Co. R. Co.*, 52 La. Ann. 2149; s. c. 28 South. Rep. 287; *Moore v. Lindell R. Co.*, 176 Mo. 528; s. c. 75 S. W. Rep. 672; *Williamson v. Metropolitan St. R. Co.*, 29 Misc. (N. Y.) 324; s. c. 60 N. Y. Supp. 477; *Wolf v. City & Co.*, 45 Or. 446; s. c. 72 Pac. Rep. 329; 78 Pac. Rep. 668; *Watkins v. Union T. Co.*, 194 Pa. St. 564; s. c. 45 Atl. Rep. 321; *Walsh v. Hestonville & Co. R. Co.*, 194 Pa. St. 570; s. c. 45 Atl. Rep. 322; *Sullivan v. Consol. T. Co.*, 198 Pa. 187; s. c. 47 Atl. Rep. 944; *Portsmouth St. R. Co. v. Peed*, 102 Va. 662; s. c. 47 S. E. Rep. 850; *Gunn v. Union R. Co.*, 22 R. I. 579; s. c. 47 Atl. Rep. 888; 48 Atl. Rep. 1045; *Hornstein v. Rhode Island Co.*, 26 R. I. 387; s. c. 59 Atl. Rep. 71.

²⁶⁸ *Fisher v. Chicago City R. Co.*, 114 Ill. App. 217; *Campbell v. Los Angeles Traction Co.*, 137 Cal. 565; s. c. 70 Pac. Rep. 624; *Schneider v. Market St. R. Co.*, 134 Cal. 482; s. c. 66 Pac. Rep. 734; *Central R. Co. v. Sehnert*, 115 Ill. App. 560.

²⁶⁹ *McDermott v. Brooklyn Heights R. Co.*, 89 App. Div. (N. Y.) 214; s. c. 85 N. Y. Supp. 807.

²⁷⁰ *Mathes v. Lowell & Co. St. R.*, 177 Mass. 416; s. c. 59 N. E. Rep. 77.

²⁷¹ *Lawson v. Metropolitan St. R. Co.*, 36 Misc. (N. Y.) 824; s. c. 74 N. Y. Supp. 885.

called back to her house to get a wrap, and, hurrying back to the crossing, stumbled and fell in front of an approaching car, and it was in the evidence that the car was brightly lighted and making considerable noise;²⁷² where the car injuring the pedestrian was well lighted, so that it could be seen one hundred fifty to three hundred feet away when the pedestrian stepped on the track.²⁷³ So, it has been held that one who knows that a street car is running at an unlawful rate of speed and attempts to cross the track within five or six feet in front of the car, is chargeable with contributory negligence defeating a recovery for the injuries so inevitably following his rash act.²⁷⁴

§ 1472. Not Negligence to Attempt to Cross in front of a Car Standing Still.²⁷⁵

§ 1474. Imputed Negligence in this Relation.—A passenger in a vehicle having no control over the team or its driver is not imputed with negligence in failing to look out for cars when crossing a street railway track.²⁷⁶ It is held that one riding in a vehicle, though without control of the horse, but a joint contributor to the hire of the team for the occasion, will be imputed with negligence if he does not look for approaching cars on crossing tracks in suburban and thinly-settled districts of the city.²⁷⁷

§ 1475. Negligently Running Down a Person who has Negligently Exposed Himself to Danger, after Discovering his Exposed

²⁷² *Gilliland v. Middlesex &c. T. Co.*, 67 N. J. L. 542; s. c. 52 Atl. Rep. 693.

²⁷³ *Donovan v. Lynn &c. R. Co.*, 185 Mass. 533; s. c. 70 N. E. Rep. 1029.

²⁷⁴ *Riska v. Union Depot R. Co.*, 180 Mo. 168; s. c. 79 S. W. Rep. 445. Where a passenger leaving a street car could have remained unharmed at the place where he alighted and avoided a car on the other track, but having seen it within five or six feet of him he attempted to cross the track in front of it and was struck and injured, the negligence of the motor-man in failing to ring the bell or give warning of the approaching car will not be regarded as the proximate cause of the injuries: *Fry v. St. Louis Transit Co.*, 111 Mo. App. 324; s. c. 85 S. W. Rep. 960.

²⁷⁵ See generally in support of the proposition indicated: *Gilda v. Met-*

ropolitan St. R. Co., 58 App. Div. (N. Y.) 528; s. c. 69 N. Y. Supp. 568; s. c. aff'd, 171 N. Y. 660; 64 N. E. Rep. 1121; *Walker v. St. Louis &c. R. Co.*, 106 Mo. App. 321; s. c. 80 S. W. Rep. 282; *North Jersey St. R. Co. v. Schwartz*, 66 N. J. L. 437; s. c. 49 Atl. Rep. 683.

²⁷⁶ *Wosika v. St. Paul City R. Co.*, 80 Minn. 364; s. c. 83 N. W. Rep. 386. A person riding by invitation with one known by him to be a skillful driver, and seeing the driver check his horse as they reached a street railroad and look for cars, the guest not being able to see the track because the curtains were drawn, is not charged with contributory negligence in relying on the care of the driver: *United Railways &c. Co. v. Biedler*, 98 Md. 564; s. c. 56 Atl. Rep. 813.

²⁷⁷ *Wosika v. St. Paul City R. Co.*, 80 Minn. 364; s. c. 83 N. W. Rep. 386.

Position.²⁷⁸—This humanitarian doctrine is available to the plaintiff only where it is clearly shown by the evidence that the operator of the car could have stopped the car, or that the car was at the time of discovering the plaintiff's dangerous situation at such distance from him that it was possible to stop the car before colliding with him.²⁷⁹ The doctrine is, of course, inapplicable where the motorman, on discovering the plaintiff's peril, uses every means at his command to stop the car and fails,²⁸⁰—as, for instance, on account of the slippery condition of the track²⁸¹—unless the company is negligent in operating

²⁷⁸ See *ante*, § 1388. The principle which renders a street railroad company liable, notwithstanding contributory negligence, if the operator of the car discovered plaintiff's danger in time to have prevented the injury, but failed to exercise reasonable care to prevent the accident, is illustrated and applied in these cases: *Harrington v. Los Angeles R. Co.*, 140 Cal. 514; s. c. 74 Pac. Rep. 15; 63 L. R. A. 238; *Lee v. Market St. R. Co.*, 135 Cal. 293; s. c. 67 Pac. Rep. 765; *Citizens' St. R. Co. v. Hamer*, 29 Ind. App. 426; s. c. 62 N. E. Rep. 658; 63 N. E. Rep. 778 (injury to child); *Hammond & Co. Elec. St. R. Co. v. Eads*, 32 Ind. App. 249; s. c. 69 N. E. Rep. 555; *Barry v. Burlington R. & Co.*, 119 Iowa 62; s. c. 93 N. W. Rep. 68; 95 N. W. Rep. 229; *Floyd v. Paducah R. & Co.*, 73 S. W. Rep. 1122; s. c. 24 Ky. L. Rep. 2364; *Louisville R. Co. v. Colston*, 117 Ky. 804; s. c. 79 S. W. Rep. 243; 25 Ky. L. Rep. 1933; *Aldrich v. St. Louis Transit Co.*, 101 Mo. App. 77; s. c. 74 S. W. Rep. 141; *Baxter v. St. Louis Transit Co.*, 103 Mo. App. 597; s. c. 78 S. W. Rep. 70; *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524; s. c. 85 S. W. Rep. 140; *Hanheide v. St. Louis Transit Co.*, 104 Mo. App. 323; s. c. 78 S. W. Rep. 820; *Kolb v. St. Louis Transit Co.*, 102 Mo. App. 143; s. c. 76 S. W. Rep. 1050; *Jett v. Central Electric R. Co.*, 178 Mo. 664; s. c. 77 S. W. Rep. 738; *McAndrews v. St. Louis & Co. R. Co.*, 83 Mo. App. 233; *Meyers v. St. Louis Transit Co.*, 99 Mo. App. 363; s. c. 73 S. W. Rep. 379; *O'Keefe v. St. Louis & Co. R. Co.*, 81 Mo. App. 386; *Rapp v. St. Louis Transit Co.*, 190 Mo. 144; s. c. 88 S. W. Rep. 865; *Septowsky v. St. Louis Transit Co.*, 102 Mo. App. 110; s. c. 76 S. W. Rep. 693; *Waddell v. Metropolitan*

St. R. Co., 113 Mo. App. 680; s. c. 88 S. W. Rep. 765; *Omaha St. R. Co. v. Larson*, — Neb. —; s. c. 97 N. W. Rep. 824; *Parkinson v. Concord St. R.*, 71 N. H. 28; s. c. 51 Atl. Rep. 268; *Laronde v. Boston & Co. R. Co.*, 73 N. H. 247; s. c. 60 Atl. Rep. 684; *Moore v. Metropolitan St. R. Co.*, 84 App. Div. (N. Y.) 613; s. c. 82 N. Y. Supp. 778; *Wagner v. Metropolitan St. R. Co.*, 79 App. Div. (N. Y.) 591; s. c. 80 N. Y. Supp. 191; s. c. *aff'd*, 176 N. Y. 610; 68 N. E. Rep. 1125; *Harpham v. Northern Ohio Traction Co.*, 26 Ohio Cir. Ct. R. 253; *Tesch v. Milwaukee Electric & Co.*, 108 Wis. 593; s. c. 84 N. W. Rep. 823.

²⁷⁹ *Goldkranz v. Metropolitan St. R. Co.*, 89 App. Div. (N. Y.) 590; s. c. 85 N. Y. Supp. 667; *Kotila v. Houghton Con. St. R. Co.*, 134 Mich. 314; s. c. 96 N. W. Rep. 437; 10 Det. Leg. N. 461 (cow injured and there was no evidence to show whether the car could have been stopped previous to the collision under the circumstances); *West v. Metropolitan St. R. Co.*, 105 App. Div. (N. Y.) 373; s. c. 94 N. Y. Supp. 250. The doctrine of "last clear chance" is without application where there is no evidence that the motorman had reason to believe that there was danger of striking the plaintiff in time to check the car before it reached him and he was entitled to assume that plaintiff would not deliberately go on the track in front of the car: *Rissler v. St. Louis Transit Co.*, 113 Mo. App. 120; s. c. 87 S. W. Rep. 578.

²⁸⁰ *Fellenz v. St. Louis & Co. R. Co.*, 106 Mo. App. 154; s. c. 80 S. W. Rep. 49.

²⁸¹ *Ellermann v. St. Louis Transit Co.*, 102 Mo. App. 295; s. c. 76 S. W. Rep. 661.

the car with an incompetent motorman or with equipment so defective that it cannot be properly controlled.²⁸²

§ 1476. Doctrine that the Company is not Liable unless it Observed the Exposed Position of the Person Injured in Time to have Averted the Calamity.²⁸³

§ 1477. Liable for Running Down a Person who has Negligently Exposed Himself on the Track, where he Might have been Discovered in Time to Avert the Calamity.²⁸⁴—The question whether the surrounding facts were sufficient to apprise the motorman of the dangerous situation of the traveller in time to stop the car, by the exercise of ordinary care before the collision took place, is purely one of fact for the determination of the jury, and not one of law for the court.²⁸⁵

§ 1479. Circumstances under which Courts have Refused to Impute Contributory Negligence to the Traveller in Attempting to Cross a Street Railway Track.²⁸⁶

²⁸² Little Rock T. & C. Co. v. Morrison, 69 Ark. 289; s. c. 62 S. W. Rep. 1045.

²⁸³ A motorman is guilty of negligence only where he fails to use proper diligence to prevent injury to a person on the track after he has actually discovered his presence thereon: Taylor v. Houston Electric Co., — Tex. Civ. App. —; s. c. 85 S. W. Rep. 1019.

²⁸⁴ See *ante*, § 1390. That plaintiff's contributory negligence will not preclude him from recovering if the motorman in charge of the car might, by the exercise of ordinary care, have discovered his peril in time to save him, see: Birmingham Ry., L. & Co. v. Brantley, 141 Ala. 614; s. c. 37 South. Rep. 698; Schneider v. Market St. R. Co., 134 Cal. 482; s. c. 66 Pac. Rep. 734; Owensboro City R. Co. v. Hill, 56 S. W. Rep. 21; s. c. 21 Ky. L. Rep. 1638; Flynn v. Louisville R. Co., 62 S. W. Rep. 490; s. c. 23 Ky. L. Rep. 57; Lexington R. Co. v. Fain, — Ky. —; s. c. 80 S. W. Rep. 463; 25 Ky. L. Rep. 2243; Barrie v. St. Louis Transit Co., 102 Mo. App. 87; s. c. 76 S. W. Rep. 706; Degel v. St. Louis Transit Co., 101 Mo. App. 56; s. c. 74 S. W. Rep. 156; Hutchinson v. St. Louis & C. R. Co., 88 Mo. App. 376; Klockenbrink v. St. Louis & C. R. Co., 172 Mo. 678; s. c. 72 S. W. Rep. 900; Kolb v. St. Louis Transit

Co., 102 Mo. App. 143; s. c. 76 S. W. Rep. 1050; McAndrew v. St. Louis & S. R. Co., 88 Mo. App. 97; Meng v. St. Louis & C. R. Co., 108 Mo. App. 553; s. c. 84 S. W. Rep. 213; Murray v. St. Louis Transit Co., 108 Mo. App. 501; s. c. 83 S. W. Rep. 995; Priesmeyer v. St. Louis Transit Co., 102 Mo. App. 518; s. c. 77 S. W. Rep. 313; Union Biscuit Co. v. St. Louis Transit Co., 108 Mo. App. 297; s. c. 83 S. W. Rep. 288; Griffin v. Toledo & C. R. Co., 21 Ohio Cir. Ct. R. 547; s. c. 11 Ohio C. D. 749.

²⁸⁵ Floyd v. Paducah R. & C. Co., 64 S. W. Rep. 653; s. c. 23 Ky. L. Rep. 1077; Jett v. Central Electric R. Co., 178 Mo. 664; s. c. 77 S. W. Rep. 738.

²⁸⁶ Courts have refused to impute contributory negligence to the traveller under these circumstances:—Where the driver of a wagon turned to cross a street behind a car, and it stopped and reversed its motion and struck the wagon, causing the injuries complained of, with the conclusion that the driver was not to be charged with negligence in not looking to see if the car was backing, nor in failing to hear and understand signals between the conductor and motorman relative to backing the car (Central R. Co. v. Knowles, 93 Ill. App. 581; s. c. aff'd, 191 Ill. 241;

§ 1480. **Conduct to which Contributory Negligence has not been Ascribed as Matter of Law.**—It was held a question for the jury whether one driving a buggy along a street on a foggy and dark night was to be imputed with contributory negligence in arranging with his companion to confine his own attention to the driving and let his companion look out for approaching cars.²⁸⁷

§ 1481. **Facts to Which Contributory Negligence has been Ascribed.**²⁸⁸

60 N. E. Rep. 829); where a salvage wagon responding to a fire alarm was driven over a crossing at a rate of from ten to fifteen miles an hour and a collision ensued since the vehicle had the right of way in the streets (*Flynn v. Louisville R. Co.*, 110 Ky. 662; s. c. 62 S. W. Rep. 490; 23 Ky. L. Rep. 57); where a driver on a rainy night on approach to a crossing listened for a car, but heard nothing, and when he reached a point at the corner where vision for sixty feet was possible, he looked both ways and did not see a car, and just as the horse got to the track a car approached only about ten feet away, and he tried to whip up his horse so as to escape, but was injured (*Stanley v. Cedar Rapids & C. R. Co.*, 119 Iowa 526; s. c. 93 N. W. Rep. 489); where a fireman on a hook and ladder truck saw, when half way across the track, that a collision was inevitable, and jumped, and was killed, not by the car, but by the truck being thrown upon him (*Geary v. Metropolitan St. R. Co.*, 73 App. Div. (N. Y.) 441; s. c. 77 N. Y. Supp. 54); where a driver started across the track when a car was two hundred fifty feet distant, and the motorman knowing that the car was running down grade, allowed it to continue on its own momentum, and did not have it under control, and though he saw the dangerous position of the traveller, he made no effort to slacken the speed of the car until it struck plaintiff's carriage, which was hindered from crossing by a team immediately in front of it (*Dallas & C. R. Co. v. Illo*, 32 Tex. Civ. App. 290; s. c. 73 S. W. Rep. 1076); where a passenger was lured into crossing a track, where he was struck by a car running at a high rate of speed by reason of the

conductor of a car on the adjoining track, which he wanted to catch, calling to him to hurry if he wanted to get the car (*Stillings v. Metropolitan St. R. Co.*, 177 N. Y. 344; s. c. 69 N. E. Rep. 641; aff'g s. c. 82 N. Y. Supp. 726).

²⁸⁷ *Indianapolis St. R. Co. v. Slifer*, 35 Ind. App. 700; s. c. 74 N. E. Rep. 19; rev'g s. c. 72 N. E. Rep. 1055.

²⁸⁸ Contributory negligence has been ascribed to the injured person under these circumstances:—Where the traveller before going onto a bridge, if he had looked, could not have failed to have seen that an electric car had entered the bridge on the other side, and that the car would take up all the room between the sides of the bridge, but he failed to look and entered on the bridge and was struck by the car (*Judge v. Elkins*, 183 Mass. 229; s. c. 66 N. E. Rep. 708); where the driver of a vehicle deliberately drove on a street car track in the face of a car not over two hundred feet distant, and approaching at an ordinary speed, and stopped on the track to allow another person to get into the vehicle and the vehicle was struck and the driver injured (*Gettys v. St. Louis Transit Co.*, 103 Mo. App. 564; s. c. 78 S. W. Rep. 82); where the driver of a wagon without a brake saw a car approaching about two hundred fifty feet from a crossing, and notwithstanding its near approach, drove down a three per cent incline toward the crossing without attempting to turn out and was struck by the car and injured (*Roefeldt v. St. Louis & C. R. Co.*, 180 Mo. 554; s. c. 79 S. W. Rep. 706); where a driver stopped his truck squarely on the track, with a car approaching not more than thirty feet distant, to enable a truck approaching him at right

§ 1482. **Care in Crossing Interurban Electric Lines.**—As respects the care to be observed by the traveller the law recognizes no distinction between interurban electric railroads crossing country highways and steam railroads.²⁸⁹

angles to pass ahead of him, and but for this he could have safely crossed, and his only excuse for this action was that the other truck was a loaded truck and entitled to the right of way (*Heinz v. Union R. Co.*, 88 N. Y. Supp. 392); where a car collided with a horse before the vehicle reached the track, and the last time that the driver looked in the direction of the car it was only forty feet away and was lighted up

in the usual manner (*March v. Traction Co.*, 209 Pa. 46; s. c. 57 Atl. Rep. 1131); where a pedestrian, with knowledge that a car was rapidly approaching, stopped on the track to talk and was struck by the car (*Gargano v. Forty-Second St. &c. R. Co.*, 94 N. Y. Supp. 544).

²⁸⁹ *McNab v. United Railways &c. Co.*, 94 Md. 719; s. c. 51 Atl. Rep. 421.

TITLE ELEVEN.

INJURIES TO TRAVELLERS AT HIGHWAY CROSSINGS OF STEAM RAILWAYS.

[§§ 1485-1701.]

§ 1485. **Railway Company has Superior Right of Way.**¹—But as between a train standing near a crossing and a traveller about to use the crossing, the right of passage is equal; neither has precedence but each should act with due regard to the rights of the other.²

§ 1487. **Relative Care Required of Traveller and Railway Company.**—The rights and duties of both parties at a crossing as to the care to be exercised are reciprocal. The railroad company is required to exercise such care as to the signals, speed, and lookout as might usually be expected of ordinarily prudent persons operating a railroad under like circumstances. And the traveller on his part rests under the obligation to use such care as might usually be expected of an ordinarily prudent person, situated as he was, to learn of the approach of the train and keep out of its way. In all cases the care demanded is commensurate with the danger.³

¹ That the train has the right of way, see *Garrett v. Illinois Cent. R. Co.*, 126 Fed. Rep. 406 (rule applied to private crossing opened by railroad company but not dedicated); *Chicago & C. R. Co. v. Roberts*, 3 Neb. (unoff.) 425; s. c. 91 N. W. Rep. 707; *New York & C. R. Co. v. Kistler*, 66 Ohio St. 326; s. c. 64 N. E. Rep. 130.

² *Allen v. Boston & C. R.*, 94 Me. 402; s. c. 47 Atl. Rep. 917.

³ *Louisville & C. R. Co. v. Price*, 76 S. W. Rep. 836; s. c. 25 Ky. L. Rep. 1033; *Louisville & C. R. Co. v. Cummins*, 111 Ky. 333; s. c. 63 S. W. Rep. 594; 23 Ky. L. Rep. 681; *Louisville & C. R. Co. v. Breeden*, 111 Ky. 729; s. c. 64 S. W. Rep. 667; 23 Ky. L. Rep. 1021, 1763; *Esler v. Wabash R. Co.*, 109 Mo. App. 580; s. c. 83 S. W. Rep. 73; *Chicago & C. R. Co. v. Roberts*, 3 Neb. (unoff.) 425; s. c. 91 N. W. Rep. 707; *Riley v. Missouri Pac. R. Co.*, 69 Neb. 82; s. c. 95 N. W. Rep. 20; *Rafferty v. Erie R. Co.*, 66 N. J. L. Rep. 444; s. c. 49

Atl. Rep. 456; *Stewart v. Long Island R. Co.*, 54 App. Div. (N. Y.) 623; s. c. 66 N. Y. Supp. 436; s. c. aff'd, 166 N. Y. 604; 59 N. E. Rep. 1130; *Cohen v. Philadelphia & C. R. Co.*, 211 Pa. 227; s. c. 60 Atl. Rep. 729; *Hall v. International & C. R. Co.*, 98 Tex. 100; s. c. 81 S. W. Rep. 520; *International & C. R. Co. v. Glover*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 515; *Meeks v. Ohio River R. Co.*, 52 W. Va. 99; s. c. 43 S. E. Rep. 118. An instruction that plaintiff and defendant railroad company were bound to exercise the same degree of care to prevent a collision on a public crossing was not vitiated by the addition of the clause that "one is not bound to anticipate negligence, where the law commands diligence for his protection at the hands of another." *Atlanta & C. R. Co. v. Lovelace*, 121 Ga. 487; s. c. 49 S. E. Rep. 607. In a case where a traveller was injured at a dangerous crossing by a train closely following an-

§ 1492. Care Demanded in Case of Children.⁴§ 1493. Relative Rights of Steam and Electric Railway Companies at Crossings.⁵§ 1495. Whether Failure to Observe Statutory Precautions is Negligence Per Se or Merely Evidence of Negligence.⁶

other, the rule was announced that if the railroad company ran its trains so close together when they crossed the highway that the noise of the first would drown the sound of the whistle of the second, and thus render unavailing the statutory warning, this would make it the duty of the railroad company to approach the crossing with its rear train with a greater degree of care than if there was nothing to prevent the signal from being heard: Grenell v. Michigan Central R. Co., 124 Mich. 141; s. c. 82 N. W. Rep. 843.

⁴An engineer engaged in switching cars is not bound to stop his train because he sees boys on a highway close to the track but not in a place of danger, until he sees some act on their part indicating an attempt to get in a dangerous position with reference to his train: Horn v. Chicago &c. R. Co., 124 Iowa 281; s. c. 99 N. W. Rep. 1068. The duty of a railroad company to use care toward a boy going over a crossing on the highway is not affected by the fact that just previously he had been a trespasser on its property: Daubert v. Delaware &c. R. Co., 199 Pa. 345; s. c. 49 Atl. Rep. 72.

⁵A statutory provision requiring some employé of a street railroad company to go ahead at a railroad crossing and ascertain if the way is clear, will not relieve a steam railway company of the duty of operating safety gates maintained by it so as to indicate to the operatives of the street car company whether the track is clear, and if both the street railway company and the steam railway company fail in the performance of such a duty they are liable to the person injured: Kopp v. Baltimore &c. R. Co., 25 Ohio Cir. Ct. R. 546.

⁶That the failure to observe a statutory precaution is negligence

per se, see Pittsburgh &c. R. Co. v. Lighthouse, 163 Ind. 247; s. c. 71 N. E. Rep. 218, 660; Baltimore &c. R. Co. v. Reynolds, 33 Ind. App. 219; s. c. 71 N. E. Rep. 250 (ordinance requiring watchmen on rear car of train running backwards, limiting speed of train, and requiring the ringing of the bell); Reed v. St. Louis &c. R. Co., 107 Mo. App. 238; s. c. 80 S. W. Rep. 919 (ordinance requiring ringing of bell at street crossings); Missouri &c. R. Co. v. Matherly, 35 Tex. Civ. App. 604; s. c. 81 S. W. Rep. 589; Galveston &c. R. Co. v. Levy, 35 Tex. Civ. App. 107; s. c. 79 S. W. Rep. 879 (ordinance requiring continuous ringing of bell); Gulf &c. R. Co. v. Hall, 34 Tex. Civ. App. 535; s. c. 80 S. W. Rep. 133 (statute requiring the ringing of bell eighty rods from crossing and until crossing is passed). A *prima facie* case of negligence is made by the introduction of a city ordinance, proof of its violation, the injury resulting therefrom and due care on the part of the injured person: Wabash R. Co. v. Kamradt, 109 Ill. App. 203. It is not necessary expressly to describe the failure to observe an ordinance as negligence in a jurisdiction where such failure constitutes negligence *per se*: Pennsylvania Co. v. Fertig, 34 Ind. App. 459; s. c. 70 N. E. Rep. 834. A traveller going on a railroad crossing after dark has a right to presume that a railroad company has complied with an ordinance requiring the ringing of a bell near a crossing and the presence of a headlight on the train: Weller v. Chicago &c. R. Co., 164 Mo. 180; s. c. 64 S. W. Rep. 141. The failure of a railroad company to give statutory signals at a crossing may be shown to establish negligence on the part of the company: Davis v. Southern R. Co., 68 S. C. 446; s. c. 47 S. E. Rep. 723.

§ 1498. Duty of Railway Company to Restore Highway to Former Safe Condition.—It is the duty of a railroad company to exercise reasonable and ordinary care to keep its highway crossings,⁷ and approaches thereto, where the tracks cross streets and highways above grade,⁸ repaired and reasonably safe for public use. Its liability for a failure in this duty is a continuing liability and exists independently of any statutory mandate.⁹ The act of a railroad company in leaving a crossing in a dangerous condition after making repairs has been held *prima facie* evidence of the company's negligence under a statute requiring the railroad company to restore a railroad "to its former state, or to such state as not to impair its usefulness."¹⁰

§ 1502. To what Highways this Duty of Reconstruction and Reparation Applies.¹¹

§ 1503. Liability for Injuries through Failing to Make and Repair Private or Farm Crossings.—There is a holding that a railroad company keeping in repair a bridge over, or an approach to, a private crossing will be charged with having extended such an invitation to the public to use the structure as will render it liable for injuries resulting from defects negligently permitted to exist in the structure.¹²

§ 1509. Increased Care Demanded of the Company where the View is Obstructed.—It is a wholesome doctrine, finding support in numerous recent authorities, that a railroad company must take special precautions to guard against injury at crossings where the traveller's view of the track is obstructed by objects maintained by the railroad company.¹³ It is not to be understood by this that it is negligence *per*

⁷ *Rock Island &c. R. Co. v. Kephle*, 106 Ill. App. 303; *Hughes v. Chicago &c. R. Co.*, 122 Wis. 258; s. c. 99 N. W. Rep. 897. If the construction of a crossing approach does not make a street more dangerous than before the railroad was built, the railroad is not required to correct defects that existed prior to the construction of the road: *Whitby v. Baltimore &c. R. Co.*, 96 Md. 700; s. c. 54 Atl. Rep. 674.

⁸ *Whitby v. Baltimore &c. R. Co.*, 96 Md. 700; s. c. 54 Atl. Rep. 674.

⁹ *Cunningham v. Thief River Falls*, 84 Minn. 21; s. c. 86 N. W. Rep. 763; *Elchorn v. New Orleans &c. R. &c. Co.*, 112 La. 236; s. c. 36 South. Rep. 335.

¹⁰ *Raper v. Wilmington &c. R. Co.*, 126 N. C. 563; s. c. 36 S. E. Rep. 115.

¹¹ In a case where a railroad com-

pany had dedicated for public use a crossing consisting of a driveway and footpaths on each side thereof, and had attempted to keep the public off the space between the driveway and the footpath by means of chains across these spaces at the ends, and the dedication had not been officially accepted, the mere fact that the public had for a long time used a path which crossed diagonally over this crossing without objection from the company was held not to impose upon the company the duty to repair damages in this path where it crossed the strips between the driveway and the footpath: *San Antonio &c. R. Co. v. Montgomery*, 31 Tex. Civ. App. 491; s. c. 72 S. W. Rep. 616.

¹² *Southern R. Co. v. Hooper*, 110 Ga. 779; s. c. 36 S. E. Rep. 232.

¹³ *Louisville &c. R. Co. v. Breeden*,

se for a railroad to erect and maintain on its right of way buildings which interfere with a view of the track; the duty in this situation is to use a degree of care commensurate with the danger to users of the highway.¹⁴ Since a railroad has no control over trees, shrubbery, structures and the like not on its right of way, the liability of the company is not to be increased by reason of the maintenance of such obstructing objects by the adjacent land-owners.¹⁵

§ 1510. In Constructing and Repairing Highway Crossings, Railway Company Liable only for the Exercise of Ordinary Care.—A railroad crossing is sufficient if safe for persons crossing; it is not necessary that it should be safe for persons walking along the track.¹⁶

§ 1518. Other Questions Relating to Railway Crossings of Highways.—A railroad company, though required to maintain a crossing in a safe condition within the foregoing rules, has the right to enter on the crossing to repair its tracks, though the effect of making these repairs is to disturb the crossing. In one case where the company was engaged in making track repairs and had left a sufficient passageway for teams, and a traveller crossing the tracks at this point was injured by the overturning of his vehicle due to the fright of his horse, caused by steam escaping from a near-by engine, it was held error to instruct broadly that, if the defendant failed to restore the street, it was liable for the plaintiff's injury, since such an instruction failed to recognize the company's right to repair its tracks at the crossing.¹⁷ Another instruction in an action against a railroad for injuries caused by failure to restore a highway crossing to a safe condition, that it was the duty of the company to restore the highway "as near as it was possible to do so to its original condition" was held not erroneous, where the instruction in its entirety charged that it was the duty of the railway company to do everything which was reasonable and practicable to restore the highway to its former state, so that its use for public travel should not be endangered.¹⁸

111 Ky. 729; s. c. 64 S. W. Rep. 667; 23 Ky. L. Rep. 1021, 1763; Ortolano v. Morgan's &c. R. &c. Co., 109 La. 902; s. c. 33 South. Rep. 914; Hires v. Atlantic City R. Co., 66 N. J. L. 30; s. c. 48 Atl. Rep. 1002; Nashville &c. R. Co. v. Witherspoon, 112 Tenn. 128; s. c. 78 S. W. Rep. 1052.

¹⁴ Toledo &c. R. Co. v. Patterson, 94 Ill. App. 670; Evansville &c. R. Co. v. Clements, 32 Ind. App. 659; s. c. 70 N. E. Rep. 554.

¹⁵ New York &c. R. Co. v. Kistler, 66 Ohio St. 326; s. c. 64 N. E. Rep. 130; St. Louis &c. R. Co. v. Rawley, 90 Ill. App. 653.

¹⁶ Raper v. Wilmington &c. R. Co., 126 N. C. 563; s. c. 36 S. E. Rep. 115.

¹⁷ San Antonio &c. R. Co. v. Belt, 24 Tex. Civ. App. 281; s. c. 59 S. W. Rep. 607.

¹⁸ Atchison &c. R. Co. v. Townsend, — Kan. —; s. c. 81 Pac. Rep. 205.

§ 1522. **Warning Sign-Boards at Crossings.**—In New York the failure to comply with a statute as to the location of warning sign-boards at public grade crossings is held to charge the railroad company with negligence *per se* where the violation of the law is the proximate cause of a grade crossing injury,¹⁹ and it is not a defense that the law is openly and commonly violated throughout the State.²⁰ Neither is it a defense that the delinquent railroad was in the hands of a receiver.²¹ But the mere fact that there is a slight deviation from the statutory requirement in the form of a sign rightly placed will not sustain a verdict for the plaintiff based solely thereon, where the sign, as constructed, did not deceive travellers, and, in the particular case announcing the rule, was not the proximate cause of the injuries.²²

§ 1525. **Duty to Maintain Lights at Crossings in Cities and Villages.**²³

§ 1526. **Electric Bell Signals at Crossings.**—A railroad company having installed an electric bell signal equipment at a crossing is under the duty to maintain the efficiency of such equipment, and where a traveller is injured by venturing on a crossing at a time when the bells were silent, the railroad company will not be allowed to urge as a defense that the bells had been out of order if beyond a time reasonably sufficient to repair them.²⁴

§ 1527. **Duty of Railway Companies to Erect Gates at Crossings.**—Municipalities have the implied power to require railroad companies at their own expense to erect, maintain and operate safety gates at street crossings,²⁵ and actionable negligence may be predicated on the

¹⁹ *Henn v. Long Island R. Co.*, 51 App. Div. (N. Y.) 292; s. c. 65 N. Y. Supp. 21.

²⁰ *Henn v. Long Island R. Co.*, 51 App. Div. (N. Y.) 292; s. c. 65 N. Y. Supp. 21.

²¹ *Arkansas Cent. R. Co. v. State*, 72 Ark. 252; s. c. 79 S. W. Rep. 772.

²² *Wellbrock v. Long Island R. Co.*, 31 Misc. (N. Y.) 424; s. c. 65 N. Y. Supp. 592.

²³ *Missouri & C. R. Co. v. Matherly*, 35 Tex. Civ. App. 604; s. c. 81 S. W. Rep. 589 (an ordinance requiring railroad companies to provide lights at crossings admissible in action for injuries at grade crossing). An ordinance enacted in conformity with a State law granting cities the power to require railroad companies to maintain at street crossings the same kind of lights maintained by the city on all nights

that the city may direct, and to prescribe the character of the lights to be maintained, is not invalid for indefiniteness, because it excuses the railroad company from lighting the crossing at times when the moon furnishes sufficient light and at all times when the city lights are not in operation: *Chicago & C. R. Co. v. Crawfordsville*, 164 Ind. 70; s. c. 72 N. E. Rep. 1025.

²⁴ *Henn v. Long Island R. Co.*, 51 App. Div. (N. Y.) 292; s. c. 65 N. Y. Supp. 21; *McSweeney v. Erie R. Co.*, 93 App. Div. (N. Y.) 496; s. c. 87 N. Y. Supp. 836.

²⁵ *In re Pennsylvania R. Co.*, 27 Pa. Super. Ct. 113; *Seibert v. Missouri Pac. R. Co.*, 188 Mo. 657; s. c. 87 S. W. Rep. 995; *Liverpool v. Liverpool R. Co.*, 35 N. S. 233. The decision of municipal authorities as to the location in the street of

failure of a railroad company to comply with statutes and ordinances directing their erection.²⁶ In States where courts are given jurisdiction to direct the erection of gates or other methods of protection at crossings, it is not necessary that the hazardous condition at the crossing should have been caused by the railroad company; it is only necessary that the conditions exist at the time the proceedings are commenced.²⁷ Though it cannot be affirmed that it is the duty of a railroad company to erect gates unless commanded to do so by law,²⁸ yet it is proper on the question of due care to take into consideration the failure to erect these safeguards at crossings specially dangerous because of obstructions preventing a view of the track.²⁹ Ordinances directing the maintenance of gates intend that they shall operate both as a warning and a physical obstruction.³⁰ But it is not required that the gates should be of sufficient strength successfully to withstand the shock of runaway teams coming in contact with them.³¹

§ 1528. Statutes and Ordinances Prescribing this Duty.³²

§ 1532. **Crossing when the Gates are Down.**—Generally speaking the mere fact that the gates across a highway at a railroad crossing are closed is sufficient warning to the public that the crossing is, for the time being, in use for the passage of trains, and one who then attempts to cross and is injured, is to be imputed with contributory negligence barring a recovery.³³ The case is different where the gates are generally kept down, as at night, without regard to the presence or absence of passing trains, and this fact is known to the public. In

machinery operating safety gates at a railroad crossing will be interfered with by the courts only where the machinery is so located as to necessarily interfere with the use of a street as a public highway; and where the machinery was so located as to leave thirty-nine feet of unobstructed space in the highway, it did not interfere with the use thereof: *Seibert v. Missouri Pac. R. Co.*, 188 Mo. 657; s. c. 87 S. W. Rep. 995.

²⁶ *Pittsburg &c. R. Co. v. Banfill*, 107 Ill. App. 254; s. c. aff'd, 206 Ill. 553; s. c. 69 N. E. Rep. 499.

²⁷ *Eckert v. Perth Amboy &c. R. Co.*, 66 N. J. Eq. 437; s. c. 57 Atl. Rep. 438.

²⁸ The failure to maintain gates at ordinary crossings in the country does not charge the railroad company with negligence as a matter of law in the absence of statute imposing this duty: *Christensen v.*

Oregon Shore Line R. Co., 29 Utah 192; s. c. 80 Pac. Rep. 746.

²⁹ *New York &c. R. Co. v. Moore*, 105 Fed. Rep. 725; s. c. 45 C. C. A. 21; *Girouard v. Canadian Pac. R. Co.*, Rap. Jud. Que. 19 C. S. 529.

³⁰ *Chicago &c. R. Co. v. Wise*, 206 Ill. 453; s. c. 69 N. E. Rep. 500; aff'g s. c. 106 Ill. App. 174.

³¹ *Brooks v. Boston &c. R. Co.*, 188 Mass. 416; s. c. 74 N. E. Rep. 670.

³² An invalid ordinance requiring a railroad company to erect safety gates is not admissible in evidence to show the dangerous character of a crossing over a boundary line between the municipality enacting the ordinance and an adjoining township: *Burns v. Pennsylvania R. Co.*, 210 Pa. 90; s. c. 59 Atl. Rep. 687.

³³ *Lake Shore &c. R. Co. v. Ehlert*, 63 Ohio St. 320; s. c. 58 N. E. Rep. 812.

such a case the fact that the gates were down when the traveller was run over when attempting to cross the tracks at night does not of itself charge the traveller with knowledge of the danger, and make him guilty of contributory negligence.³⁴

§ 1533. **Negligence in the Management of the Gates.**—A railroad company must exercise ordinary care in the management of gates at crossings, and it will be responsible to a traveller who, being without fault himself, is injured by their negligent manipulation.³⁵ Thus, a traveller approaching a crossing guarded by gates, and seeing the gates up and motionless, and no train in sight, will not be imputed with contributory negligence as a matter of law, where he attempts to cross and is struck by the gates on their being lowered by a gateman, who did not look to see whether persons were in the path of their descent.³⁶ A gateman is manifestly guilty of culpable negligence in leaving his post knowing that a train is approaching the crossing without placing some signal of danger to warn travellers.³⁷ It is the duty of the gateman to lower the gates on the approach of a train though he sees no person approaching the crossing at the time.³⁸

§ 1535. **Duty to Station Flagmen at Crossings.**—Though a railroad company may not be imputed with negligence *per se* in failing to station flagmen at crossings in the absence of laws imposing the duty,³⁹ yet that fact may be considered by the jury in determining whether due care was exercised by the railroad company at a dangerous crossing.⁴⁰ Whether a flagman should have been stationed at a particular crossing is important only where the absence of such a flagman was the cause of the accident.⁴¹ Where the railroad company

³⁴ Baltimore &c. R. Co. v. Landrigan, 191 U. S. 461; s. c. 24 Sup. Ct. Rep. 137; 48 L. Ed. 262; aff'g s. c. 20 App. (D. C.) 135.

³⁵ Smith v. Atlantic City R. Co., 66 N. J. L. 307; s. c. 49 Atl. Rep. 547; O'Keefe v. St. Louis &c. R. Co., 108 Mo. App. 177; s. c. 83 S. W. Rep. 308.

³⁶ O'Keefe v. St. Louis &c. R. Co., 108 Mo. App. 177; s. c. 83 S. W. Rep. 308.

³⁷ Sights v. Louisville &c. R. Co., 117 Ky. 436; s. c. 78 S. W. Rep. 172; 25 Ky. L. Rep. 1548.

³⁸ Chicago &c. R. Co. v. Wise, 206 Ill. 453; s. c. 69 N. E. Rep. 500; aff'g s. c. 106 Ill. App. 174.

³⁹ Evansville &c. R. Co. v. Clements, 32 Ind. App. 659; s. c. 70 N. E. Rep. 554 (railroad not charged with the duty to maintain watch-

man at crossing in small village); Brooks v. Boston &c. R. R., 188 Mass. 416; s. c. 74 N. E. Rep. 670; Lake Shore &c. R. Co. v. Reynolds, 23 Ohio Cir. Ct. R. 199 (flagman not required at highway crossing outside municipality where view of track is unobstructed).

⁴⁰ Seifred v. Pennsylvania R. Co., 206 Pa. 399; s. c. 55 Atl. Rep. 1061; Central Texas &c. R. Co. v. Gibson, 35 Tex. Civ. App. 66; s. c. 79 S. W. Rep. 351; International &c. R. Co. v. Jones (Tex. Civ. App.), 60 S. W. Rep. 978.

⁴¹ Illinois Cent. R. Co. v. Watson, 117 Ky. 374; s. c. 78 S. W. Rep. 175; 25 Ky. L. Rep. 1360; Louisville &c. R. Co. v. Cummin, 111 Ky. 333; s. c. 63 S. W. Rep. 594; 23 Ky. L. Rep. 681. The failure to station a watchman at a crossing must have

voluntarily assumes the duty of protecting the crossing by a flagman, it is then liable for the failure of the flagman to exercise reasonable care in the performance of his duties and in an action for injuries caused by the flagman's negligence cannot raise the question of its duty to employ him.⁴²

§ 1538. Statutes and Ordinances Requiring Railway Companies to Station Flagmen.—The mere fact that the laws of a State authorize a railroad commission to designate the places where a flagman shall be stationed, will not relieve the railroad company from using proper and effective means to warn travellers of the approach of trains at undesignated crossings where the necessity for such protection is apparent.⁴³ Statutes requiring flagmen to be stationed at crossings to give signals of the approach of trains are intended not merely to protect the approaching traveller from actual collision, but also to warn approaching travellers in vehicles in time to allow them to take measures to prevent their animals from taking fright at approaching trains.⁴⁴

§ 1539. Withdrawal of a Flagman Negligence.⁴⁵

§ 1541. Liability of Railway Company for Negligence of its Flagman.—Travellers at crossing are entitled to a signal of danger instead of being required to await a signal of safety from the flagman. The mere fact that the flagman is at the crossing does not amount to a warning not to cross.⁴⁶ Again, a railroad company may be charged with the negligence of its flagman who delays giving a signal until a traveller is in a position of great danger, and the traveller could have escaped had a timely signal been given.⁴⁷ But in these cases it is essential to the liability of the railroad company that the negligence of the flagman should have been the proximate cause of the injuries

been the proximate cause of the accident. This omission cannot be claimed to have been the proximate cause where the injured person could have avoided the accident by using ordinary care to discover the approach of the train: *Cowen v. Dietrick*, 101 Md. 46; s. c. 60 Atl. Rep. 282.

⁴² *Wolcott v. New York & C. R. Co.*, 68 N. J. L. 421; s. c. 53 Atl. Rep. 297.

⁴³ *Louisville & C. R. Co. v. Lyon*, 58 S. W. Rep. 434; s. c. 22 Ky. L. Rep. 544.

⁴⁴ *Pennsylvania Co. v. Fertig*, 34 Ind. App. 459; s. c. 70 N. E. Rep. 334.

⁴⁵ Where a railroad company habitually maintains a watchman at a crossing, his absence when a person having knowledge of the custom is injured by collision with a train at the crossing is evidence of negligence on the part of the railroad company: *Montgomery v. Missouri Pac. R. Co.*, 181 Mo. 477; s. c. 79 S. W. Rep. 930.

⁴⁶ *Montgomery v. Missouri Pac. R. Co.*, 181 Mo. 477; s. c. 79 S. W. Rep. 930.

⁴⁷ *Edwards v. Chicago & C. R. Co.*, 94 Mo. App. 36; s. c. 67 S. W. Rep. 950.

suffered.⁴⁸ It has been held that where the railroad company maintains a flagman at a place where it is not compelled to have one, his duty is limited to warning persons crossing on that particular street; he is not required to warn persons crossing outside the limits of the street.⁴⁹

§ 1543. **Effect of Disregarding or Disobeying Flagman.**⁵⁰

§ 1548. **Failure to have Proper Headlights on Locomotive and Train.**—A headlight is not intended exclusively as an aid to the engineer in keeping a careful lookout on the track, but is also for use as a warning to others rightfully on the track,⁵¹ and a railroad company is negligent in propelling a train at a high rate of speed over crossings with the engine headlight extinguished and without giving any warning of its approach by reason of which a person free from negligence is injured or killed while crossing the track.⁵² But there is no such obligation as to mere trespassers or licensees using the tracks for a walkway.⁵³ The question whether a headlight is a conspicuous light within the meaning of a city ordinance requiring such a light on trains is a question of fact for the jury.⁵⁴

§ 1549. **Failure to Display Proper Hind-Lights.**⁵⁵

§ 1552. **Duty to Give Reasonable Warning when Train Approaches Highway.**—Generally speaking, a railroad company will be charged with negligence where it fails to give due and timely warning of the approach of its trains to highway crossings to those using the highway,⁵⁶ and this though the company is not commanded to do so by

⁴⁸ The principle is illustrated by a case where a traveller approached a crossing during the absence of the flagman at a time when no signal would have been given, if the flagman had been at his post of duty, by reason of the remoteness of the train. The driver reached the track and turned onto a road alongside the tracks, and after driving a considerable distance met an approaching train, which caused the fright of his team and the injuries complained of. In this case it was held proper to refuse a charge based on the failure of the flagman to warn plaintiff of the approach of the train: *Bell v. Texas &c. R. Co.* (Tex. Civ. App.), 70 S. W. Rep. 573.

⁴⁹ *Strickland v. New York Cent. &c. R. Co.*, 88 App. Div. (N. Y.) 367; s. c. 84 N. Y. Supp. 655.

⁵⁰ *Chicago &c. R. Co. v. Williams*, 87 Ill. App. 511 (contributory negligence to attempt to cross a track in face of signals of danger from the flagman).

⁵¹ *Southern R. Co. v. Bonner*, 141 Ala. 517; s. c. 37 South. Rep. 702.

⁵² *Southern R. Co. v. Aldridge*, 101 Va. 142; s. c. 43 S. E. Rep. 333.

⁵³ *Williamson v. Southern R. Co.*, 104 Va. 146; s. c. 51 S. E. Rep. 195.

⁵⁴ *Chicago &c. R. Co. v. Condon*, 108 Ill. App. 639.

⁵⁵ That it is negligence to back a train over a crossing without displaying hind lights, see *Pruey v. New York Cent. &c. R. Co.*, 41 App. Div. (N. Y.) 158; s. c. 58 N. Y. Supp. 797; s. c. aff'd, 166 N. Y. 616; 59 N. E. Rep. 1129; *Fleming v. Kansas City &c. R. Co.*, 89 Mo. App. 129.

⁵⁶ *Reed v. Queen Anne's R. Co.*, —

statute or ordinance.⁵⁷ The object of this requirement is not merely to prevent collisions with travellers, but also to enable them to avoid the danger arising from coming in close proximity to passing trains on the crossing.⁵⁸ Where a signal is given the railroad company has performed its duty, and it is not generally material whether the signal was heard or heeded by persons intending to use the crossing.⁵⁹ This obligation to signal is without application to hand cars.⁶⁰

§ 1555. Statutory Precautions do not Exclude the Common-law Obligation of Diligence and Care.⁶¹

§ 1556. Construction of Statutes Requiring Signals to be Given at Crossings.⁶²

§ 1557. Omission to give Statutory Signals is Negligence or Evidence of Negligence.⁶³

Del. —; s. c. 57 Atl. Rep. 529; Cleveland &c. R. Co. v. Baker, 106 Ill. App. 500; Illinois Cent. R. Co. v. Scheffner, 106 Ill. App. 344; Nichols v. Baltimore &c. R. Co., 33 Ind. App. 229; s. c. 70 N. E. Rep. 183; 71 N. E. Rep. 170; New Orleans &c. R. Co. v. Brooks, 85 Miss. 269; s. c. 38 South. Rep. 40; Gosa v. Southern R., 67 S. C. 347; s. c. 45 S. E. Rep. 810.

⁵⁷ Cleveland &c. R. Co. v. Miles, 162 Ind. 646; s. c. 70 N. E. Rep. 985.

⁵⁸ Cleveland &c. R. Co. v. Carey, 33 Ind. App. 275; s. c. 71 N. E. Rep. 244.

⁵⁹ Cox v. Chicago &c. R. Co., 92 Ill. App. 15.

⁶⁰ Louisville &c. R. Co. v. Hower-ton, 115 Ky. 89; s. c. 72 S. W. Rep. 760; 24 Ky. L. Rep. 1905.

⁶¹ See generally in support of principle: Reed v. Queen Anne's R. Co., — Del. —; s. c. 57 Atl. Rep. 529; Kinyon v. Chicago &c. Ry. Co., 118 Iowa 349; s. c. 92 N. W. Rep. 40; Ortolano v. Morgan's &c. R. &c. Co., 109 La. 902; s. c. 33 South. Rep. 914; Missouri &c. R. Co. v. Oslin, 26 Tex. Civ. App. 370; s. c. 63 S. W. Rep. 1039.

⁶² The Tennessee act requiring railroad companies to keep the engineer, fireman or some other person on a lookout ahead, and when any person appears on the road to sound the alarm whistle, and to use every possible means to stop the train, and making the railroad company liable in damages for a fail-

ure to observe these precautions, does not apply where a compliance with the act is impossible, as where the engines or cars are being switched and the cars are necessarily pushed instead of being pulled by the engine: Towles v. Southern R. Co., 103 Fed. Rep. 405. The Mississippi statute making it unlawful to back cars or engines into passenger stations at a speed exceeding three miles an hour, and requiring every such train or engine to be preceded by an employé to give warning, and making the railroad company liable for injuries inflicted while violating the provision, is held to be a regulation intended to preserve human life and limb, which is to be given full scope in accordance with its meaning and not to be restricted by a strained interpretation by the courts: Yazoo &c. R. Co. v. Metcalf, 84 Miss. 242; s. c. 36 South. Rep. 259. An ordinance requiring a locomotive bell to be rung continuously while the engine is in motion within the corporate limits applies to locomotives moved through railroad yards over which the streets have been closed by the city: Gulf &c. R. Co. v. Melville, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 863.

⁶³ That omission to give statutory signals is negligence *per se*, see Greenawaldt v. Lake Shore &c. R. Co., 165 Ind. 219; s. c. 73 N. E. Rep. 910; Baltimore &c. R. Co. v. Peterson, 156 Ind. 364; s. c. 59 N. E. Rep.

§ 1558. **Failure to give Signal must be Proximate Cause of the Injury.**⁶⁴—The sole object of the requirement to signal on the approach to a crossing is to acquaint travellers with notice of the near approach of trains. If, however, the traveller has this knowledge by sight or hearing, or otherwise, the entire purpose of the signal is accomplished, and he cannot claim that the failure to signal was the proximate cause of his injury.⁶⁵ The failure to sound a signal will generally be held the proximate cause of a collision with a traveller where the view of the crossing is obscured, and a traveller having looked and listened, and failed to note the approach of a train, drives onto the track in time to encounter an approaching train which neglected to signal.⁶⁶ The failure to sound a signal was held to have been the proximate cause of the injury in a case where the sudden and unexpected approach of the car without warning and at unlawful speed so frightened

1044; Louisville &c. R. Co. v. Cooper, 65 S. W. Rep. 795; s. c. 23 Ky. L. Rep. 1658; Sights v. Louisville &c. R. Co., 117 Ky. 436; s. c. 78 S. W. Rep. 172, 25 Ky. L. Rep. 1548; Roberts v. Wabash R. Co., 113 Mo. App. 6; s. c. 87 S. W. Rep. 601; Bowen v. Southern R. Co., 58 S. C. 222; s. c. 36 S. E. Rep. 590; Burns v. Southern R. Co., 65 S. C. 229; s. c. 43 S. E. Rep. 679; Davis v. Atlanta &c. R. Co., 63 S. C. 370; s. c. 41 S. E. Rep. 468, 892; Hutto v. South Bound R. Co., 61 S. C. 495; s. c. 39 S. E. Rep. 710; Mercer v. Southern R., 66 S. C. 246; s. c. 44 S. E. Rep. 750; McKerley v. Red River &c. R. Co. (Tex. Civ. App.), 85 S. W. Rep. 499. That the failure to sound signals is evidence of negligence, see: Mobile &c. R. Co. v. Dugan, 103 Ill. App. 371; Tucker v. Boston &c. R., —N. H. —; s. c. 59 Atl. Rep. 943; Butts v. Atlantic &c. R. Co., 133 N. C. 82; s. c. 45 S. E. Rep. 472.

⁶⁴See generally in support of principle: Illinois Cent. R. Co. v. Klein, 95 Ill. App. 220; Killian v. Chicago &c. R. Co., 86 Mo. App. 473; Geist v. Missouri Pac. R. Co., 62 Neb. 309; s. c. 87 N. W. Rep. 43 (child); Edwards v. Atlantic Coast Line R. Co., 129 N. C. 78; s. c. 39 S. E. Rep. 730; Missouri &c. R. Co. v. Jackson, —Tex. Civ. App. —; s. c. 88 S. W. Rep. 406.

⁶⁵Lambert v. Southern Pac. R. Co., 148 Cal. 231; s. c. 79 Pac. Rep. 873; Pittsburgh &c. R. Co. v. West, 34 Ind. App. 95; s. c. 69 N. E. Rep. 1017; Carpenter v. Chicago &c. R.

Co., 126 Iowa 94; s. c. 101 N. W. Rep. 758; Atchison &c. R. Co. v. Judah, 65 Kan. 474; s. c. 70 Pac. Rep. 346; Hutchinson v. Missouri Pac. R. Co., 161 Mo. 246; s. c. 61 S. W. Rep. 635, 852; McAuliffe v. New York Cent. &c. R. Co., 88 App. Div. (N. Y.) 356; s. c. 84 N. Y. Supp. 607; Gosa v. Southern R., 67 S. C. 347; s. c. 45 S. E. Rep. 810; Gulf &c. R. Co. v. Abendroth (Tex. Civ. App.), 55 S. W. Rep. 1122; Brammer v. Norfolk &c. R. Co., 103 Va. 50; s. c. 51 S. E. Rep. 211 (train plainly visible to traveller if he had looked). Where the signals were not given the railroad cannot escape liability to a person injured because of such failure, on the ground that the latter could have heard the noise of the approaching train in time to enable him to avoid the injury, if, in fact, he did not hear it in time to avoid injury: Trinity &c. R. Co. v. Simpson, —Tex. Civ. App. —; s. c. 86 S. W. Rep. 1034.

⁶⁶Cleveland &c. R. Co. v. Carey, 33 Ind. App. 275; s. c. 71 N. E. Rep. 244; Wood v. New York &c. R. Co., 83 App. Div. (N. Y.) 604; s. c. 82 N. Y. Supp. 160; s. c. aff'd, 179 N. Y. 557; 71 N. E. Rep. 1142; Browne v. New York &c. R. Co., 87 App. Div. (N. Y.) 206; s. c. 83 N. Y. Supp. 1028; 13 N. Y. Ann. Cas. 409; s. c. aff'd, 179 N. Y. 582; 72 N. E. Rep. 1140; Houston &c. R. Co. v. Byrd (Tex. Civ. App.), 61 S. W. Rep. 147.

the traveller as to produce unconsciousness and loss of control over his actions which caused him to fall on the ground toward the track and suffer injury.⁶⁷ The failure to signal the approach of a train to a crossing was held not the proximate cause of injuries in these instances:—Where the driver of a wagon drove across one of numerous tracks crossing the highway, and stopped to look and listen for an approaching train, and an engine on one of the tracks without signal moved out in front of the plaintiff's horse, stopped and backed, and the horse took fright at the escaping steam and ran away; here the failure to give signal was clearly not the proximate cause of the injury;⁶⁸ where a child came on to the track at a crossing, and with time to clear the crossing, saw the train approaching without signal and walked toward it along the track and was injured;⁶⁹ where a traveller stepped on a crossing at a depot with knowledge that a train was standing at the depot and stopped only long enough to let passengers off and on, and heard the noise of the train, and notwithstanding this knowledge and warning, stepped on the track and was struck by the train as it pulled out.⁷⁰ Whether the failure to sound the signals was the proximate cause of the injury is generally a question of fact for the determination of the jury.⁷¹

§ 1560. **For whose Protection Statutory Signals Intended.**—The requirement that signals be sounded by trains on the approach to highways is for the benefit of travellers on the highway,⁷² though having no intention to cross,⁷³ but not for the benefit of trespassers or licensees on the railroad company's right of way.⁷⁴ Neither is the requirement intended for the benefit of persons travelling on roads running parallel with the railroad track, so as to make the railroad company liable for

⁶⁷ *Morey v. Lake Superior Terminal &c. R. Co.*, 125 Wis. 148; s. c. 103 N. W. Rep. 271.

⁶⁸ *Killian v. Chicago &c. R. Co.*, 86 Mo. App. 473.

⁶⁹ *Nashville &c. R. Co. v. Harris*, 142 Ala. 249; s. c. 37 South. Rep. 794.

⁷⁰ *Boutell v. Michigan Cent. R. Co.*, 133 Mich. 486; s. c. 95 N. W. Rep. 568; 10 Det. Leg. N. 284.

⁷¹ *Hutto v. South Bound R. Co.*, 61 S. C. 495; 39 S. E. Rep. 710.

⁷² *Chicago &c. Co. v. Pollock*, 93 Ill. App. 483; *St. Louis &c. R. Co. v. Matthews*, 34 Tex. Civ. App. 302; s. c. 79 S. W. Rep. 71; *Lampman v. New York Cent. &c. R. Co.*, 72 App. Div. (N. Y.) 363; s. c. 76 N. Y. Supp. 492.

⁷³ *St. Louis &c. R. Co. v. Kilman*,

— *Tex. Civ. App.* —; s. c. 86 S. W. Rep. 1050.

⁷⁴ *Smith v. Chicago &c. R. Co.*, 99 Ill. App. 296; *Batchelder v. Boston &c. R.*, 72 N. H. 528; s. c. 57 Atl. Rep. 926; *Cleveland &c. R. Co. v. Workman*, 66 Ohio St. 509; s. c. 64 N. E. Rep. 582; *Hortenstine v. Virginia-Carolina R. Co.*, 102 Va. 914; s. c. 47 S. E. Rep. 996; *Texas &c. R. Co. v. Shoemaker*, 98 Tex. 451; s. c. 84 S. W. Rep. 1049; *rev'g* s. c. 81 S. W. Rep. 1019. But see *Boggero v. Southern R. Co.*, 64 S. C. 104; s. c. 41 S. E. Rep. 819; *Missouri &c. R. Co. v. Taff*, 31 Tex. Civ. App. 657; s. c. 74 S. W. Rep. 89. But see *Texas &c. R. Co. v. Short* (Tex. Civ. App.), 58 S. W. Rep. 56 (failure to give may be shown on question of negligent operation of train).

injuries caused by a horse becoming frightened at the approach of a train on a nearby railroad track without giving a statutory signal for a crossing.⁷⁵ A statute making a railroad company liable "for every injury" inflicted while violating the law requiring signals, and allowing "the party injured" to recover full damages, has been held not restricted to particular classes of persons, but to authorize a recovery by such persons as mere licensees.⁷⁶ On the question whether the failure to give signals at a public crossing is negligence as to a party using a nearby private crossing within hearing of signals if they had been given, the decisions are not harmonious. The courts of Iowa⁷⁷ and Kentucky hold that he is entitled to the signal,⁷⁸ while the opposite conclusion is reached in Maryland.⁷⁹

§ 1564. **Necessity of Giving Signals at Farm or Private Crossings.**⁸⁰—Although generally a railroad company is not required to signal the approach of trains to private crossings, yet the circumstances may be such as to require it, as where the crossing is a dangerous one, and has been used for a long time not only by the adjoining land-owner, but by the public, and it has been the habit of the railroad company to give these signals.⁸¹

§ 1566. **What Constitutes a Public Road or Street with Reference to the Statutory Duty of Giving Signals.**—The term will include a crossing established by use for the statutory time,⁸² and this particularly where the railroad company has recognized its existence⁸³ and repaired it, though some of the essentials of a dedication are lacking.⁸⁴ So the phrase "in a public highway," within the meaning of a

⁷⁵ *New York & C. R. Co. v. Martin*, 35 Ind. App. 669; s. c. 72 N. E. Rep. 654.

⁷⁶ *Yazoo & C. R. Co. v. Metcalf*, 84 Miss. 242; s. c. 36 South. Rep. 259.

⁷⁷ *Defrieze v. Illinois Cent. R. Co.*, — Iowa —; s. c. 94 N. W. Rep. 505 (is negligence).

⁷⁸ *Wilson v. Chesapeake & C. R. Co.*, 86 S. W. Rep. 690; s. c. 27 Ky. L. Rep. 778 (is negligence).

⁷⁹ *Philadelphia & C. R. Co. v. Holden*, 93 Md. 417; s. c. 49 Atl. Rep. 625 (not negligence).

⁸⁰ That a railroad company is not generally under the obligation to signal the approach of trains to farm or private crossings, see: *Defrieze v. Illinois Cent. R. Co.*, — Iowa —; s. c. 94 N. W. Rep. 505; *Nicholas v. Chicago & C. R. Co.*, 125 Iowa 236; 100 N. W. Rep. 1115; *Early v. Louisville & C. R. Co.*, 115 Ky. 13; s. c. 72 S. W. Rep. 348; 24 Ky. L. Rep. 1807; *Davis v. Chesapeake*

& C. R. Co., 116 Ky. 144; s. c. 75 S. W. Rep. 275; 25 Ky. L. Rep. 342; *Lyons v. Illinois Cent. R. Co.*, 59 S. W. Rep. 507; s. c. 22 Ky. L. Rep. 1032 (pathway).

⁸¹ *Louisville & C. R. Co. v. Bodine*, 109 Ky. 509; s. c. 59 S. W. Rep. 740; 23 Ky. L. Rep. 147; *Connell v. Chesapeake & C. R. Co. (Ky.)*, 58 S. W. Rep. 374; s. c. 22 Ky. L. Rep. 501. See also, *Ayers v. Wabash R. Co.*, 190 Mo. 228; s. c. 88 S. W. Rep. 608.

⁸² *Kirby v. Southern R.*, 63 S. C. 494; s. c. 41 S. E. Rep. 765 (twenty years).

⁸³ *Galveston & C. R. Co. v. Levy*, 35 Tex. Civ. App. 107; s. c. 79 S. W. Rep. 879; *Ray v. Chesapeake & C. R. Co.*, 57 W. Va. 333; s. c. 50 S. E. Rep. 413 (railroad had erected whistling post).

⁸⁴ *Illinois Cent. R. Co. v. Klein*, 95 Ill. App. 220.

statute, using the expression in this connection, has been held to include a much used and travelled, though not formally and legally established, highway.⁸⁵ An open place travelled for years by the public in going from the streets of a town to a depot has been held "a travelled place" within a statute requiring railroad companies to sound signals at such places before crossing.⁸⁶

§ 1567. **Duty to give Signals at Overhead Crossings.**—Generally speaking no absolute duty rests on a railroad company to warn travellers of the approach of a train to an overhead crossing,⁸⁷ unless the place is dangerous⁸⁸ or the operatives of the train observe a traveller in a dangerous position.⁸⁹

§ 1568. **Duty to Give Signal before Starting Train at or Near Crossings.**⁹⁰

§ 1571. **Duty to give Warning Signals where Trains are Backing.**—Independently of statute or ordinance, it is a grave form of negligence to back railroad cars over a street in a city without either ringing the bell or blowing the whistle;⁹¹ and persons using crossings are

⁸⁵ *Cleveland &c. R. Co. v. Baker*, 106 Ill. App. 500.

⁸⁶ *Risinger v. Southern R. Co.*, 59 S. C. 429; s. c. 38 S. E. Rep. 1.

⁸⁷ *Cooper v. Charleston &c. R. Co.*, 65 S. C. 214; s. c. 43 S. E. Rep. 682; *Louisville &c. R. Co. v. Sawyer*, 114 Tenn. 84; s. c. 86 S. W. Rep. 386; 69 L. R. A. 662.

⁸⁸ *Louisville &c. R. Co. v. Sawyer*, 114 Tenn. 84; s. c. 86 S. W. Rep. 386; 69 L. R. A. 662; *Chesapeake &c. R. Co. v. Ogles (Ky.)*, 73 S. W. Rep. 751; s. c. 24 Ky. L. Rep. 2160.

⁸⁹ *Skinner v. New York &c. R. Co.*, 64 N. Y. Supp. 325.

⁹⁰ *Minot v. Boston &c. R. R.*, 73 N. H. 317; s. c. 61 Atl. Rep. 509 (negligence to move standing train at crossing without warning to travellers). A statute requiring the bell on an engine to be rung and the whistle blown at a distance of at least eighty rods from a crossing, is inapplicable to a train backing from a switch track not eighty rods from the crossing: *Texas &c. R. Co. v. Berry*, 32 Tex. Civ. App. 259; s. c. 72 S. W. Rep. 423. A statute providing that the bell of an engine shall be rung or the whistle sounded at the distance of 500 yards from any public crossing, and be kept ringing until the engine has

crossed, and, if the cars be at a standstill, such bell shall be rung for at least thirty seconds before the engine shall be moved, and shall be kept ringing until it shall have crossed the highway, applies to a train of cars standing across a highway, the engine of which has already crossed, not to return, and to require the signals to be given for thirty seconds before such train is moved: *Brown v. Southern R.*, 65 S. C. 260; 43 S. E. Rep. 794. That a person crossing tracks near which trains are standing has a right to rely on the operatives of the train performing their duty and giving warning before the train undertakes to cross a public street, see: *Toledo &c. R. Co. v. Hammett*, 115 Ill. App. 268.

⁹¹ *St. Louis &c. R. Co. v. Johnson*, — Ark. —; s. c. 86 S. W. Rep. 282; *Chicago &c. R. Co. v. McDonnell*, 194 Ill. 82; s. c. 62 N. E. Rep. 308; aff'g s. c. 91 Ill. App. 488 (question for jury whether signals were given where evidence conflicting); *Reed v. St. Louis &c. R. Co.*, 107 Mo. App. 238; s. c. 80 S. W. Rep. 919; *Chicago &c. R. Co. v. Russell*, — Neb. —; s. c. 100 N. W. Rep. 156 (question for jury); *Berkery v. Erie R. Co.*, 55 App. Div. (N. Y.) 489; s. c. 67 N. Y. Supp. 189; *Brad-*

not bound to anticipate that this will be done.⁹² In cases where because of the location of the engineer backing a train in the direction of the crossing, the signals sounded by him cannot be heard at the crossing, it is the plain duty of the operatives to give warning of the train's approach in some other effective manner.⁹³

§ 1572. Duty to give Warning Signals in Making the "Flying Switch."⁹⁴

§ 1573. Greater Duty to give Signals where View Obstructed.⁹⁵

§ 1574. Nature of Warnings which are to be Given—Bell, Whistle, or Both.—An ordinance, making it the duty of the engineer to ring the bell continually and sound the whistle at every street crossing within the city, requires the engine bell to be rung continually while the engine is in motion within the city limits.⁹⁶

§ 1575. Point at which Signals are to be given—At what Distance from Crossing.⁹⁷—Where the law requires signals to be given a certain distance before reaching a street crossing, and the streets crossed by the railroad running through a city are nearer together than

ley v. Ohio River &c. R. Co., 126 N. C. 735; s. c. 36 S. E. Rep. 181. A railroad company thus negligently backing a train can escape liability for failure to sound the signal only where the traveller was guilty of contributory negligence: Meeks v. Ohio River R. Co., 52 W. Va. 99; s. c. 43 S. E. Rep. 118.

⁹² Meeks v. Ohio River R. Co., 52 W. Va. 99; s. c. 43 S. E. Rep. 118.

⁹³ Cleveland &c. R. Co. v. Carey, 33 Ind. App. 275; s. c. 71 N. E. Rep. 244.

⁹⁴ That it is negligence to send cars across street in populous district without warning, see: Chicago Terminal Transfer R. Co. v. Walton, 165 Ind. 642; s. c. 74 N. E. Rep. 988 (kicked cars); Central Texas &c. R. Co. v. Gibson, 35 Tex. Civ. App. 66; s. c. 79 S. W. Rep. 351.

⁹⁵ See generally in illustration of the principle: Northern Pac. R. Co. v. Spike, 121 Fed. Rep. 44; s. c. 57 C. C. A. 384; McSorley v. New York Cent. &c. R. Co., 60 App. Div. (N. Y.) 267; s. c. 70 N. Y. Supp. 10.

⁹⁶ Galveston &c. R. Co. v. Levy, 35 Tex. Civ. App. 107; s. c. 79 S. W. Rep. 879.

⁹⁷ An instruction that a failure to blow the whistle and ring the bell eighty rods from a crossing "as pro-

vided by law," is negligence, has been held not open to the construction that it requires the jury to find that these acts were done at the exact distance of eighty rods from the crossing: Galveston &c. R. Co. v. Tirres, 33 Tex. Civ. App. 362; s. c. 76 S. W. Rep. 806. The Missouri statute requiring the ringing of the bell of a locomotive and the sounding of the whistle at least eighty rods from a railroad crossing makes it the duty of the engineer to employ both methods where his train starts to back over a crossing from a point within the eighty-rod limit: Spiller v. St. Louis &c. R. Co., 112 Mo. App. 491; s. c. 87 S. W. Rep. 43. The Texas statute, requiring the whistle to be blown and the bell rung at a distance of at least eighty rods from a crossing, and that these signals shall be continued until the crossing is passed, requires the ringing of the bell, but not the blowing of the whistle, where the train starts at a distance less than eighty rods from the crossing: Ft. Worth &c. R. Co. v. Greer, 32 Tex. Civ. App. 606; s. c. 75 S. W. Rep. 552; Gulf &c. R. Co. v. Hall, 34 Tex. Civ. App. 535; s. c. 80 S. W. Rep. 133.

the distance fixed by the statute, then it becomes the duty of the operatives of the engine to signal continually until all such streets are passed.⁹⁸

§ 1577. What will not Excuse the Failure to Perform the Statutory Duty of Giving Signals.—The failure of the employés in charge of a train to give signals of its approach to a highway crossing is not excused by showing that the train itself made sufficient noise to have warned the injured party of his danger, unless it is also proved that he actually heard the noise in time to escape the injury;⁹⁹ nor is it a sufficient excuse that an employé, on discovering the traveller's peril, signaled the engineer and the train was immediately stopped.¹⁰⁰

§ 1578. Liability for Frightening Traveller's Horses by Giving the Statutory Signals and by Failing to Give Them.—In a case where injuries were the result of the fright of horses at an approaching train that gave no signal, and the driver testified that the engine was in plain view and that the sounding of the signals might have added to the fright of the horse, it was held that the company was not to be charged with negligence in failing to sound the signals.¹⁰¹

§ 1579. Effect of the Failure to Give Signals upon the Question of Contributory Negligence.—Though the law imposes upon a railroad company the duty to give signals at a crossing, the corresponding duty is imposed on the traveller to use his senses to ascertain whether a train is approaching. The mere omission to sound a signal at a public crossing is not of itself sufficient to authorize a recovery, if the party, notwithstanding the omission of the signal, by the exercise of ordinary care might have avoided the accident.¹⁰² The doctrine of discovered peril, which permits a recovery by a traveller who negligently places himself in a dangerous position, if the defendant, after discovering his perilous position, fails to exercise reasonable care to prevent the

⁹⁸ *Golinvaux v. Burlington & C. R. Co.*, 125 Iowa 625; s. c. 101 N. W. Rep. 465; *Mitchell v. Union Terminal R. Co.*, 122 Iowa 237; s. c. 97 N. W. Rep. 1112.

⁹⁹ *Missouri & C. R. Co. v. Taff*, 31 Tex. Civ. App. 657; s. c. 74 S. W. Rep. 89.

¹⁰⁰ *Cleveland & C. R. Co. v. Carey*, 33 Ind. App. 275; s. c. 71 N. E. Rep. 244.

¹⁰¹ *Fares v. Rio Grande Western R. Co.*, 28 Utah 132; s. c. 77 Pac. Rep. 230.

¹⁰² *Central of Georgia R. Co. v. Forshee*, 125 Ala. 199; s. c. 27 South. Rep. 1006; *Keesey v. Lake Erie &*

R. Co., 104 Ill. App. 619; *Wabash R. Co. v. Keister*, 163 Ind. 609; s. c. 67 N. E. Rep. 521; *Chicago & C. R. Co. v. Reed*, 29 Ind. App. 94; s. c. 63 N. E. Rep. 878; *Cleveland & C. R. Co. v. Carey*, 33 Ind. App. 275; s. c. 71 N. E. Rep. 244; *Evansville & C. R. Co. v. Clements*, 32 Ind. App. 659; s. c. 70 N. E. Rep. 554; *Missouri & C. R. Co. v. Bussey*, 66 Kan. 735; s. c. 71 Pac. Rep. 261; *Illinois Cent. R. Co. v. McLeod*, 78 Miss. 334; s. c. 29 South. 76; *Norfolk & C. R. Co. v. Great China Tea Co.*, 26 Ohio Cir. Ct. R. 547; *Gosa v. Southern R.*, 67 S. C. 347; s. c. 45 S. E. Rep. 810.

accident, applies here, and where employ es see a person going into a place of danger at a crossing, and by warning may prevent the accident, the railroad company will be liable though the plaintiff was negligent.¹⁰³ So, under the rule in Georgia, a traveller will not necessarily be denied a recovery if, after it is apparent that the engineer is disobeying a rule requiring signals by trains approaching public crossings, he exercises ordinary care in endeavoring to escape the consequences of the railroad company's negligence, though he may not have observed the amount of diligence exercised under like circumstances by ordinarily prudent persons using the highway.¹⁰⁴ In Tennessee it is held that a breach of the statute gives a right of action without regard to whether its non-observance was the proximate cause of the accident.^{104a}

  1586. Whether Negligence in the Omission of Signals is a Question of Law or of Fact.¹⁰⁵

  1587. Evidence: Presumptions—Burden of Proof.—Where the negligence pleaded consists of a failure to give warning of the approach of the train by signals sufficient to attract the attention of a person exercising ordinary care, the burden is not on the defendant in proving contributory negligence to show that such warnings were given; it is the duty of the plaintiff to show that they were not given before he can recover.¹⁰⁶ In Massachusetts a defendant in an action for wrongful death, who relies on the gross negligence of the person killed as a defense, has the burden of proving such negligence, and the plaintiff will make out his case by showing that the signals were not given, and that his decedent was killed by the train at a crossing.¹⁰⁷ Where the issue is whether the proper signals were given, the fact that the railroad company had at other times given, or omitted to give, the signals, is of little or no probative value, and evidence of this character should not be received.¹⁰⁸ A rule of a railroad company requiring a bell to be rung for a specified distance before reaching a

¹⁰³ *Central Texas &c. R. Co. v. Gibson*, 35 Tex. Civ. App. 66; s. c. 79 S. W. Rep. 351.

¹⁰⁴ *Macon &c. R. Co. v. McLendon*, 119 Ga. 297; s. c. 46 S. E. Rep. 106.

^{104a} *Illinois Cent. R. Co. v. Davis*, 104 Tenn. 442; s. c. 58 S. W. Rep. 296.

¹⁰⁵ Whether signals were given is a question for the jury where the evidence on that issue is conflicting: *Southern R. Co. v. Carroll*, 138 Fed. Rep. 638; *Grenell v. Michigan Cent. R. Co.*, 124 Mich. 141; s. c. 82 N. W. Rep. 843; *Turrell v.*

Erie R. Co., 63 App. Div. (N. Y.) 619; s. c. 71 N. Y. Supp. 502; *Kuntz v. New York &c. R. Co.*, 206 Pa. 162; s. c. 55 Atl. Rep. 915.

¹⁰⁶ *Gulf &c. R. Co. v. Hall*, 34 Tex. Civ. App. 535; s. c. 80 S. W. Rep. 133.

¹⁰⁷ *McDonald v. New York &c. R. Co.*, 186 Mass. 474; s. c. 72 N. E. Rep. 55.

¹⁰⁸ *Chicago &c. R. Co. v. Downey*, 85 Ill. App. 175; *Stewart v. Galveston &c. R. Co.*, 34 Tex. Civ. App. 370; s. c. 78 S. W. Rep. 979.

crossing is admissible on the question whether such precaution was regarded as reasonably necessary, and whether the failure to obey the rule was negligence on the part of the company.¹⁰⁹ The incompetency of evidence of the failure to ring a bell on the ground that the plaintiff had failed to declare on this omission as negligence does not of necessity warrant its exclusion when offered for any other proper purpose in the case.¹¹⁰ On the question as to the extent of the use of a crossing evidence is admissible as to how many persons were in the habit of using such crossing.¹¹¹ That the signals were actually sounded cannot be proved by testimony of the engineer and fireman that it was their habit or custom to sound the signals at the place where the accident occurred, and such evidence should be refused.¹¹²

§ 1588. Instructions on the Duty of Giving Signals.¹¹³

¹⁰⁹ *Hecker v. Oregon R. Co.*, 40 Or. 6; s. c. 66 Pac. Rep. 270. A rule of the railroad company requiring the engine bell to be rung when an engine is about to move was admissible for the purpose of showing a recognition of the necessity of this precaution: *Minot v. Boston & c. R. Co.*, 73 N. H. 317; s. c. 61 Atl. Rep. 509.

¹¹⁰ *Illinois Cent. R. Co. v. Aland*, 94 Ill. App. 428; s. c. aff'd, 192 Ill. 37; 61 N. E. Rep. 450.

¹¹¹ *Christensen v. Oregon Short Line R. Co.*, 29 Utah 192; s. c. 80 Pac. Rep. 746.

¹¹² *Texas & c. R. Co. v. Frank*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 333.

¹¹³ An instruction on the right to recover if there was a failure to sound the statutory signals, was held authorized by the evidence though witnesses, testifying that they did not hear the bell, admitted that they did not know definitely whether it was rung or not, and defendant's witnesses testified that the bell was rung automatically and had been ringing for more than a mile before the crossing was reached: *Chicago & c. R. Co. v. Pulliam*, 208 Ill. 456; s. c. 70 N. E. Rep. 460. An instruction that the plaintiff is entitled to recover for injuries by reason of the defendant's negligent failure to give signals if free from fault is proper, where the same instruction or other instructions in the charge explained what would constitute fault on the part of the plaintiff: *Esler*

v. Wabash R. Co., 109 Mo. App. 580; s. c. 83 S. W. Rep. 73. An instruction as to the adequacy of the bell when ringing to give notice of the approach of the train is warranted by the testimony of a witness that he heard the bell, but that it was ringing very low: *Weller v. Chicago & c. R. Co.*, 164 Mo. 180; s. c. 64 S. W. Rep. 141. Under a statute making it the duty of the railroad company to have locomotive bells rung at a distance of eighty rods from a crossing, and kept ringing until the crossing is passed, an instruction is erroneous which merely charges that a railroad company was negligent if it failed to give warning signals when persons of ordinary prudence would have given them. The duty under the statute is mandatory: *Hawkins v. Missouri & c. R. Co.*, 36 Tex. Civ. App. 633; s. c. 83 S. W. Rep. 52. Where the only issue on the question of signals is as to whether they were given at all or not, the jury should not be charged on the question of the proximity to the crossing where the signals should have been given: *Missouri & c. R. Co. v. Melugin* (Tex. Civ. App.), 63 S. W. Rep. 338. In an action for frightening a team by unnecessarily sounding a locomotive whistle at a crossing, an instruction that "the law does not require that the whistle shall be blown more than once or blown all the time from where it is first sounded until the crossing is passed" was held not open to the objection that it led the jury to believe

§ 1592. **Duty to Maintain a Lookout upon the Train.**—Here the degree of care imposed on the operatives is that known as ordinary care.¹¹⁴ Whatever a locomotive engineer or fireman would see while in the proper discharge of their respective duties they are chargeable with having seen,¹¹⁵ but the failure of the fireman to maintain a lookout while engaged in his duties about the engine will not be charged to the railroad company as negligence.¹¹⁶

§ 1593. **Statutes and Ordinances Enforcing this Duty.**¹¹⁷

§ 1594. **Duty to Maintain a Lookout upon Backing Trains.**—It is negligence of the plainest and most indefensible character to back a railroad train over a street¹¹⁸ or into depot grounds without signals

that one blast of the whistle was all that was required and that other blasts were excessive, particularly where this language was qualified by a statement that the railroad company may have such whistles blown for any purpose in the furtherance of its business and that it was not negligence so to do, unless it was reasonably apparent to the engineer that a team would be frightened if the whistle were blown: *Houston & C. R. Co. v. Blan* (Tex. Civ. App.), 62 S. W. Rep. 552.

¹¹⁴ *Missouri & C. R. Co. v. Matherly*, — Tex. Civ. App. —; s. c. 81 S. W. Rep. 589; *McGrew v. St. Louis & C. R. Co.*, 32 Tex. Civ. App. 265; s. c. 74 S. W. Rep. 816; *Louisville & C. R. Co. v. Dick*, 78 S. W. Rep. 914; s. c. 25 Ky. L. Rep. 1831.

¹¹⁵ *New York & C. R. Co. v. Kistler*, 66 Ohio St. 326; s. c. 64 N. E. Rep. 130; *Bradley v. Ohio River & C. R. Co.*, 126 N. C. 735; s. c. 36 S. E. Rep. 181. In a case where the engineer failed to see the person on the crossing on account of a curve which caused the smokestack to obstruct his view, the testimony of the engineer that he could have seen the traveller if he had made an effort to obtain a view of the track and that he failed to make the effort, and did not see him, was held competent as showing that the engineer had failed in his duty to use ordinary care to observe such traveller: *Arrowood v. South Carolina & C. R. Co.*, 126 N. C. 629; s. c. 36 S. E. Rep. 151.

¹¹⁶ *Brammer v. Norfolk & C. R. Co.*, 104 Va. 50; s. c. 51 S. E. Rep. 211; *O'Brien v. Wisconsin Cent. R. Co.*, 119 Wis. 7; s. c. 96 N. W. Rep. 424.

¹¹⁷ Under the Tennessee statute, requiring every railroad company to keep some person on its locomotive on a lookout ahead, and rendering such railroad absolutely liable for injuries occasioned by a failure to comply with the law in this respect, the defense of contributory negligence may not be urged: *Southern R. Co. v. Simpson*, 131 Fed. Rep. 705; s. c. 65 C. C. A. 563. This act is held by the Federal Court not to render a railroad company absolutely liable for a collision occurring in the daytime while the engine is being backed with the tender in front, as for example, if the engineer is actually on the lookout ahead of the backing engine and the evidence shows that he saw the traveller at a crossing and immediately used every endeavor to avoid a collision: *Southern R. Co. v. Simpson*, 131 Fed. Rep. 705; s. c. 65 C. C. A. 563. An ordinance providing that no train should be moved within the city limits unless manned with experienced brakemen, who should be so stationed as to see the danger signals and hear the signals from the engine, contemplated that they should be so located that they could not only see and hear danger signals, but could give them to those whose duty it was to receive and obey them: *Harper v. St. Louis Merchants' Bridge Terminal Co.*, 187 Mo. 575; s. c. 86 S. W. Rep. 99.

¹¹⁸ *Sullivan v. New York & C. R. Co.*, 73 Conn. 203; s. c. 47 Atl. Rep. 131 (engine backed over crossing on wrong track at high rate of speed without light or lookout); *Illinois Cent. R. Co. v. Jernigan*,

or lookout,¹¹⁹ and this is particularly the case where the engine and cars are backed toward and upon a crossing while another train is passing.¹²⁰ But it is essential to liability of the railroad company that the failure to maintain the lookout should have been the proximate cause of the injury.¹²¹ Ordinances requiring lookouts on backing trains are within the police power of municipalities.¹²² A city ordinance, which forbids running trains backward without signals and lookouts, is violated by backing one section of a train, without warning or lookout, across a street in order to couple with another section.¹²³

§ 1596. Failure to Keep a Lookout in Case of a Traveller who is Himself Negligent.¹²⁴

§ 1598. What after Discovering the Perilous Situation of the Traveller.¹²⁵

§ 1601. Right to Assume that the Traveller will Look Out for Himself.¹²⁶

101 Ill. App. 1; s. c. aff'd, 198 Ill. 200; 65 N. E. Rep. 88; Baltimore & C. R. Co. v. Reynolds, 33 Ind. App. 219; s. c. 71 N. E. Rep. 250; Louisville & C. R. Co. v. Price, 76 S. W. Rep. 836; s. c. 25 Ky. L. Rep. 1033; Smith v. Pere Marquette R. Co., 136 Mich. 224; s. c. 98 N. W. Rep. 1022; 10 Det. Leg. N. 1033; Bradley v. Ohio River & C. R. Co., 126 N. C. 735; s. c. 36 S. E. Rep. 181.

¹¹⁹ Willis v. Vicksburg & C. R., 115 La. 53; s. c. 38 South. Rep. 892.

¹²⁰ Wabash R. Co. v. Billings, 105 Ill. App. 111; Illinois Cent. R. Co. v. Hays, 84 S. W. Rep. 338; s. c. 27 Ky. L. Rep. 91.

¹²¹ Missouri Pac. R. Co. v. Jaffi, 67 Kan. 81; s. c. 72 Pac. Rep. 535.

¹²² Baltimore & C. R. Co. v. Peterson, 156 Ind. 364; s. c. 59 N. E. Rep. 1044.

¹²³ Pittsburgh & C. R. Co. v. McNeil, 34 Ind. App. 310; s. c. 66 N. E. Rep. 777.

¹²⁴ It is the rule in Louisiana that a company will be liable for injuries caused by a failure to maintain a lookout though the traveller himself may not have been free from negligence: Lampkin v. McCormick, 105 La. 418; s. c. 29 South. Rep. 952.

¹²⁵ Edwards v. Chicago & C. R. Co., 94 Mo. App. 36; s. c. 67 S. W. Rep. 950 (evidence held sufficient as tending to show that the engineer

was negligent in failing to take proper steps to stop the train after discovering the traveller's peril). In one case the railroad company was absolved from liability for negligence in running onto the traveller on the track where the traveller had ample warning of the approach of the train, and could have gone safely over had it not been for one of his horses balking and backing, and it was further shown that the engineer, as soon as he discovered the dangerous situation of the traveller, blew the alarm whistle, and applied the emergency brake, but could not stop the train because of its speed: Glockner v. Wabash R. Co., 95 Ill. App. 550.

¹²⁶ In support of the proposition that an engineer seeing a person approaching a track may assume that such person will keep away from the track until the train passes, see: Southern R. Co. v. Shelton, 136 Ala. 191; s. c. 34 South. Rep. 194; Green v. Los Angeles Terminal R. Co., 143 Cal. 31; s. c. 76 Pac. Rep. 719; rev'g s. c. 69 Pac. Rep. 694; Lambert v. Southern Pac. R. Co., 146 Cal. 231; s. c. 79 Pac. Rep. 873; Waldron v. Boston & C. R., 71 N. H. 362; s. c. 52 Atl. Rep. 443; New York & C. R. Co. v. Kistler, 66 Ohio St. 326; s. c. 64 N. E. Rep. 130; Gosa v. Southern R., 67 S. C. 347; s. c. 45 S. E. Rep. 810; Woolf

§ 1605. No Recovery where Traveller Guilty of Negligence Proximately Contributing to the Injury, although Railway Company also Negligent.¹²⁷—The obligation to exercise reasonable care at railroad crossings is reciprocal. The fact that statutes prescribe in the case of a railroad what things are necessary in the exercise of reasonable care, and that no such specific duties are imposed upon a traveller at a crossing, does not render it any less necessary for the traveller to exercise an equal degree of care.¹²⁸

§ 1606. No Recovery if Traveller Negligent, although Railway Company may have Neglected the Statutory or Customary Precautions.—A traveller whose failure to exercise ordinary care at a crossing contributed as a proximate cause to his injuries cannot recover damages though no signals were given,¹²⁹ and the speed of the train may have been unlawful.¹³⁰

§ 1608. How under the Disappearing Rule of Comparative Negligence.¹³¹

§ 1609. Traveller Required to Exercise Ordinary Care or Reasonable Care.¹³²—The rule of ordinary care in this class of cases "is to be measured not by the great caution of one or the extreme carelessness

v. Washington R. & C. Co., 37 Wash. 491; s. c. 79 Pac. Rep. 997.

¹²⁷ On the general proposition that there can be no recovery where the traveller's negligence contributed proximately to the injury though the railroad company was also negligent, see: *Day v. Boston & C. R.*, 97 Me. 528; s. c. 55 Atl. Rep. 420; *Cincinnati St. R. Co. v. Jenkins*, 20 Ohio Cir. Ct. R. 256; s. c. 11 Ohio C. D. 130; *Mercer v. Southern R.*, 66 S. C. 246; s. c. 44 S. E. Rep. 750; *Steber v. Chicago & C. R. Co.*, 115 Wis. 200; s. c. 91 N. W. Rep. 654.

¹²⁸ *Toledo & C. R. Co. v. Gallagher*, 109 Ill. App. 67.

¹²⁹ *Gosa v. Southern R.*, 67 S. C. 347; s. c. 45 S. E. Rep. 810; *Van Winkle v. New York & C. R. Co.*, 34 Ind. App. 476; s. c. 73 N. E. Rep. 157.

¹³⁰ *Central of Georgia R. Co. v. Forshee*, 125 Ala. 199; s. c. 27 South. Rep. 1006; *Thomas v. Central of Georgia R. Co.*, 121 Ga. 38; s. c. 48 S. E. Rep. 683; *Lake Shore & C. R. Co. v. Landphair*, 23 Ohio Cir. Ct. R. 435.

¹³¹ The provision of the Civil Code of Georgia that no person shall recover damages from a railroad com-

pany for injury done by his consent, or caused by his negligence, and that if complainant and the railroad company are both at fault the former may recover, but the damages shall be diminished in proportion to the amount of default attributable to plaintiff, is not properly presented by an instruction that a failure to exercise ordinary care on the part of the person injured before the negligence complained of is apparent, or should be reasonably apprehended, would not preclude a recovery, but would authorize the jury to diminish the damages in proportion to the fault of the person injured: *Atlanta & C. R. Co. v. Gardner*, 122 Ga. 82; s. c. 49 S. E. Rep. 818.

¹³² That a traveller approaching a crossing is required to exercise only reasonable or ordinary care, see: *Reed v. Queen Anne's R. Co.*, — Del. —; s. c. 57 Atl. Rep. 529; *Lorenz v. Burlington & C. R. Co.*, 115 Iowa 377; s. c. 88 N. W. Rep. 835; *Passman v. West Jersey & C. R.*, 68 N. J. L. 719; s. c. 54 Atl. Rep. 809; 61 L. R. A. 609; *Watson v. Erie R. Co.*, 8 Ohio N. P. 18; s. c. 10 Ohio S. & C. P. Dec. 454.

of another, but according to the standard fixed by the consensus of common sense based upon human experience."¹³³ A railroad crossing is recognized as a place of extraordinary danger, and the law exacts of all persons competent to exercise care for their protection and safety the use of their faculties of sight and hearing when such use is possible, and to act upon a presumption that engines or trains may be expected to pass at any time.¹³⁴ A traveller on a bicycle is subject to this rule of reasonable care the same as a pedestrian.¹³⁵

§ 1610. Care to be Exercised by Traveller should be in Proportion to the Danger.¹³⁶

§ 1612. Right of the Traveller to Assume that the Railway Company will do its Duty with Reference to Gates, Signals, etc.—It is the doctrine of this section that the mere failure of the servants of a railroad company to give the required signals on approaching a highway crossing will not relieve a traveller at such crossing from the necessity of exercising ordinary care for his own safety. The obligation to use care is equally imposed on each of the parties at a crossing, and the negligence of one will not excuse the other.¹³⁷ A traveller, exercising reasonable care for his own safety and unable to see or hear approaching trains, may assume that an approaching train will give the usual, and especially the statutory, signals.¹³⁸ And it seems proper that the fact that the traveller in some degree relied on the presumption that the railroad company would manage its trains according to law should be considered as a circumstance in determining whether such traveller exercised the degree of care required.¹³⁹

§ 1613. Right of Traveller to Rely upon Gate and Flagman.—Where it is the custom of a railroad company to keep gates or a flag-

¹³³ *Smith v. New York & C. R. Co.*, 177 N. Y. 224; s. c. 69 N. E. Rep. 427; rev'g s. c. 78 N. Y. Supp. 1137.

¹³⁴ *Quinn v. Chicago & C. R. Co.*, 162 Ind. 442; s. c. 70 N. E. Rep. 526.

¹³⁵ *Passman v. West Jersey & C. R.*, 68 N. J. L. 719; s. c. 54 Atl. Rep. 809; 61 L. R. A. 609.

¹³⁶ That a traveller approaching a railroad crossing must exercise care proportionate to the dangerous nature of the crossing, see: *Reed v. Queen Anne's R. Co.*, — Del. —; s. c. 57 Atl. Rep. 529; *Riley v. Missouri Pac. R. Co.*, 69 Neb. 82; s. c. 95 N. W. Rep. 20; *Rowe v. Central of Georgia R. Co.*, 115 Ga. 929; s. c. 42 S. E. Rep. 219.

¹³⁷ *Van Winkle v. New York & C. R. Co.*, 34 Ind. App. 476; s. c. 73

N. E. Rep. 157; *Gahagan v. Boston & C. R.*, 70 N. H. 441; s. c. 50 Atl. Rep. 146; 55 L. R. A. 426; *Larsen v. United States Mortgage & C. Co.*, 104 App. Div. (N. Y.) 76; s. c. 93 N. Y. Supp. 610; *Edwards v. Southern R. Co.*, 63 S. C. 271; s. c. 41 S. E. Rep. 458.

¹³⁸ *Pittsburgh & C. R. Co. v. McNeil*, 34 Ind. App. 310; s. c. 69 N. E. Rep. 471; *Malott v. Hawkins*, 159 Ind. 127; s. c. 63 N. E. Rep. 308.

¹³⁹ *Chicago & C. R. Co. v. Pulliam*, 111 Ill. App. 305; *St. Louis & C. R. Co. v. Rawley*, 106 Ill. App. 550; *Cleveland & C. R. Co. v. Heine*, 28 Ind. App. 163; s. c. 62 N. E. Rep. 455; *Baltimore & C. R. Co. v. Van Horn*, 21 Ohio Cir. Ct. R. 337; s. c. 12 Ohio C. D. 106.

man at a dangerous crossing, the raised gates or the absence of a flagman, to a traveller to whom the custom is known, is an assurance of safety and an implied invitation to make the crossing upon which he may to some extent rely and act upon the presumption that it is safe for him to go upon the crossing.¹⁴⁰ Thus, where a railroad company had voluntarily maintained a flagman at a grade crossing for many years, it was held that one knowing that fact had a right to rely on the absence of the flagman as an indication of safety with the same assurance as though he had been maintained by express order of the railroad commissioners of the State or other public authorities.¹⁴¹ So a person familiar with a custom of a flagman stationed at a crossing to give notice of approaching trains, seeing the flagman at his post with his flag in his hand, was held to have a right to rely upon the presence of such flagman and his failure to warn him of an approaching train as a notice to him that no train was close at hand and as an invitation to make the crossing in safety as far as an approaching train was concerned.¹⁴²

§ 1614. Doctrine that the Traveller has no Right to Rely upon Gate and Flagman.—The doctrine of the foregoing section will not permit a traveller at a crossing to say that he relied on the presumption that the employes of the railroad company would do their duty in the matter of warning, where the use of his senses of sight and hearing would have revealed to him that this supposition was wrong, and that a train was approaching the crossing and his danger was imminent.¹⁴³

§ 1615. Right of Traveller to Rely on Direction or Invitation of Gateman, Conductor, Brakeman, etc.—A traveller approaching a cross-

¹⁴⁰ Chicago &c. R. Co. v. Schmitz, 211 Ill. 446; s. c. 71 N. E. Rep. 1050; aff'g s. c. 113 Ill. App. 295; Chicago &c. R. Co. v. Wise, 106 Ill. App. 174; s. c. aff'd, 206 Ill. 453; 69 N. E. Rep. 500; Chicago &c. R. Co. v. Olson, 113 Ill. App. 320; Pittsburg &c. R. Co. v. Smith, 110 Ill. App. 154; Stegner v. Chicago &c. R. Co., 94 Minn. 166; s. c. 102 N. W. Rep. 205; Woehrl v. Minnesota Transfer R. Co., 82 Minn. 165; s. c. 84 N. W. Rep. 791; 52 L. R. A. 348; Smith v. Atlantic City R. Co., 66 N. J. L. 307; s. c. 49 Atl. Rep. 547; San Antonio &c. R. Co. v. Votaw (Tex. Civ. App.), 81 S. W. Rep. 130.

¹⁴¹ Dolph v. New York &c. R. Co., 74 Conn. 538; s. c. 51 Atl. Rep. 525. See also, Lake Shore &c. R. Co. v. Johnston, 25 Ohio Cir. Ct. R. 41.

¹⁴² Chicago Junction R. Co. v. McAnrow, 114 Ill. App. 501.

¹⁴³ Chicago &c. R. Co. v. Sutherland, 88 Ill. App. 295; Van Riper v. New York &c. R. Co., 71 N. J. L. 345; s. c. 59 Atl. Rep. 26; Stack v. New York &c. R. Co., 96 App. Div. (N. Y.) 575; s. c. 89 N. Y. Supp. 112; Watson v. Erie R. Co., 8 Ohio N. P. 18; s. c. 10 Ohio S. & C. P. Dec. 454. In a case where a person was injured through being struck by a descending gate at a street crossing the fact that the gate was going up when he started to cross was held not to justify him in ignoring all the other sounds and sights warning him that he could not safely cross: Briggs v. Boston &c. R. R., 188 Mass. 463; s. c. 74 N. E. Rep. 667.

ing and signaled to by the flagman,¹⁴⁴ or other employ  s of the railroad company at a crossing,¹⁴⁵ is not under the same duty of care that he would be if there had been no such invitation, but in this situation he must use such care as a reasonably prudent person would use under the circumstances. Where, however, a signal is misunderstood—as in the case of a signal by an employ   to the engineer, and not to the traveller—and the trainmen are not aware that the signal has been misunderstood by the traveller and are not apprised of his danger, the case is different and the traveller cannot recover for injuries thus caused.¹⁴⁶

   1617. **Care to be Exercised at Railway Crossings by Persons non sui juris.**¹⁴⁷—A traveller is none the less guilty of contributory negligence because he was drunk and in a helpless condition at the time of the accident and unable to realize his dangerous position.¹⁴⁸

   1618. **Contributory Negligence of Children Killed or Injured at Railway Crossings.**—Courts have imputed contributory negligence to children in these cases:—To a boy six years old who stood by the side of a passing train and caught hold of the stirrups of a passing car and was thrown under the train and injured, and the operatives of the train could not have stopped the train in time to save him;¹⁴⁹ to a boy ten years old who jumped on a passing car, and was jolted therefrom by a jerk shortly after getting hold;¹⁵⁰ to a boy thirteen years old crossing a railroad track in a street and struck by a car being pushed by hand at a rate of about a mile an hour.¹⁵¹ As indi-

¹⁴⁴ Lake Erie & C. R. Co. v. Fike, 35 Ind. App. 554; s. c. 74 N. E. Rep. 636; Edwards v. Chicago & C. R. Co., 94 Mo. App. 36; s. c. 67 S. W. Rep. 950; Ayres v. Pittsburgh & C. R. Co., 201 Pa. 124; s. c. 50 Atl. Rep. 958; Missouri & C. R. Co. v. Ray, 25 Tex. Civ. App. 567; s. c. 63 S. W. Rep. 912; St. Louis & C. R. Co. v. Stonecypher, 25 Tex. Civ. App. 569; s. c. 63 S. W. Rep. 946 (example of sufficient complaint alleging invitation by member of train crew).

¹⁴⁵ Scott v. St. Louis & C. R. Co., 112 Iowa 54; s. c. 83 N. W. Rep. 818 (brakeman); Plaunt v. Railway Transfer Co., 86 Minn. 506; s. c. 91 N. W. Rep. 19 (engineer); Bradley v. Ohio River & C. R. Co., 126 N. C. 735; s. c. 36 S. E. Rep. 181 (conductor); St. Louis & C. R. Co. v. Stonecypher, 25 Tex. Civ. App. 569; s. c. 63 S. W. Rep. 946 (brakeman).

¹⁴⁶ St. Louis & C. R. Co. v. Stonecy-

pher, 25 Tex. Civ. App. 569; s. c. 63 S. W. Rep. 946.

¹⁴⁷ A man eighty years of age is chargeable with negligence, preventing a recovery for injuries received at a grade crossing, where he testifies that his sight and hearing are good, and the near approach of the train could have been known to him by the exercise of either of his faculties: Toledo & C. R. Co. v. Patterson, 94 Ill. App. 670.

¹⁴⁸ Baltimore & C. R. Co. v. State, 96 Md. 67; s. c. 53 Atl. Rep. 672; Stewart v. North Carolina R. Co., 136 N. C. 385; s. c. 48 S. E. Rep. 793; Mercer v. Southern R., 66 S. C. 246; s. c. 44 S. E. Rep. 750.

¹⁴⁹ Green v. Maysville & C. R. Co., 78 S. W. Rep. 439; s. c. 25 Ky. L. Rep. 1623.

¹⁵⁰ Horn v. Chicago & C. R. Co., 124 Iowa 281; s. c. 99 N. W. Rep. 1068.

¹⁵¹ Galveston & C. R. Co. v. Kieff, 94 Tex. 334; s. c. 60 S. W. Rep. 543.

cated in the main section the question is regarded as one more especially for the jury in cases where the injured child is between the ages of six and fourteen years.¹⁵²

§ 1619. Contributory Negligence of Cripples at Railway Crossings.—The rules do not require that one having an impediment in his walk should exercise more care in looking and listening for an approaching train than one not so afflicted.¹⁵³

§ 1621. Contributory Negligence at Railway Crossings of One Riding with Another who is Driving.—A person riding with another in the vicinity of a railroad crossing should exercise watchfulness on the approach to the track, and may not rely entirely on the watchfulness of the driver, and whether this degree of watchfulness has been exercised is usually a question for the jury.¹⁵⁴

§ 1622. Presumption that the Traveller Did Take the Proper Precautions on Approaching the Crossing.¹⁵⁵—Where all the facts ap-

¹⁵² *Pittsburgh &c. R. Co. v. McNeil*, 34 Ind. App. 310; s. c. 69 N. E. Rep. 471; *Todd v. Philadelphia &c. R. Co.*, 201 Pa. 558; s. c. 51 Atl. Rep. 332; *Texas &c. R. Co. v. Ball*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 456.

¹⁵³ *Gulf &c. R. Co. v. Melville*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 863.

¹⁵⁴ *Willfong v. Omaha &c. R. Co.*, 116 Iowa 548; s. c. 90 N. W. Rep. 358. The question was held one for the jury where the wife of the driver was injured and his negligence was admitted, and the evidence showed that the wife had the care of two children in the vehicle with her and had her head muffled: *Lammers v. Great Northern R. Co.*, 82 Minn. 120; s. c. 84 N. W. Rep. 728. A wife was not guilty of contributory negligence in failing to look around her husband to observe the approach of a train from his side of the buggy, the train not being visible for more than sixty feet from the track: *Heater v. Delaware &c. R. Co.*, 90 App. Div. (N. Y.) 495; s. c. 85 N. Y. Supp. 524.

¹⁵⁵ In the absence of evidence that a person killed at a crossing did not look or listen before he stepped on a track, there is a presumption that he did so: *Baltimore &c. R. Co. v. Landrigan*, 191 U. S. 461; s. c. 24 Sup. Ct. Rep. 137; 48 L. Ed. 262; aff'g s. c. 20 App. (D. C.) 135;

Cowen v. Merriman, 17 App. (D. C.) 186; *Reed v. Queen Anne's R. Co.*, — Del. —; s. c. 57 Atl. Rep. 529; *E. Bradford Clarke Co. v. Baltimore &c. R. Co.*, 27 Pa. Super. Ct. 251. The presumption that one killed at a crossing did look and listen is not rebutted as a matter of law by the testimony of third persons, that as he approached the crossing they did not see him stop, but one of them testified that there was a "bump" in the road and that deceased was back of this long enough to have stopped without these witnesses seeing him: *Patterson v. Pittsburg &c. R. Co.*, 210 Pa. 47; s. c. 59 Atl. Rep. 318. The presumption that a traveller looked and listened is supported by evidence that the night was so dark that the engine running backward could not be seen, that the signals could not be seen and that the locomotive carried no light, and could not be heard by one on the crossing: *Blauvelt v. Delaware &c. R. Co.*, 206 Pa. 141; s. c. 55 Atl. Rep. 857. Where there was evidence that the deceased could not have seen or heard the approaching train even if he had looked and listened until his horses reached the track and too late to prevent the accident, the question of contributory negligence was held for the jury although there was no direct evidence that he did look and listen for the

pearing in evidence show the negligence of a traveller killed at a crossing, the doctrine that the exercise of care may be inferred from the instinct of self-preservation will not apply,¹⁵⁶ and this will be the case where such a contention is clearly negated by the evidence of physical facts.¹⁵⁷

§ 1623. Circumstances which Speak upon the Question One Way or the Other.¹⁵⁸—Where the conduct of a person killed at a crossing was fully disclosed by the testimony, evidence of a habit of care on his part when crossing railroad tracks, and his fear of trains was held clearly irrelevant.¹⁵⁹

§ 1624. When the Negligence of the Traveller is a Question for the Jury.¹⁶⁰—The case should not be taken from the jury on a plea of contributory negligence, unless the undisputed facts conclusively show that the injury complained of was the fault of the traveller, or the testimony essential to the plaintiff's case is disproved by the physical facts.¹⁶¹

§ 1627. How in Case of the Contributory Negligence of the Traveller and the Gross, Reckless, Willful or Wanton Negligence of the Railway Company.¹⁶²—A railroad company is not generally regarded as guilty of willful or wanton injury by reason of the intentional running of a train at a rate in excess of the legal requirement;¹⁶³ nor by

train: *Lewis v. Erie R. Co.*, 105 App. Div. (N. Y.) 292; s. c. 94 N. Y. Supp. 765.

¹⁵⁶ *Gahagan v. Boston & C. R.*, 70 N. H. 441; s. c. 50 Atl. Rep. 146; 55 L. R. A. 426; *Woolf v. Washington R. & C. Co.*, 37 Wash. 491; s. c. 79 Pac. Rep. 997.

¹⁵⁷ *Tomlinson v. Chicago & C. R. Co.*, 134 Fed. Rep. 233; s. c. 67 C. C. A. 218.

¹⁵⁸ *Westervelt v. New York & C. R. Co.*, 86 App. Div. (N. Y.) 316; s. c. 83 N. Y. Supp. 827 (traveller imputed with contributory negligence as a matter of law where he disregarded the warning of a flagman not to attempt to cross tracks).

¹⁵⁹ *Minot v. Boston & C. R. R.*, 73 N. H. 317; s. c. 61 Atl. Rep. 509.

¹⁶⁰ *Pittsburg & C. R. Co. v. Banfill*, 107 Ill. App. 254; s. c. aff'd, 206 Ill. 553; 69 N. E. Rep. 499 (whether traveller exercised due care in approaching a railroad crossing); *Chicago & C. R. Co. v. Urbaniac*, 106 Ill. App. 325 (whether traveller negligent in going on tracks when gate

was down); *De Graw v. Erie R. Co.*, 49 App. Div. (N. Y.) 29; s. c. 63 N. Y. Supp. 296 (where evidence was conflicting as to whether headlight was lighted and warning signals were sounded).

¹⁶¹ *Herring v. Wabash R. Co.*, 80 Mo. App. 562; s. c. 2 Mo. App. Rep. 707; *Cowen v. Merriman*, 17 App. (D. C.) 186.

¹⁶² That contributory negligence is not a defense if injuries were willfully and maliciously inflicted, see: *Central of Georgia R. Co. v. Partidge*, 136 Ala. 587; s. c. 34 South. Rep. 927; *Birmingham Southern R. Co. v. Powell*, 136 Ala. 232; s. c. 33 South. Rep. 875; *Gaynor v. Louisville & C. R. Co.*, 136 Ala. 244; s. c. 33 South. Rep. 808; *Elgin & C. R. Co. v. Duffy*, 191 Ill. 489; s. c. 61 N. E. Rep. 432; aff'g s. c. 93 Ill. App. 463.

¹⁶³ *Brown v. Chicago & C. R. Co.*, 109 Wis. 384; s. c. 85 N. W. Rep. 271; *Memphis & C. R. Co. v. Martin*, 131 Ala. 269; s. c. 30 South. Rep. 827.

reason of the disobedience of an ordinance requiring a flagman on the front of an engine in crossing the streets of a city;¹⁶⁴ nor by failure to sound the signals at the distance from the crossing required by the statute, particularly where there is no evidence that other signals were not given.¹⁶⁵

§ 1629. **Liability of Railway Company for Failure to Use Care to Avoid Injuring Travellers Negligently Exposed on Highway Crossings.**—An engineer who sees a traveller's peril, or by the exercise of due care can see it, is bound to use every reasonable and practicable means to prevent the injury, and if he fails to do so, and by reason of such failure an injury is inflicted, the railroad company will be liable.¹⁶⁶ But the peril of the traveller must be apparent.¹⁶⁷ The rule only imposes on the engineer the duty to use reasonable efforts to prevent an injury; he is not required to use extraordinary care in such an emergency.¹⁶⁸ Neither does the rule require that the engineer should anticipate negligent action on the part of the traveller. The engineer has a right within reasonable limits to act on the assumption that a traveller will note the danger of his position and use reasonable care to save himself.¹⁶⁹ The railroad company will not be liable where the engineer, on the discovery of the dangerous position of the negligent traveller, does all in his power to avert the accident;¹⁷⁰ or where

¹⁶⁴ *Southern R. Co. v. Shelton*, 136 Ala. 191; s. c. 34 South. Rep. 194.

¹⁶⁵ *Olson v. Northern Pac. R. Co.*, 84 Minn. 258; s. c. 87 N. W. Rep. 843.

¹⁶⁶ *Yeaton v. Boston & C. R. R.*, 73 N. H. 285; s. c. 61 Atl. Rep. 522; *Barnhill v. Texas & C. R. Co.*, 109 La. 43; s. c. 33 South. Rep. 63; *Eichorn v. New Orleans & C. Light & C. Co.*, 112 La. 236; s. c. 36 South. Rep. 335; *Fletcher v. South Carolina & C. R. Co.*, 57 S. C. 205; s. c. 35 S. E. Rep. 513. The rule is without application where the presence and peril of the traveller is not known to the operators of the train: *Burns v. Louisville & C. R. Co.*, 136 Ala. 522; s. c. 33 South. Rep. 891; *Dunworth v. Grand Trunk & C. R. Co.*, 127 Fed. Rep. 307. Notwithstanding the negligence of a traveller in allowing himself to be penned in by trains on a crossing numerous covered by railroad tracks, yet, where he is in plain view of the operators of an approaching engine, and his danger is plainly apparent to them, they are negligent in pushing the

engine down upon him, and the company is liable for any injury to such traveller, in attempting to escape from the impending danger: *Wall v. New York & C. R. Co.*, 56 App. Div. (N. Y.) 599; s. c. 67 N. Y. Supp. 519.

¹⁶⁷ The fact that a bicyclist turned his wheel and ran into the open space ten or twelve feet wide between the tracks where persons did and could ride with safety does not of itself show that the rider was in peril or made it the duty of the operatives of an approaching train to stop the train to avoid injuring him on the theory that he might possibly fall and be thrown upon the track: *Seaboard & C. R. Co. v. Vaughn*, 104 Va. 113; s. c. 51 S. E. Rep. 452.

¹⁶⁸ *Bump v. New York & C. R. Co.*, 38 App. Div. (N. Y.) 60; s. c. 55 N. Y. Supp. 962; s. c. aff'd, 165 N. Y. 636; 59 N. E. Rep. 1119.

¹⁶⁹ *Van Bach v. Missouri Pac. R. Co.*, 171 Mo. 338; s. c. 71 S. W. Rep. 358; *Garrett v. Illinois Cent. R. Co.*, 126 Fed. Rep. 406.

¹⁷⁰ *Green v. Los Angeles Terminal*

at the time of the discovery of the traveller's dangerous position, it is impossible to stop the train in time to avoid the accident.¹⁷¹ In a case where the engineer, seeing the dangerous position of a traveller crossing in a vehicle, and unable to stop before reaching him, has the choice of two ways of meeting the contingency, one to slacken speed and strike the vehicle, or to increase the speed and strike the animal, and he chooses the former with the result of injuring the occupant of the vehicle—the railroad company will not be liable under the doctrine of discovered peril, as the facts show a mere error of judgment of the engineer on which negligence could not be based.¹⁷² Where the contributory negligence of a traveller is later in time than the negligence of the railroad company the doctrine of discovered peril does not apply.¹⁷³

§ 1633. Instructions Submitting Question of Contributory Negligence of Traveller to Jury.¹⁷⁴

R. Co., 143 Cal. 31; s. c. 76 Pac. Rep. 719; rev'g s. c. 69 Pac. Rep. 694; *Brammer v. Norfolk & C. R. Co.*, 104 Va. 50; s. c. 51 S. E. Rep. 211.

¹⁷¹ *Missouri & C. R. Co. v. Eyer* (Tex. Civ. App.), 70 S. W. Rep. 529.

¹⁷² *Wellbrock v. Long Island R. Co.*, 31 Misc. (N. Y.) 424; s. c. 65 N. Y. Supp. 592.

¹⁷³ *McNab v. United Railways & C. Co.*, 94 Md. 719; s. c. 51 Atl. Rep. 421.

¹⁷⁴ Another example of an erroneous instruction is one which requires the plaintiff to "prove by more and better evidence than defendant that he was, when injured, doing all that a reasonably cautious man would do under the circumstances to protect himself from injury." In denouncing this instruction the court said: "This instruction requires more than the law requires. The plaintiff is required to make his case by a preponderance of the evidence. That preponderance may arise from the plaintiff having either more evidence or better evidence, but he is not required to have both more and better. An equal number of witnesses may testify on each side to the same question and the jury may regard the evidence of the witnesses for the plaintiff better than that of the witnesses for the defendant and thereby hold that the plaintiff has made

the preponderance." *Chicago & C. R. Co. v. Pollock*, 195 Ill. 156; s. c. 62 N. E. Rep. 831; aff'g s. c. 93 Ill. App. 483. In railroad crossing accident cases, a railroad company is entitled as a matter of right to have the jury instructed specifically as to the duty of the traveller to exercise reasonable care on approaching the track: *Chicago & C. R. Co. v. Turner*, 33 Ind. App. 264; s. c. 69 N. E. Rep. 484. Where there is evidence that the traveller might have assured his safety by stopping to look and listen, it is the duty of the court to submit to the jury the question of the traveller's obligation to take these precautions: *St. Louis & C. R. Co. v. Brock*, 64 Kan. 90; s. c. 67 Pac. Rep. 538. An instruction that "you will scrutinize carefully this question with regard to the care of plaintiff in crossing that track and determine whether on his part it was a foolhardy act or not to drive that horse at that time and in the manner that he did, and under the circumstances, across the track," is erroneous as authorizing an inference that though plaintiff was chargeable with contributory negligence he could recover if his act was anything less than foolhardy: *Hinchman v. Pere Marquette R. Co.*, 136 Mich. 341; s. c. 99 N. W. Rep. 277; 11 Det. Leg. N. 38; 65 L. R. A. 553.

§ 1637. **Duty of Traveller to Look.**¹⁷⁵—It is the doctrine of this section that a traveller is presumed to have seen what would have been clearly visible if he had used his eyes.¹⁷⁶ Where there is no law restricting the speed of trains, it is especially the duty of a reasonably careful person to guard himself against the consequences of trains running at an excessive speed by looking before venturing on the crossing.¹⁷⁷

§ 1638. **Duty to Look Both Ways.**¹⁷⁸

§ 1639. **Duty to Look Twice, and Keep on Looking.**¹⁷⁹—The doctrine of the main section was applied in a case where a traveller when

¹⁷⁵ That a failure to look for an approaching train when in the act of crossing a railroad track will preclude a recovery for personal injuries, where to have looked would have disclosed the danger and where there were no circumstances which justified such a failure, see generally: *Kallmerten v. Cowen*, 111 Fed. Rep. 297; s. c. 49 C. C. A. 346; *St. Louis & C. R. Co. v. Crabtree*, 69 Ark. 134; s. c. 62 S. W. Rep. 64; *Queen Anne's R. Co. v. Reed*, — Del. —; s. c. 59 Atl. Rep. 860; *Knopf v. Philadelphia & C. R. Co.*, 2 Pen. (Del.) 392; s. c. 46 Atl. Rep. 747; *Patterson v. Chicago & C. R. Co.*, 111 Ill. App. 441; *Toledo & C. R. Co. v. Christy*, 111 Ill. App. 247; *Lake St. Elevated R. Co. v. Gormley*, 103 Ill. App. 59; *Golinvaux v. Burlington & C. R. Co.*, 125 Iowa 625; s. c. 101 N. W. Rep. 465; *Sights v. Louisville & C. R. Co.*, 117 Ky. 436; s. c. 78 S. W. Rep. 172; 25 Ky. L. Rep. 1548; *Raymond v. New York & C. R. Co.*, 182 Mass. 337; s. c. 65 N. E. Rep. 399; *Olson v. Northern Pac. R. Co.*, 84 Minn. 258; s. c. 87 N. W. Rep. 843; *Fiddler v. New York Cent. & C. R. Co.*, 64 App. Div. (N. Y.) 95; s. c. 71 N. Y. Supp. 721; *Stack v. New York Cent. & C. R. Co.*, 96 App. Div. (N. Y.) 575; s. c. 89 N. Y. Supp. 112; *Leary v. Fitchburg R. Co.*, 53 App. Div. (N. Y.) 52; s. c. 65 N. Y. Supp. 699; *Ayres v. Pittsburgh & C. R. Co.*, 201 Pa. 124; s. c. 50 Atl. Rep. 958; *French v. Grand Trunk R. Co.*, 76 Vt. 441; s. c. 58 Atl. Rep. 722; *Woolf v. Washington R. & C. Co.*, 37 Wash. 491; s. c. 79 Pac. Rep. 997; *Koester v. Chicago & C. R. Co.*, 106 Wis. 460; s. c. 82 N. W. Rep. 295.

¹⁷⁶ *Wabash R. Co. v. Smillie*, 97

Ill. App. 7; *Smith v. Detroit & C. R. Co.*, 136 Mich. 282; s. c. 99 N. W. Rep. 15; 11 Det. Leg. N. 24; *Fox v. Pennsylvania R. Co.*, 195 Pa. St. 538; s. c. 46 Atl. Rep. 106; *Marshall v. Green Bay & C. R. Co.*, 125 Wis. 96; s. c. 103 N. W. Rep. 249. A traveller killed in a railroad crossing accident drove onto the crossing before reaching which, at a distance of thirty feet, he could have had, if he had looked, an unobstructed view of the track for two-fifths of a mile, and failed to stop his horse before reaching the track. He was held guilty of contributory negligence: *Dotty v. Atlantic City R. Co.*, 64 N. J. L. 710; s. c. 46 Atl. Rep. 772.

¹⁷⁷ *Green v. Los Angeles Terminal R. Co.*, 143 Cal. 31; s. c. 76 Pac. Rep. 719; rev'g s. c. 69 Pac. Rep. 694.

¹⁷⁸ That it is the duty of the traveller about to cross a railroad track to look in each direction to ascertain whether a train is coming, and if his failure so to do results in his injury, he cannot recover damages, see: *Wabash R. Co. v. Monegan*, 94 Ill. App. 82; *Day v. Boston & C. R.*, 96 Me. 207; s. c. 52 Atl. Rep. 771; *Chicago & C. R. Co. v. Yost*, 61 Neb. 530; s. c. 85 N. W. Rep. 561; *Harvey v. Erie R. Co.*, 210 Pa. 95, 97; s. c. 59 Atl. Rep. 691, 1119.

¹⁷⁹ That the obligation of the traveller to use due care is not satisfied by looking once, but that it is his duty to keep on looking as he approaches the crossing, see: *St. Louis & C. R. Co. v. Crabtree*, 69 Ark. 134; s. c. 62 S. W. Rep. 64; *St. Louis & C. R. Co. v. Johnson*, — Ark. —; s. c. 86 S. W. Rep. 282; *Green v. Los Angeles Terminal R.*

he reached a point between fifty feet and six or seven rods from a railroad track, stopped his horse and looked and listened for a train, then started again, and looked out of the glass at the back of the buggy, where he could only see a few rods of the track, and then passed onto the track without further looking in the direction of the approaching train, or any further attempt to find whether there was an approaching train—with the conclusion that the traveller was chargeable with such contributory negligence as to prevent a recovery for his death in an ensuing collision.¹⁸⁰

§ 1640. Doctrine that the Failure to Look is not Negligence as Matter of Law.¹⁸¹—A traveller driving under closed gates without looking for trains, has been held not to be imputed with contributory negligence, as a matter of law, where the significance of closed gates at this point had been largely lost by reason of a custom, known to the traveller, to leave the gates down for long periods when no train was passing or about to pass.¹⁸² So, it has been held that an instruction, that the plaintiff was guilty of contributory negligence if he did not look in each direction at such time and place as would enable him to avoid an approaching train, was properly refused, as the instruction requested would have taken the question of contributory negligence from the jury.¹⁸³

§ 1641. Duty to Listen.¹⁸⁴

§ 1642. Duty to Look and Listen.¹⁸⁵—A railroad crossing is of itself notice of danger, requiring a person about to cross to use both

Co., 143 Cal. 31; s. c. 76 Pac. Rep. 719; rev'g s. c. 69 Pac. Rep. 694; Baltimore &c. R. Co. v. Reynolds, 33 Ind. App. 219; s. c. 71 N. E. Rep. 250; Defrieze v. Illinois Cent. R. Co., — Iowa —; s. c. 94 N. W. Rep. 505; Sandberg v. St. Paul &c. R. Co., 80 Minn. 442; s. c. 83 N. W. Rep. 411; McAuliffe v. New York &c. R. Co., 83 N. Y. Supp. 200; Winter v. New York &c. R. Co., 66 N. J. L. 677; s. c. 50 Atl. Rep. 339.

¹⁸⁰ Proper v. Lake Shore &c. R. Co., 136 Mich. 352; s. c. 99 N. W. Rep. 283; 11 Det. Leg. N. 35.

¹⁸¹ Whether a traveller was negligent in not looking again, after he had once looked, before driving on the track a question for the jury, see: Louisville &c. R. Co. v. Cooper (Ky.), 65 S. W. Rep. 795; s. c. 23 Ky. L. Rep. 1658; Frederick v. Fonda &c. R. Co., 52 App. Div. (N. Y.) 603; s. c. 65 N. Y. Supp. 440; Cromley v. Pennsylvania R. Co.,

208 Pa. 445; s. c. 57 Atl. Rep. 832; Confer v. Pennsylvania R. Co., 209 Pa. 425; s. c. 58 Atl. Rep. 811.

¹⁸² Chicago &c. R. Co. v. Keegan, 112 Ill. App. 338.

¹⁸³ Hecker v. Oregon R. Co., 40 Or. 6; s. c. 66 Pac. Rep. 270.

¹⁸⁴ A traveller is guilty of negligence in failing to listen for a train where an obstruction prevents him from having a view of the track: Sulder v. Pennsylvania R. Co., — N. J. L. —; s. c. 56 Atl. Rep. 124.

¹⁸⁵ That it is the duty of a traveller approaching a railroad crossing to both look and listen, see: Neininger v. Cowan, 101 Fed. Rep. 787; s. c. 42 C. C. A. 20; Work v. Chicago &c. R. Co., 105 Fed. Rep. 874; s. c. 45 C. C. A. 101; Central of Georgia R. Co. v. Freeman, 134 Ala. 354; s. c. 32 South. Rep. 778; Gaynor v. Louisville &c. R. Co., 136 Ala. 244; s. c. 33 South. Rep. 808 (plea charging contributory negligence in that

his eyes and his ears to note the approach of trains.¹⁸⁶ And the greater the difficulties in the way of hearing or seeing the train, the greater should be the effort of the traveller to acquaint himself with the conditions at the crossing.¹⁸⁷ But the law does not charge a traveller with all the possibilities of vision and hearing as he approaches the crossing. What it requires is simply that he make all reasonable efforts to see and hear that a prudent man would make under like circumstances.¹⁸⁸ The rule as to looking and listening makes no exception in favor of children.¹⁸⁹

§ 1643. Illustrations of Contributory Negligence in Failing to Look and Listen.¹⁹⁰

plaintiff failed to look and listen before going on the track, and that if he had so looked and listened he could have seen the approaching train and avoided the danger—held good on demurrer); *Chicago & C. R. Co. v. Palmer*, 61 Kan. 860; s. c. 60 Pac. Rep. 736; *Robinson v. Rockland & C. R.*, 99 Me. 47; s. c. 58 Atl. Rep. 57; *Blumenthal v. Boston & C. R.*, 97 Me. 255; s. c. 54 Atl. Rep. 747; *Hook v. Missouri Pac. R. Co.*, 162 Mo. 569; s. c. 63 S. W. Rep. 360; *Lake Shore & C. R. Co. v. Harris*, 23 Ohio Cir. Ct. R. 400; *Koester v. Toledo & C. R. Co.*, 20 Ohio Cir. Ct. R. 475; s. c. 11 Ohio C. D. 283; *Lake Shore & C. R. Co. v. Reynolds*, 23 Ohio Cir. Ct. R. 199; *Pennsylvania Co. v. Alburn*, 23 Ohio Cir. Ct. R. 130; *Gosa v. Southern R.*, 67 S. C. 347; s. c. 45 S. E. Rep. 810; *St. Louis & C. R. Co. v. Branom* (Tex. Civ. App.), 73 S. W. Rep. 1064; *Brown v. Chicago & C. R. Co.*, 109 Wis. 384; s. c. 85 N. W. Rep. 271; *Villeneuve v. Canadian Pac. R. Co.*, Rap. Jud. Que. 21 C. S. 422.

¹⁸⁶ *Brammer v. Norfolk & C. R. Co.*, 104 Va. 50; s. c. 51 S. E. Rep. 211; *Hook v. Missouri Pac. R. Co.*, 162 Mo. 569; s. c. 63 S. W. Rep. 360.

¹⁸⁷ *Green v. Southern Pac. Co.*, 132 Cal. 254; s. c. 64 Pac. Rep. 255 (traveller approached crossing at place where view was obstructed by tall corn and failed to look and listen—conduct held to show contributory negligence); *Barnhill v. Texas & C. R. Co.*, 109 La. 43; s. c. 33 South. Rep. 63; *Day v. Boston & C. R.*, 96 Me. 207; s. c. 52 Atl. Rep. 771; *Chicago & C. R. Co. v. Roberts*, 3 Neb. (unoff.) 425; s. c. 91 N. W. Rep. 707; *Louisville & C. R. Co. v.*

Satterwhite, 112 Tenn. 185; s. c. 79 S. W. Rep. 106. Thus it has been held contributory negligence that would defeat a recovery for injuries received at a crossing for a traveller to undertake to cross, when the atmosphere was more or less clouded by steam and smoke, without waiting for the atmosphere to clear so that his vision would not be obstructed, or by taking some other adequate means to ascertain the presence of danger: *Baltimore & C. R. Co. v. McClellan*, 69 Ohio St. 142; s. c. 68 N. E. Rep. 816.

¹⁸⁸ *Birmingham Southern R. Co. v. Lintner*, 141 Ala. 420; s. c. 38 South. Rep. 363; *Chicago & C. R. Co. v. Weeks*, 99 Ill. App. 518; s. c. aff'd, *Weeks v. Chicago & C. R. Co.*, 198 Ill. 551; 64 N. E. Rep. 1039; *Wiedman v. Erie R. Co.*, 66 App. Div. (N. Y.) 347; s. c. 72 N. Y. Supp. 683; *Mitchell v. Third Ave. R. Co.*, 62 App. Div. (N. Y.) 371; s. c. 70 N. Y. Supp. 1118.

¹⁸⁹ *Cox v. New York & C. R. Co.*, 69 App. Div. (N. Y.) 451; s. c. 74 N. Y. Supp. 1011 (child fourteen years old).

¹⁹⁰ A traveller was deemed guilty of contributory negligence, as a matter of law, where he attempted to cross three parallel railroad tracks, on the first of which there were cars which obstructed the view of the other tracks, without stopping to look and listen after passing these cars, relying solely on the absence of warning bells which were usually rung, and he was struck by a train on the third track which he could have seen and heard if he had looked and listened: *Cleveland & C. R. Co. v. Heine*, 28 Ind.

§ 1644. **Duty of Traveller to Stop and Stop Again.**¹⁹¹—A traveller who heard the puffing of an engine before he started across the track, but, his view being obscured and being advised by another that the puffing he heard proceeded from an engine on another track, was held not guilty of contributory negligence, as a matter of law, in going forward and not waiting until certain that the puffing was not from an engine approaching on the track he intended to cross.¹⁹² In another case a traveller approaching a railroad crossing, the view of which was entirely obstructed, who stopped when only thirty feet from the track until satisfied that it was safe to proceed, was held not guilty of contributory negligence, as a matter of law, in not stopping again in addition to continuously listening before driving on the track.¹⁹³ In still another case a traveller, who approached a street crossing at a time when no train was scheduled to pass, and slowed up and looked and listened for a train, was held not guilty of contributory negligence as a matter of law for failing to stop.¹⁹⁴

§ 1646. **Duty to Alight, Go Forward, Look and Listen.**¹⁹⁵

App. 163; s. c. 62 N. E. Rep. 455. An adult, in the full enjoyment of his sight and hearing, who had an unobstructed view, in crossing the tracks of a railroad, of from one hundred feet to two hundred fifty yards in the direction of an approaching train, which was heard and seen by others at least one hundred to one hundred fifty feet distant from the crossing, and who did not look for trains until he was upon the track, and it was too late for him to escape, was guilty of contributory negligence: *Anderson v. Baltimore & C. R. Co.*, 101 Md. 487; s. c. 61 Atl. Rep. 575. In a case where the accident occurred on a day which was bright and clear, with the sun shining and the view of the track in both directions unobstructed, and the traveller's eyesight was good, the traveller was imputed with contributory negligence in failing to look up and down such tracks, and failing to observe, if he did look, the approaching cars: *Chicago & C. R. Co. v. Vremeister*, 112 Ill. App. 346.

¹⁹¹ The question whether a traveller is guilty of negligence in failing to stop repeatedly when at, or approaching to, crossings depends upon the circumstances of the par-

ticular case, and is a question of fact for the determination of the jury: *Ayres v. Pittsburgh & C. R. Co.*, 201 Pa. 124; s. c. 50 Atl. Rep. 958.

¹⁹² *Coffee v. Pere Marquette R. Co.*, 139 Mich. 378; s. c. 102 N. W. Rep. 953; 11 Det. Leg. N. 896.

¹⁹³ *Coffee v. Pere Marquette R. Co.*, 139 Mich. 378; s. c. 102 N. W. Rep. 953; 11 Det. Leg. N. 896.

¹⁹⁴ *Louisville & C. R. Co. v. Crominarity*, 86 Miss. 464; s. c. 38 South. Rep. 633.

¹⁹⁵ That a traveller may be imputed with contributory negligence in cases where view of track is so obscured as to make this precaution necessary, see: *Chicago & C. R. Co. v. Thomas*, 155 Ind. 634; s. c. 58 S. E. Rep. 1040; *Kinter v. Pennsylvania R. Co.*, 204 Pa. 497; s. c. 54 Atl. Rep. 276. Whether the circumstances are of that peculiar character as to require the traveller to take this precaution, is a question of fact for the jury, see: *Chicago & C. R. Co. v. Turner*, 33 Ind. App. 264; s. c. 69 N. E. Rep. 484; *Elliott v. Chicago & C. R. Co.*, 105 Mo. App. 523; s. c. 80 S. W. Rep. 270; *Newton v. Pittsburgh & C. R. Co.*, 18 Pa. Super. Ct. 18.

§ 1647. **Duty to Stop and Listen.**—Again, contributory negligence may be imputed to the traveller, where he fails to stop and listen when his view of the track is obstructed,¹⁹⁷ or he is prevented from hearing by reason of the noise made by his own vehicle.¹⁹⁸ An instruction that, if a man of ordinary care, stopping where the traveller stopped and listened for a train, would have heard the approach of the train, was condemned as holding the traveller responsible not for what he did or failed to do, but for the failure of his act to accomplish its purpose.¹⁹⁹ Another instruction that it was negligence to drive upon a railroad crossing until a train on an east-bound track had moved far enough from the crossing so that its noise would not interfere with the driver's "hearing" a train approaching on a west-bound track, was held open to the objection that it gave the sense of hearing undue importance and emphasis within the familiar rule condemning this vice in instructions.²⁰⁰

§ 1648. **Duty of Traveller to Stop, Look and Listen.**²⁰¹—The absolute rule that the person must show that he stopped, looked and listened in order to free himself from contributory negligence at a railroad crossing does not obtain in Kentucky,²⁰² Nebraska,²⁰³ or Ohio.²⁰⁴ Where the view of the traveller on approaching a crossing is in any manner obstructed, it would seem a dictate of prudence to require him to stop, look, and listen for approaching trains, and it is the rule of numerous courts that he will be imputed with negligence where he fails to take these precautions.²⁰⁵

¹⁹⁷ Killian v. Chicago &c. R. Co., 86 Mo. App. 473; Keyley v. Central R. Co., 64 N. J. L. 355; s. c. 45 Atl. Rep. 811.

¹⁹⁸ Rogers v. Boston &c. R., 187 Mass. 217; s. c. 72 N. E. Rep. 945.

¹⁹⁹ Kansas City &c. R. Co. v. Weeks, 135 Ala. 614; s. c. 34 South. Rep. 16.

²⁰⁰ Boyden v. Fitchburg R. Co., 72 Vt. 89; s. c. 47 Atl. Rep. 409.

²⁰¹ Cases supporting the rule that a failure to stop, look and listen before going on a railroad track is negligence: Barnhill v. Texas &c. R. Co., 109 La. 43; s. c. 33 South. Rep. 63; Day v. Boston &c. R., 96 Me. 207; s. c. 52 Atl. Rep. 771; Wands v. Chicago &c. R. Co., 106 Mo. App. 96; s. c. 80 S. W. Rep. 18; Gahagan v. Boston &c. R., 70 N. H. 441; s. c. 50 Atl. Rep. 146; 55 L. R. A. 426; Ihrig v. Erie R. Co., 210 Pa. 98; s. c. 59 Atl. Rep. 686; McGoran v. New York &c. R. Co., 25 R. I. 387; s. c. 55 Atl. Rep. 929.

²⁰² Louisville &c. R. Co. v. Price, 76 S. W. Rep. 836; s. c. 25 Ky. L. Rep. 1033.

²⁰³ Union Pac. R. Co. v. Ruzicka, 65 Neb. 621; s. c. 91 N. W. Rep. 543.

²⁰⁴ Baltimore &c. R. Co. v. Van Horn, 21 Ohio Cir. Ct. R. 337; s. c. 12 Ohio C. D. 106.

²⁰⁵ Robinson v. Rockland &c. R., 99 Me. 47; s. c. 58 Atl. Rep. 57; Philadelphia &c. R. Co. v. Holden, 93 Md. 417; s. c. 49 Atl. Rep. 625; Kinter v. Pennsylvania R. Co., 204 Pa. 497; s. c. 54 Atl. Rep. 276. A complaint was held to show the exercise of the proper degree of care in this respect which alleged that, by reason of obstructions, persons approaching the railroad crossing at the point in question could not see more than ten feet along the track, and that plaintiff and her husband drove toward the crossing looking and listening for trains; that on failing to see or hear any, they drove on, looking and listen-

§ 1649. **Doctrine that the Failure to Stop, Look and Listen is Evidence of Negligence and not Negligence per se.**²⁰⁶

§ 1650. **Doctrine that Failure to Look and Listen is not Negligence as Matter of Law.**—The failure of the traveller to look and listen before crossing a railway at a public crossing is not generally regarded as negligence as a matter of law. Whether under the particular circumstances a reasonably prudent person would have done so is the test, and this makes it a question for the determination of the jury.²⁰⁷ Thus it has been held a question for the jury whether a traveller was negligent in failing to look and listen at a crossing, where the noise of a flour mill, located at the crossing, drowned that of the approaching train, and cars on a side track obstructed the traveller's view of the crossing.²⁰⁸ So, it has been held not negligence *per se* for a traveller to fail to look and listen for a train at a street crossing where a railroad company kept a watchman and gates and the gates were up.²⁰⁹

§ 1651. **Circumstances Tending to Excuse the Failure of the Traveller to Look or Listen.**—The failure to look and listen will not impute the traveller with negligence as a matter of law in cases where it appears that the party was misled without his fault, or when the surroundings excuse such failure.²¹⁰

ing, and when on the crossing, defendant, without giving any signals, pushed a freight train on them causing the injuries complained of: *Cleveland &c. R. Co. v. Carey*, 33 Ind. App. 275; s. c. 71 N. E. Rep. 244.

²⁰⁶ That it is for the jury to determine whether under the circumstances of the particular case, ordinary care required a traveller on approaching a crossing to stop, as well as to look and listen for approaching trains, see: *Louisville &c. R. Co. v. Summers*, 125 Fed. Rep. 719; s. c. 60 C. C. A. 487 (whether traveller should stop a second time before crossing a track); *Chicago City R. Co. v. Barker*, 209 Ill. 321; s. c. 70 N. E. Rep. 624; *Malott v. Hawkins*, 159 Ind. 127; s. c. 63 N. E. Rep. 308; *Nichols v. Baltimore &c. R. Co.*, 33 Ind. App. 229; s. c. 70 N. E. Rep. 170, 183; *Cleveland &c. R. Co. v. Penketh*, 27 Ind. App. 210; s. c. 60 N. E. Rep. 1095; *Wheeling &c. R. Co. v. Suhrwiar*, 22 Ohio Cir. Ct. R. 560; *Peck v. Oregon Short Line R. Co.*, 25 Utah 21; s. c. 69 Pac. Rep. 153. Failure to stop, look and listen after going on the tracks at a crossing

may or may not be negligence, according to the circumstances: *Cohen v. Philadelphia &c. R. Co.*, 211 Pa. 227; s. c. 60 Atl. Rep. 729.

²⁰⁷ See generally: *Atlanta &c. R. Co. v. Lovelace*, 121 Ga. 487; s. c. 49 S. E. Rep. 607; *Chicago &c. R. Co. v. Pulliam*, 111 Ill. App. 305; *Chicago Junction R. Co. v. McAnrow*, 114 Ill. App. 501; *Cleveland &c. R. Co. v. Beard*, 106 Ill. App. 486; *Pittsburg &c. R. Co. v. Smith*, 110 Ill. App. 154; *Wilson v. Chesapeake &c. R. Co.*, 86 S. W. Rep. 690; s. c. 27 Ky. L. Rep. 778; *Smith v. Boston &c. R.*, 70 N. H. 53; s. c. 47 Atl. Rep. 290; *Gulf &c. R. Co. v. Melville*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 863; *Gulf &c. R. Co. v. Dolson*, — Tex. Civ. App. —; 85 S. W. Rep. 444; *Frugia v. Texarkana &c. R. Co.*, 36 Tex. Civ. App. 648; s. c. 82 S. W. Rep. 814.

²⁰⁸ *Louisville &c. R. Co. v. Satterwhite*, 112 Tenn. 185; s. c. 79 S. W. Rep. 106.

²⁰⁹ *Dick v. Louisville &c. R. Co.*, 64 S. W. Rep. 725; s. c. 23 Ky. L. Rep. 1068.

²¹⁰ *Chicago City R. Co. v. Fennimore*, 99 Ill. App. 174; s. c. aff'd, 199 Ill. 1; 64 N. E. Rep. 985; Illi-

§ 1652. **Circumstances which Furnish no Excuse for not Looking.**—Generally speaking the known presence of the railroad track is a standing proclamation to those approaching it that cars are liable to run thereon at any time, and the duty to look and listen is not relaxed by any question as to whether one might or might not reasonably expect a train to pass.²¹¹ A failure to look and listen will not be excused on the ground that the view was obstructed by buildings erected on the right of way by the railroad company,²¹² or that the operatives of the train failed to ring the bell, or blow the whistle, according to their custom,²¹³ or that they violated a speed ordinance,²¹⁴ or that the railroad company failed to maintain a flagman or gate at the crossing as required by law.²¹⁵ So a traveller who approached a crossing at a place where several stationary lights were maintained along the track was not relieved from the charge of contributory negligence in passing over this crossing under the impression that the headlight of an approaching locomotive was also stationary. It was his duty to ascertain whether or not the lights were stationary before attempting to cross the tracks.²¹⁶ "Diversion of attention" will excuse a failure to look and listen only where the traveller's attention is so irresistibly occupied with something else that threatens danger, or confuses or perplexes him as to deprive him of the opportunity to look and listen.²¹⁷ Close attention to the condition of an approach to a crossing does not satisfy the rule.²¹⁸

§ 1653. **Doctrine that it is not Contributory Negligence as Matter of Law not to Look and Listen.**²¹⁹

§ 1654. **Not Necessary to Take Unavailing or Useless Precautions.**²²⁰

nois Cent. R. Co. v. Finrock, 103 Ill. App. 232.

²¹¹ Guhl v. Whitcomb, 109 Wis. 69; s. c. 85 N. W. Rep. 142; Evansville & C. R. Co. v. Clements, 32 Ind. App. 659; s. c. 70 N. E. Rep. 554.

²¹² Evansville & C. R. Co. v. Clements, 32 Ind. App. 659; s. c. 70 N. E. Rep. 554.

²¹³ Rich v. Evansville & C. R. Co., 31 Ind. App. 10; s. c. 66 N. E. Rep. 1028.

²¹⁴ Day v. Boston & C. R., 96 Me. 207; s. c. 52 Atl. Rep. 771.

²¹⁵ Schneider v. Northern Pac. R. Co., 81 Minn. 383; s. c. 84 N. W. Rep. 124; Wabash R. Co. v. Smillie, 97 Ill. App. 7.

²¹⁶ Hoopes v. West Jersey & C. R. Co., 65 N. J. L. 89; s. c. 47 Atl. Rep. 27.

²¹⁷ Bush v. Union Pac. R. Co., 62 Kan. 709; s. c. 64 Pac. Rep. 624; Guhl v. Whitcomb, 109 Wis. 69; s. c. 85 N. W. Rep. 142.

²¹⁸ Mackrall v. Omaha & C. R. Co., 111 Iowa 547; s. c. 82 N. W. Rep. 975.

²¹⁹ The failure of a person to look and listen at a street crossing, while attempting to drive back a refractory cow, does not show contributory negligence defeating a right to recover for the injuries, as a matter of law, but the question is for the jury: Lorenz v. Burlington & C. R. Co., 115 Iowa 377; s. c. 88 N. W. Rep. 835.

²²⁰ Goodell v. New York & C. R. Co., 67 App. Div. (N. Y.) 271; s. c. 73 N. Y. Supp. 428.

§ 1655. Traveller Looking Without Seeing where View is Unobstructed.—It is a sensible rule which charges the traveller with seeing what he could have seen if he had looked, and heard what he could have heard if he had listened. Where an approaching train is in full sight of a person attempting to cross a track, and he apparently looks but does not see the train, the law will presume that he did not look at all, or else deliberately thrust himself in front of the train.²²¹

§ 1656. Place, Point or Distance from the Track at which the Traveller ought to Stop, Look and Listen.—A traveller approaching a railroad crossing is required to exercise ordinary care to select a place to look and listen for approaching trains, where the acts of looking and listening will be reasonably effective. There is no arbitrary rule as to distance.²²² It is the view of one court that the looking required before going upon a crossing should take place just before the travel-

²²¹ *Boyle v. Illinois Cent. R. Co.*, 88 Ill. App. 255; *Chicago & C. R. Co. v. DeFreitas*, 109 Ill. App. 104; *Toledo & C. R. Co. v. Gallagher*, 109 Ill. App. 67; *Southern R. Co. v. Davis*, 34 Ind. App. 377; s. c. 72 N. E. Rep. 1053; *Chicago & C. R. Co. v. Reed*, 28 Ind. App. 629; s. c. 63 N. E. Rep. 878; *Northern Cent. R. Co. v. McMahon*, 97 Md. 483; s. c. 55 Atl. Rep. 627; *Schmidt v. Great Northern R. Co.*, 83 Minn. 105; s. c. 85 N. W. Rep. 935; *Hook v. Missouri Pac. R. Co.*, 162 Mo. 569; s. c. 63 S. W. Rep. 360; *Dolfini v. Erie R. Co.*, 178 N. Y. 1; s. c. 70 N. E. Rep. 68; rev'g s. c. 81 N. Y. Supp. 1124; *McAuliffe v. New York & C. R. Co.*, 88 App. Div. (N. Y.) 356; s. c. 84 N. Y. Supp. 607; s. c. aff'd, 181 N. Y. 537; 73 N. E. Rep. 1126; *Swart v. New York & C. R. Co.*, 81 App. Div. (N. Y.) 402; s. c. 80 N. Y. Supp. 906; s. c. aff'd, 177 N. Y. 529; 69 N. E. Rep. 1131; *Dryden v. Pennsylvania R. Co.*, 211 Pa. 620; s. c. 61 Atl. Rep. 249; *Woolf v. Washington R. & C. Co.*, 37 Wash. 491; s. c. 79 Pac. Rep. 997; *Le Duc v. New York Cent. & C. R. Co.*, 92 App. Div. (N. Y.) 107; s. c. 87 N. Y. Supp. 364.

²²² *Burns v. Louisville & C. R. Co.*, 136 Ala. 522; s. c. 33 South. Rep. 891; *Malott v. Hawkins*, 159 Ind. 127; s. c. 63 N. E. Rep. 308; *Chicago & C. R. Co. v. Turner*, 33 Ind. App. 264; s. c. 69 N. E. Rep. 484; *Greenwaldt v. Lake Shore & C. R. Co.*, 165 Ind. 219; s. c. 73 N. E. Rep. 910; 74 N. E. Rep. 1081. A finding, in an

action for injuries at a crossing, that defendants were negligent in not signaling; that, if plaintiff had stopped as he approached the track, he could have avoided the injury; that, if he had looked when within fifteen feet of the crossing, he could have seen the train, and at a distance of twenty-five feet he could have seen one hundred feet of the track—shows such negligence on the part of plaintiff as bars recovery: *Walker v. Mercer*, 61 Kan. 736; s. c. 60 Pac. Rep. 735; rev'g *Mercer v. Walker*, 9 Kan. App. 832; s. c. 58 Pac. Rep. 27. Contributory negligence was ascribed to a traveller who stopped at a point from sixty to one hundred twenty-five feet from a crossing and then drove rapidly in a heavy rain over the intervening space where the view of the track was obstructed and he was struck by a train just as he reached the track: *Knox v. Philadelphia & C. R. Co.*, 202 Pa. 504; s. c. 52 Atl. Rep. 90. A person who drove on a crossing in front of a moving train is guilty of contributory negligence, there being no evidence that he stopped except at a distance of three hundred twenty feet from the crossing, and it appearing that at almost any point between there and the crossing there could be seen nearly four thousand feet of the track from the crossing in the direction from which the train was coming: *Born v. Philadelphia & C. R. Co.*, 198 Pa. 409; s. c. 48 Atl. Rep. 263.

ler goes on the track, or so near thereto as to enable a person to get across before the train within the range of his view of the track, going at the usual rate of speed of fast trains, would reach the crossing.²²³ The question whether a person is imputable with contributory negligence in not looking for an approaching train at any given place before crossing the track under the foregoing rules is a question of fact for the determination of the jury.²²⁴

§ 1658. **Contributory Negligence of Persons of Defective Sight or Hearing.**²²⁵

§ 1659. **Contributory Negligence of Travellers who Voluntarily Disable Themselves From Seeing or Hearing.**²²⁶

§ 1665. **Traveller Thrusting himself into Danger and Taking his Chances.**—It is the plain duty of a traveller approaching a railroad crossing to give way to a train which is in sight or hearing and moving so rapidly as to make it doubtful whether he can cross in safety.²²⁷

§ 1666. **Traveller Thrusting himself in Front of an Advancing Engine or Train.**²²⁸—Where the case of the traveller's contributory

²²³ New York &c. R. Co. v. Kistler, 66 Ohio St. 326; s. c. 64 N. E. Rep. 130. See also, Hook v. Missouri Pac. R. Co., 162 Mo. 569; s. c. 63 S. W. Rep. 360; Robinette v. Alabama Great Southern R. Co., 132 Ala. 501; s. c. 31 South. Rep. 18. Contributory negligence was imputed to a traveller who stopped one hundred ten feet away from a crossing where a view of the track could be had and then without again stopping, drove to within a few feet of the track, where, being unable to stop his team, he attempted to hurry across the track ahead of an approaching train and was injured, and it was shown that he would have had a full view of the track for a long distance when he reached a point thirty-three feet from the crossing: Green v. Southern California R. Co., 138 Cal. 1; s. c. 70 Pac. Rep. 926; rev'g s. c. 67 Pac. Rep. 4.

²²⁴ Chicago &c. R. Co. v. Pollock, 195 Ill. 156; s. c. 62 N. E. Rep. 831; aff'g s. c. 93 Ill. App. 483; Hecker v. Oregon R. Co., 40 Or. 6; s. c. 66 Pac. Rep. 270; Newton v. Pittsburg &c. R. Co., 18 Pa. Super. Ct. 18.

²²⁵ That it is the duty of a traveller with impaired hearing to use his eyesight, if that sense would dis-

close the impending danger, and that a failure to do so would indicate a want of ordinary care, see: Schneider v. Northern Pac. R. Co., 81 Minn. 383; s. c. 84 N. W. Rep. 124; Shatto v. Erie R. Co., 121 Fed. Rep. 678 (traveller with ears covered drove at a trot in the direction of an approaching train, without looking or listening, and was injured—charged with contributory negligence); Chicago &c. R. Co. v. Rosow, 117 Fed. Rep. 491; s. c. 54 C. C. A. 313 (traveller, without stopping or looking in the direction from which a train was approaching, drove over hard frozen ground at a trot with his ears muffled—imputed with contributory negligence).

²²⁶ Southern R. Co. v. Carroll, 138 Fed. Rep. 638 (contributory negligence charged to person driving carriage with drawn curtains on track without looking or listening).

²²⁷ Southern R. Co. v. Carroll, 138 Fed. Rep. 638.

²²⁸ In each of these cases a recovery was denied because of the foolhardiness of the traveller in rashly attempting to cross in front of moving trains or engines: Central of Georgia R. Co. v. Forshee, 125 Ala. 313; s. c. 27 South. Rep. 1006;

negligence in this situation is clear as a matter of law, the railroad company may urge this as a defense though itself violating a statutory regulation at the time of the accident.²²⁹

§ 1669. Error of Judgment Committed by Traveller in Estimating the Time it will Take Him to Get Across and the Train to Arrive.—It is not required that a traveller should anticipate that an approaching train will proceed at an unlawful or unusual rate of speed, and he will not be charged with negligence, as a matter of law, in attempting to cross if, in view of the distance at which the track seems to be clear, he would have time to cross before a train going at the usual and lawful speed would reach the crossing.²³⁰ Applying the principle that mere error of judgment, when ordinary care has been exercised, will not be set down as amounting to negligence, courts have refused to ascribe contributory negligence to the conduct of travellers under these circumstances:—Where a traveller proceeded to cross a track, a view of which was obstructed, in the belief that he could cross before there was a probability of the train reaching the crossing, and in reliance on its stopping at the crossing and giving signals required by law, and running at a lawful rate of speed;²³¹ where a traveller, having sufficient time to cross the track without injury, caught his foot in a defect in the crossing, and was thrown down and injured before being able to get off the track.²³²

§ 1670. Traveller Taking Chances where his View is Obstructed, or His Hearing Impaired.—It is the general rule that the traveller whose view of a crossing is obstructed is bound to use all his faculties to ascertain whether a train is approaching at the time he attempts to cross, and it is his duty not only to look, but to listen, and so dispose himself as to make those powers of observation effective under the

Reed v. Queen Anne's R. Co., — Del. —; s. c. 57 Atl. Rep. 529; Patterson v. Chicago & C. R. Co., 111 Ill. App. 441; Chicago & C. R. Co. v. McElhaney, 87 Ill. App. 420; Atchison & C. R. Co. v. Withers, 69 Kan. 620; s. c. 77 Pac. Rep. 542; 78 Pac. Rep. 451; Illinois Cent. R. Co. v. Jackson (Ky.), 65 S. W. Rep. 342; s. c. 23 Ky. L. Rep. 1405; De Jong v. Erie R. Co., 59 App. Div. (N. Y.) 168; s. c. 69 N. Y. Supp. 78; St. Louis & C. R. Co. v. Matthews, 34 Tex. Civ. App. 302; s. c. 79 S. W. Rep. 71; Gulf & C. R. Co. v. Wilson (Tex. Civ. App.) 59 S. W. Rep. 589; 60 S. W. Rep. 438; Galveston & C. R. Co. v. Polk (Tex. Civ. App.), 63 S.

W. Rep. 343; Steber v. Chicago & C. R. Co., 115 Wis. 200; s. c. 91 N. W. Rep. 654; Tanguay v. Grand Trunk R. Co., Rap. Jud. Que. 20 C. S. 90.

²²⁹ Dunworth v. Grand Trunk Western R. Co., 127 Fed. Rep. 307; s. c. 62 C. C. A. 225.

²³⁰ Farrell v. Erie R. Co., 138 Fed. Rep. 28; Green v. Los Angeles Terminal R. Co. (Cal.), 69 Pac. Rep. 694 (no off. rep.).

²³¹ St. Louis & C. R. Co. v. Matthews, 34 Tex. Civ. App. 302; s. c. 79 S. W. Rep. 71.

²³² Baltimore & C. R. Co. v. Keck, 185 Ill. 400; s. c. 57 N. E. Rep. 197; aff'g s. c. 84 Ill. App. 159.

circumstances at the time.^{232a} A traveller was imputed with such negligence as to prevent his recovery of damages for injuries where, fully aware of the existence of a crossing, he drove over a frozen road, which caused the vehicle to make considerable noise and did not slacken his speed, though the view of the track approaching the crossing was obscured by an intervening embankment.²³³ So, contributory negligence was imputed to one *sui juris* and in possession of all his faculties with the exception of a slight deafness, who was struck while standing on the tracks of a railroad without taking note of the approach of a train, though the place where he stood was one of the principal thoroughfares of a city.²³⁴ One court refused to impute contributory negligence as a matter of law to a traveller who looked and listened before approaching the track at a crossing, where the view was obscured by standing cars, and gates were maintained but were not closed at this particular time, and he was struck on the crossing by a train which approached without warning of any kind, and this though the traveller failed to stop before he attempted to cross;²³⁵ and the same conclusion was reached by another court in the case of a traveller who drove in front of a train, which he could not see until the team was on the track, by reason of obstructions to his view, and he testified that he listened for a train and it was shown that his horses, though afraid of cars, did not act as though they heard anything of the train.²³⁶ In a case where the traveller's view of a railroad crossing was entirely obstructed by a cold storage building and a freight car, and, as he was about to cross the track, other men were standing in front of him, who were in a position to have seen the approaching engine by which the traveller was struck, but said nothing to warn him of his danger, it was held that he was not guilty of contributory negligence, as a matter of law, in failing to ask such persons whether it was safe to cross the track.²³⁷

§ 1673. Traveller Getting in Front of a Backing Train.—The case of contributory negligence is plain where a traveller drives on a track in front of a backing train in disregard of warning signals of the trainmen and is injured as a result of his rashness.²³⁸

^{232a} Fuchs v. Lehigh Valley R. Co.,
— N. J. L. —; s. c. 61 Atl. Rep. 1.

²³³ Carter v. Central Vermont R. Co., 72 Vt. 190; s. c. 47 Atl. Rep. 797.

²³⁴ Oliver v. Iowa Cent. R. Co., 122 Iowa 217; s. c. 97 N. W. Rep. 1072.

²³⁵ Baltimore &c. R. Co. v. Stumpf, 97 Md. 78; s. c. 54 Atl. Rep. 978.

²³⁶ New York &c. R. Co. v. Moore,

105 Fed. Rep. 725; s. c. 45 C. C. A. 21.

²³⁷ Coffee v. Pere Marquette R. Co., 139 Mich. 378; s. c. 102 N. W. Rep. 953; 11 Det. Leg. N. 896.

²³⁸ Riley v. Missouri Pac. R. Co., 69 Neb. 82; s. c. 95 N. W. Rep. 20; Gaynor v. Louisville &c. R. Co., 136 Ala. 244; s. c. 33 South. Rep. 808.

§ 1674. **Traveller Attempting to Climb Over or Pass Between Stationary Cars Obstructing Crossings.**²³⁰—It is still the general view of the American courts that a person, attempting to pass over a standing train illegally obstructing a public crossing, and injured by the sudden moving of the train, cannot recover unless some person having control of the train knew of his attempt to cross and failed to use reasonable efforts to save him from injury. In attempting to cross the train without the knowledge of the trainmen the traveller assumes the risk of the danger from the starting of the train,²⁴⁰ and being a trespasser, the employes of the railroad company are not required to exercise diligence to detect his presence.²⁴¹ But the traveller will not be charged with contributory negligence in this situation where he proceeds after assurance of operatives of the train that he has plenty of time to cross.²⁴²

§ 1677. **Attempting to Cross in Front of Standing Engines or Trains.**—Generally speaking, a person is not imputed with contributory negligence by reason of his attempt to cross a track at a public crossing directly in front of cars or engines which are stationary, unless he knows, or ought to know, that the engine or cars are about to be moved.²⁴³ And this is generally the rule where the crossing is obstructed and the traveller attempts to cross in front of such cars at a point to one side of the crossing and on the premises of the railroad

²³⁰ The personal view of the author advanced in the main section finds some support in South Carolina. In that State it was held error to direct a nonsuit in a case where it was in evidence that a railroad company stopped a freight train across a public way for a longer period than allowed by an ordinance of the town, and that it started the train without giving the statutory signal, and that a traveller, who was climbing over the bumpers between the freight cars to reach a passenger train, was injured: *Burns v. Southern R. Co.*, 61 S. C. 404; s. c. 39 S. E. Rep. 567. Under a Pennsylvania statute declaring the obstruction of a public crossing with cars illegal and prohibiting same under penalty, it is held that an obstruction of a crossing with a train, in attempting to get over which, a pedestrian is injured, is *prima facie* negligence: *Todd v. Philadelphia & C. R. Co.*, 201 Pa. 558; s. c. 51 Atl. Rep. 332.

²⁴⁰ *Russell v. Central of Georgia*

R. Co., 119 Ga. 705; s. c. 46 S. E. Rep. 858; *Illinois Cent. R. Co. v. Broughton*, 78 S. W. Rep. 876; 25 Ky. L. Rep. 1752; *Murdock v. Yazoo & C. R. Co.*, 77 Miss. 487; s. c. 29 South. Rep. 25 (rule stronger in cases where crossing is made on premises of railroad company); *Thompson v. Missouri & C. R. Co.*, 93 Mo. App. 548; s. c. 67 S. W. Rep. 693; *Kriwinski v. Pennsylvania R. Co.*, 65 N. J. L. 392; s. c. 47 Atl. Rep. 447; *Barr v. Southern R. Co.*, 105 Tenn. 544; s. c. 58 S. W. Rep. 849.

²⁴¹ *Thompson v. Missouri & C. R. Co.*, 93 Mo. App. 548; s. c. 67 S. W. Rep. 693.

²⁴² *Scott v. St. Louis & C. R. Co.*, 112 Iowa 54; s. c. 83 N. W. Rep. 818.

²⁴³ *Chicago Junction R. Co. v. McGrath*, 107 Ill. App. 100; s. c. aff'd, 203 Ill. 511; 68 N. E. Rep. 69; *St. Louis & C. R. Co. v. Dawson*, 64 Kan. 99; s. c. 67 Pac. Rep. 521; *Illinois Cent. R. Co. v. Hays*, 84 S. W. Rep. 338; s. c. 27 Ky. L. Rep. 91.

company.²⁴⁴ But authorities are not wanting which charge the traveller with the assumption of the risk in the latter situation on the theory that he is a trespasser as to whom the railroad company is not bound to keep its right of way safe for travel.²⁴⁵ A traveller driving a vehicle will take the risks of fright of his team caused by steam escaping from an engine standing still at a crossing, in front of which he attempts to drive.²⁴⁶

§ 1678. **Injuries to Travellers While Crossing Between Detached Portions of Trains on the Highway.**—The mere fact that a train is cut so as to leave some of it on one side and some on the other of a highway is not to be taken as an invitation to the public to cross through this opening without looking and listening.²⁴⁷ The rule requiring reasonable care is stronger where the traveller attempts to pass through a broken train on the premises of the railroad company, and here he cannot complain that no signal other than the customary one was given before closing the train. In this situation he is clearly a trespasser.²⁴⁸ In one case where a train obstructing a crossing was separated and the plaintiff attempted to pass through, when the portion of the train attached to the engine backed, and the plaintiff was caught between the two sections, it was held that the evidence tended to show that the plaintiff exercised ordinary care, where it appeared that there was nothing in the position of the two sections of the train to warn the plaintiff not to pass between them, though it further appeared that some one warned him that the train was about to back, but he was in the middle of the passage when the warning was given.²⁴⁹

²⁴⁴ *Chicago &c. R. Co. v. Mayer*, 112 Ill. App. 149; *Chicago Junction R. Co. v. McGrath*, 107 Ill. App. 100; s. c. aff'd, 203 Ill. 511; 68 N. E. Rep. 69. Where a pedestrian in a city street found the railroad crossing obstructed by a train, and waited forty minutes, and, it not moving, undertook to go around the end thereof, the railroad company was held liable for injuries received by falling into a ditch while making his way around the train, in the exercise of ordinary care: *Central of Georgia R. Co. v. Owen*, 121 Ga. 220; 48 S. E. Rep. 916. In such a case evidence that people were accustomed to cross the tracks at the end of the train when a freight train was obstructing the street is admissible, as bearing on the question of the care which should have been exercised by the railroad com-

pany, which knew of and acquiesced in the custom: *Leary v. Fitchburg R. Co.*, 53 App. Div. (N. Y.) 52; s. c. 65 N. Y. Supp. 699.

²⁴⁵ *Kelly v. Texas &c. R. Co.*, 97 Tex. 619; s. c. 80 S. W. Rep. 1197; aff'g s. c. 78 S. W. Rep. 372; *De La Pena v. International &c. R. Co.*, 32 Tex. Civ. App. 241; s. c. 74 S. W. Rep. 58.

²⁴⁶ *Miller v. Wellington &c. R. Co.*, 128 N. C. 26; s. c. 38 S. E. Rep. 29; *Lake Erie &c. R. Co. v. Fike*, 35 Ind. App. 554; s. c. 74 N. E. Rep. 636.

²⁴⁷ *Passman v. West Jersey &c. R.*, 68 N. J. L. 719; s. c. 54 Atl. Rep. 809; 61 L. R. A. 609.

²⁴⁸ *Furey v. New York &c. R. Co.*, 67 N. J. L. 270; s. c. 51 Atl. Rep. 505.

²⁴⁹ *Chicago &c. R. Co. v. Filler*, 195 Ill. 9; s. c. 62 N. E. Rep. 919.

§ 1679. **Traveller Caught between Trains Proceeding in Opposite Directions upon Parallel Tracks.**²⁵⁰—There is another example of rashness where a traveller at a crossing leaves a position of safety and places himself between parallel tracks so close together that he is injured by contact with trains moving in opposite directions as they pass the place where he stands. It would seem that the rule of contributory negligence should be enforced in such a case.²⁵¹

§ 1681. **Attempting to Cross where One Train Closely Follows Another.**—It has been held that a person, attempting to cross a railroad track on a public highway, who is familiar with and relies on a rule of the company which prohibits trains from following one another within ten minutes, is chargeable with contributory negligence in going on the track without looking and listening for approaching trains, though the train which caused the injury was a “wild train” and followed the preceding one within one or two minutes.²⁵²

§ 1682. **Contributory Negligence of Motorman of Electric Car in Getting Run Upon by Trains at Steam Railway Crossing.**—On the ground of contributory negligence a recovery was denied a street railway conductor who attempted to cross railroad tracks without stopping and knowing that the way was clear, and his car became stalled on the track for the want of electricity, and he was injured in a collision with cars on the railroad track.²⁵³

²⁵⁰ Cases ascribing contributory negligence to a traveller injured by going on tracks immediately after a train had cleared the crossing, and at a time when the noise of the departing train and the smoke thereof prevented him from seeing or hearing a train approaching from the opposite direction on a parallel track: *Quinn v. Chicago &c. R. Co.*, 162 Ind. 442; s. c. 70 N. E. Rep. 526; *Meinrenken v. New York &c. R. Co.*, 81 App. Div. (N. Y.) 132; s. c. 80 N. Y. Supp. 1074. But see *Cleveland &c. R. Co. v. Miles*, 162 Ind. 646; s. c. 70 N. E. Rep. 985, which sustains as against a demurrer a complaint which alleged that the traveller was waiting to cross the tracks as soon as a freight train, moving in the opposite direction from the locomotive obstructing the view and drowning the noise thereof, should move off the crossing, and that as soon as this happened the traveller started to cross the track, without notice or warning of the approach

of the locomotive, and without fault or carelessness on his part, when he was injured. Where two railroads run parallel to each other and the steam and smoke from the train of one is likely to shut off the view of a train on the other, it is the duty of persons approaching the tracks of the latter to stop before crossing until the smoke and steam have disappeared and rendered the approaching trains visible: *Keller v. Erie R. Co.*, 98 App. Div. (N. Y.) 550; 100 App. Div. 509; s. c. 90 N. Y. Supp. 236.

²⁵¹ *McCann v. Chicago &c. R. Co.*, 105 Fed. Rep. 480; s. c. 44 C. C. A. 566. But see *Eichorn v. New Orleans &c. Light &c. Co.*, 112 La. 236; s. c. 36 South. Rep. 335.

²⁵² *Bush v. Union Pac. R. Co.*, 62 Kan. 709; s. c. 64 Pac. Rep. 624.

²⁵³ *Birmingham Southern R. Co. v. Powell*, 136 Ala. 232; s. c. 33 South. Rep. 875. See also, *Pittsburg &c. R. Co. v. Browning*, 34 Ind. App. 90; s. c. 71 N. E. Rep. 227.

§ 1684. Facts to Which Contributory Negligence has been Ascribed as Matter of Law.²⁵⁴

§ 1685. Care to be Exercised by Bicyclist.—Where the view of the track is obstructed and the hearing of the bicyclist is dulled by other sounds, he should not proceed across the track without having his bicycle under such control that he can stop, and avoid an accident if necessary.²⁵⁵ A bicyclist crossing a series of tracks and required to be alert in looking for approaching trains from different directions is not indisputably negligent in failing to notice a defect in the crossing into which he runs his wheel and is thrown and injured.²⁵⁶

§ 1690. Precautions Specially Applicable at Railway Street Crossings in Cities.—Negligent operation is chargeable to a railroad company, which runs a locomotive and a train over a street crossing in a populous section of a city, without warning at a high rate of speed, while at the same time trains are running in the opposite direction on an adjacent track, obstructing the view and drowning the noise of the train to persons waiting to cross.²⁵⁷

§ 1692. Injuries where Trains Obstruct Crossings.—A railroad company may properly leave its cars standing in a highway for short periods of time when necessary in the reasonable conduct of its business, but to leave a train of cars in or upon a highway obstructing its use for a time longer than prescribed by law, or than is needful, may charge the railroad company with negligence,²⁵⁸ where the act is the proximate cause of an injury.²⁵⁹ The Iowa supreme court holds that the obstruction of a highway by a railroad for thirty minutes at a time amounts to a nuisance and declares invalid an ordinance authorizing an obstruction for that length of time.²⁶⁰

§ 1694. Starting Trains which have been Blocking the Highway without Giving Warning.—One court has very properly held that a railroad company, which leaves its cars in a street so near a crossing that a coupling therewith cannot be made without forcing the cars

²⁵⁴ *South Chicago City R. Co. v. Kinnare*, 96 Ill. App. 210 (driver of vehicle drove into side of moving train).

²⁵⁵ *Waddell v. New York Cent. & C. R. Co.*, 98 App. Div. (N. Y.) 343; s. c. 90 N. Y. Supp. 239.

²⁵⁶ *Sonn v. Erie R. Co.*, 67 N. J. L. 350; s. c. 51 Atl. Rep. 1109; aff'g s. c. 66 N. J. L. 428; 49 Atl. Rep. 458.

²⁵⁷ *Cleveland & C. R. Co. v. Miles*, 162 Ind. 646; s. c. 70 N. E. Rep. 985.

²⁵⁸ *Chicago & C. R. Co. v. Roberts*, 3 Neb. (unoff.) 425; s. c. 91 N. W. Rep. 707; *Mason v. Ohio River R. Co.*, 51 W. Va. 183; s. c. 41 S. E. Rep. 418; *Chicago & C. R. Co. v. Body*, 85 Ill. App. 133.

²⁵⁹ *Chicago & C. R. Co. v. Roberts*, 3 Neb. (unoff.) 425; s. c. 91 N. W. Rep. 707.

²⁶⁰ *J. K. & W. H. Gilcrest Co. v. Des Moines*, 128 Iowa 49; s. c. 102 N. W. Rep. 831.

onto the crossing and then makes the coupling without seeing whether such crossing is clear, is chargeable with negligence.²⁶¹

§ 1695. Practice of Making "Flying Switches," "Shunting" or "Kicking" Cars Across Highway Crossings Condemned.²⁶²

§ 1697. Contributory Negligence of the Person Hurt by Cars "Shunted" or "Kicked" Over Crossings.—A statute providing that contributory negligence is no defense to an action against a railroad company for injuries caused by kicking cars in the limits of a municipality does not prevent the interposition of the defense in an action for injuries so received outside of towns.²⁶³

§ 1698. Burden of Proof, Presumptions, Evidence, in Cases of Injuries at Crossings.²⁶⁴

²⁶¹ St. Louis &c. R. Co. v. Bowles, 32 Tex. Civ. App. 118; s. c. 72 S. W. Rep. 451.

²⁶² See generally: Mitchell v. Illinois Cent. R. Co., 110 La. 630; s. c. 34 South. Rep. 714; Bradley v. Ohio River &c. R. Co., 126 N. C. 735; s. c. 36 S. E. Rep. 181; International &c. R. Co. v. Mitchell (Tex. Civ. App.), 60 S. W. Rep. 996.

²⁶³ Yazoo &c. R. Co. v. Humphrey, 83 Miss. 721; s. c. 36 South. Rep. 154.

²⁶⁴ That defendant has burden of proof of contributory negligence, see: Pittsburgh &c. R. Co. v. Reed, — Ind. App. —; s. c. 75 N. E. Rep. 50; Baltimore &c. R. Co. v. Stumpf, 97 Md. 78; s. c. 54 Atl. Rep. 978; Bruseau v. New York &c. R. Co., 187 Mass. 84; s. c. 72 N. E. Rep. 348 (defendant must show plaintiff's gross negligence). The plaintiff has the burden of proving his freedom from contributory negligence in Illinois, although at the time of the injury the railroad company was running its train in violation of the laws as to signals and speed: Imes v. Chicago &c. R. Co., 105 Ill. App. 37. The plaintiff is not entitled to recover unless it is shown that his injury was the proximate result of the actionable negligence of the railroad company: Louisville &c. R. Co. v. Lewis, 141 Ala. 466; s. c. 37 South. Rep. 587. A statute, imposing on railroad companies the burden of proof to show compliance with statutes governing signals at crossings, and that there was no negligence on its part, is applicable in an action by a hus-

band for injury to his wife and personal property in a crossing accident: Birmingham Southern R. Co. v. Lintner, 141 Ala. 420; s. c. 38 South. Rep. 363. In an action against a railroad for injuries sustained at a grade crossing by reason of the railroad's failure to give statutory signals, the burden is on the defendant to prove that the plaintiff was guilty of gross or willful negligence within the meaning of a statute making a railroad company liable for injuries sustained under such circumstances, unless the injured person is guilty of gross or willful negligence: Kenny v. Boston &c. R. Co., 188 Mass. 127; s. c. 74 N. E. Rep. 309. Where the evidence shows that the injured person could have seen an approaching train, and he himself testifies that he actually looked for the train, the noise of which he undoubtedly heard, it was incumbent on him to testify expressly as to whether or not he saw the train, and his freedom from contributory negligence as dependent upon that fact is not to be established by circumstantial evidence: Seidman v. Long Island R. Co., 104 App. Div. 4; s. c. 93 N. Y. Supp. 209. In an action for injuries to one injured in passing through an opening in a freight train, evidence is admissible that the plaintiff saw others crossing through the opening, and that it was the custom of the railroad to leave openings of a similar character as tending to show an invitation to the public to pass through the opening: Gulf &c.

§ 1701. Various Other Questions in Cases of Injuries to Travellers at Railway Crossings.²⁶⁵

R. Co. v. Grisom, 36 Tex. Civ. App. 630; s. c. 82 S. W. Rep. 671; Chicago &c. R. Co. v. Russell, — Neb. —; s. c. 100 N. W. Rep. 156.

²⁶⁵ In Massachusetts a person injured at a railroad crossing on a public highway because of a defect

therein cannot recover from the railroad company unless he has given notice of his injuries within thirty days after receiving them: Nickerson v. New York &c. R. Co., 78 Mass. 195; s. c. 59 N. E. Rep. 636.

TITLE TWELVE

RAILWAY INJURIES AT OTHER PLACES THAN HIGHWAY CROSSINGS.

[§§ 1705-1869.]

§ 1705. **Railway Company under no Obligation to Provide in Advance against the Possibility of Injury to Trespassers.**—It is but another statement of the doctrine of the main section to say that the actual use and occupancy of tracks at these places is, so long as it lasts, a suspension and revocation of any right which the public may have to use the track, and for injuries to one attempting to cross the track or crawling under the cars thereon, during such occupancy, there can be no recovery.¹ In other words, the fact that a railroad track is used by pedestrians does not lessen the rights of the railroad company to run its trains without taking their possible presence on the track into consideration.²

§ 1706. **Not Bound to Take Special Precautions, or Keep a Special Lookout, or Give Special Warnings in Anticipation of Trespassers.**³—Speaking generally, a railroad company is under no obligation to keep a lookout for trespassers on its right of way and the failure to maintain a lookout will not impute the railroad company with negligence.⁴ The doctrine applies to trains traversing side tracks and bridges,⁵ and contains no exception in favor of trespassing children.⁶ Even a rule of the railroad company requiring its employes to use

¹Wagner v. Chicago &c. R. Co., 122 Iowa 360; s. c. 98 N. W. Rep. 141.

²Gregory v. Louisville &c. R. Co., 79 S. W. Rep. 238; s. c. 25 Ky. L. Rep. 1986.

³That railroad companies are not held to the same degree of care toward trespassers as toward passengers and employes, see: Brimmer v. Illinois Cent. R. Co., 101 Ill. App. 198; Gilliam v. Texas &c. R. Co., 114 La. 272; s. c. 38 South. Rep. 166; Seaboard &c. R. Co. v. Vaughn, 104 Va. 113; s. c. 51 S. E. Rep. 452.

⁴Cleveland &c. R. Co. v. Hibsman, 99 Ill. App. 405; Chicago &c. R. Co.

v. Urbaniac, 106 Ill. App. 325; Carrier v. Missouri Pac. R. Co., 175 Mo. 470; s. c. 74 S. W. Rep. 1002; Egan v. Montana Cent. R. Co., 24 Mont. 569; s. c. 63 Pac. Rep. 831; Cleveland &c. R. Co. v. Stein, 24 Ohio Cir. Ct. R. 643.

⁵Jordan v. Grand Rapids &c. R. Co., 162 Ind. 464; s. c. 70 N. E. Rep. 524; Purcell v. Chicago &c. R. Co., 117 Iowa 667; s. c. 91 N. W. Rep. 933; Vanarsdell v. Louisville &c. R. Co. (Ky.), 65 S. W. Rep. 858; s. c. 23 Ky. L. Rep. 1666.

⁶Louisville &c. R. Co. v. Logsdon, 118 Ky. 600; s. c. 81 S. W. Rep. 657; 26 Ky. L. Rep. 457.

"great care" to avoid injury will not change the degree of care which the law requires from the company to trespassers.⁷

§ 1707. Not Bound to Give Signals, Display Lights, etc., in Anticipation of Trespassers.⁸—In any event a railroad company will not be held liable for failure to have the headlight burning at the time of striking a trespasser unless such failure was the proximate cause of the accident, and this omission would not be the cause of injuries to a trespasser, where the train at the time of the accident was running through a fog so dense that the headlight would have been ineffectual if it had been lighted.⁹

§ 1708. Nor Maintain Any Particular Equipment, Run at Any Particular Speed, etc.—Here it is to be observed that speed regulations are adopted for the convenience and safety of passengers and those who cross the road at a place where they have a legal right to cross. They are not intended for the protection of trespassers;¹⁰ nor is the railroad company under any greater obligation to the trespasser to provide safe and proper appliances for its engines or cars.¹¹

§ 1709. No Duty to Trespasser until his Presence Becomes Known.—It is a corollary of the foregoing principles that the duty of observing ordinary care and diligence for the protection of trespassers on the tracks of a railroad company will not devolve on the company's servants until the presence of the trespasser on the track becomes known to them;¹² and it follows that a trespasser, to recover for a personal injury caused by failure of the engineer of a train to exercise due care after knowledge of his peril, must show this knowledge.¹³

⁷ Heck v. New York & C. R. Co., 94 App. Div. (N. Y.) 562; s. c. 88 N. Y. Supp. 154.

⁸ That a railroad company is not required to give signals or display lights in anticipation of presence of trespassers on track, see: Coleman v. Wrightsville & C. R. Co., 114 Ga. 386; s. c. 40 S. E. Rep. 247; Brooks v. Pittsburgh & C. R. Co., 158 Ind. 62; s. c. 62 N. E. Rep. 694; Davis v. Chesapeake & C. R. Co., 116 Ky. 144; s. c. 75 S. W. Rep. 275; 25 Ky. L. Rep. 342; Chesapeake & C. R. Co. v. Rogers, 100 Va. 324; s. c. 41 S. E. Rep. 732.

⁹ Dillas v. Chesapeake & C. R. Co., 71 S. W. Rep. 492; s. c. 24 Ky. L. Rep. 1347.

¹⁰ Smith v. Chicago & C. R. Co., 99 Ill. App. 296; Hortenstine v. Virginia-Carolina R. Co., 102 Va. 914; s. c. 47 S. E. Rep. 996.

¹¹ Hortenstine v. Virginia-Carolina R. Co., 102 Va. 914; s. c. 47 S. E. Rep. 996.

¹² Grady v. Georgia & C. Banking Co., 112 Ga. 668; s. c. 37 S. E. Rep. 861; Hambright v. Western & C. R. Co., 112 Ga. 36; s. c. 37 S. E. Rep. 99; Nashville & C. R. Co. v. Priest, 117 Ga. 767; s. c. 45 S. E. Rep. 35; Cleveland & C. R. Co. v. Largent, 108 Ill. App. 650; Chicago Terminal Transfer R. Co. v. Gruss, 102 Ill. App. 439; s. c. aff'd, 200 Ill. 195; 65 N. E. Rep. 693; McCowen v. Gulf & C. R. Co. (Tex. Civ. App.), 73 S. W. Rep. 46; Richmond Passenger & Power Co. v. Rack, 101 Va. 487; s. c. 44 S. E. Rep. 709; Dotta v. Northern Pac. R. Co., 36 Wash. 506; s. c. 79 Pac. Rep. 32.

¹³ Hulsey v. Louisville & C. R. Co., 87 S. W. Rep. 302; s. c. 27 Ky. L. Rep. 969; Erie R. Co. v. McCormick,

§ 1710. Or until there is Reasonable Ground to Believe that the Trespasser is in Peril.—Where, however, the railroad company does not know of the use of its right of way as a footpath, and the facts do not necessarily charge it with such knowledge, then it cannot be required to anticipate the presence of persons on the track, or to use ordinary care to discover their presence and avoid injuring them.¹⁴

§ 1711. Doctrine that Railway Company is Liable where, by the Exercise of Reasonable Care, it might Become Aware of the Presence of the Trespasser in Time to Avoid Injuring him.—The rule that the only duty a railroad company owes a trespasser is not to injure him wantonly does not everywhere relieve the company under all circumstances from anticipating the presence of trespassers on the track, and taking precautions to prevent injuring them;¹⁵ and the cases are numerous which hold a railroad company liable for injuries to a trespasser on the track, where the trainmen failed to use due care to discover him in a position of danger, and under such circumstances as would have put a man of average prudence on inquiry.¹⁶ But it must be shown that the failure of the operatives to exercise this degree of care was the proximate cause of the accident.¹⁷

§ 1712. This Doctrine Makes the Company Liable for Failing to Keep a Reasonable Lookout for Trespassers.—Where the trainmen, by the exercise of reasonable or ordinary care, could have seen the trespasser and prevented the injury then the defective lookout will be held to have been the proximate cause of the injury.¹⁸ In jurisdic-

69 Ohio St. 45; s. c. 68 N. E. Rep. 571; Ayers v. Wabash R. Co., 190 Mo. 228; s. c. 88 S. W. Rep. 608.

¹⁴ Reichert v. International & C. R. Co. (Tex. Civ. App.), 72 S. W. Rep. 1031.

¹⁵ Ashworth v. Southern R. Co., 116 Ga. 635; s. c. 43 S. E. Rep. 36; 59 L. R. A. 592. Plaintiff, in order to recover on the ground of defendant's negligence in not availing itself of the "last clear chance," must show that decedent was then apparently helpless, and that the engineer, by reasonable lookout, could have discovered him in time to prevent the injury: Clegg v. Southern R. Co., 133 N. C. 303; s. c. 43 S. E. Rep. 836; 45 S. E. Rep. 657.

¹⁶ Chesapeake & C. R. Co. v. Keelin, 62 S. W. Rep. 261; s. c. 22 Ky. L. Rep. 1942; McClanahan v. Vicksburg & C. R. Co., 111 La. 781; s. c. 35 South. Rep. 902 (intoxicated person struck while lying on the track

in such a situation that the engineer could have seen his dangerous position); Morgan v. Wabash R. Co., 159 Mo. 262; s. c. 60 S. W. Rep. 195; Whitesides v. Southern R. Co., 128 N. C. 229; s. c. 38 S. E. Rep. 878; Myers v. Boston & C. R., 72 N. H. 175; s. c. 55 Atl. Rep. 892; McKeown v. South Carolina & C. R. Co., 68 S. C. 483; s. c. 47 S. E. Rep. 713 (injured person, a pedestrian hard of hearing, was struck by train running at night without headlight).

¹⁷ Texas & C. R. Co. v. Shoemaker, 98 Tex. 451; s. c. 84 S. W. Rep. 1049; rev'g s. c. 81 S. W. Rep. 1019.

¹⁸ Sullivan v. New York & C. R. Co., 73 Conn. 203; s. c. 47 Atl. Rep. 131 (backing engine with insufficient headlight); Chesapeake & C. R. Co. v. Keelin, 62 S. W. Rep. 261; s. c. 22 Ky. L. Rep. 1942; Downing v. Morgan's & C. R. & S. S. Co., 104 La. 508; s. c. 29 South. Rep. 207;

tions where this rule is most consistently enforced, it is not a sufficient compliance that the lookout was maintained solely by the engineer. If the engineer's view is obstructed then it is the duty of the fireman to assist the engineer in keeping the lookout and warn him of the presence of trespassers.¹⁹ In one case it is held that the sending of a brakeman down a track to see if the track is clear before making a switch will not relieve the operatives of the train from the duty of keeping a reasonable lookout while the engine is in motion to prevent injury to persons on the track.²⁰

§ 1713. Doctrine that Company is Liable for Injuries to Trespassers only in Case of Gross, Reckless, Wanton or Willful Negligence.—

It is the doctrine of this section that the railroad company owes no duty to persons walking along its tracks without invitation, either express or implied, except to refrain from wantonly or willfully injuring them, and to use reasonable care to avoid injuring them after their presence is known. Where, however, the injuries are caused by the gross or willful negligence of the trainmen after knowledge of the trespasser's peril, the railroad company will be liable notwithstanding his contributory negligence.²¹

§ 1714. What Constitutes Gross, Reckless, Wanton or Willful Negligence within the Meaning of this Rule.—One court has held

Murrell v. Missouri Pac. R. Co., 105 Mo. App. 88; s. c. 79 S. W. Rep. 505; Arrowood v. South Carolina &c. R. Co., 126 N. C. 629; s. c. 36 S. E. Rep. 151; McArver v. Southern R. Co., 129 N. C. 380; s. c. 40 S. E. Rep. 94; St. Louis &c. R. Co. v. Bolton, 36 Tex. Civ. App. 87; s. c. 81 S. W. Rep. 123.

¹⁹ Arrowood v. South Carolina &c. R. Co., 126 N. C. 629; s. c. 36 S. E. Rep. 151.

²⁰ Galveston &c. R. Co. v. Levy, 35 Tex. Civ. App. 107; s. c. 79 S. W. Rep. 879.

²¹ See generally: Mizzell v. Southern R. Co., 132 Ala. 504; s. c. 31 South. Rep. 86; Denver &c. R. Co. v. Buffehr, 30 Colo. 27; s. c. 69 Pac. Rep. 582; Tully v. Philadelphia &c. R. Co., 3 Pen. (Del.) 455; s. c. 50 Atl. Rep. 95; Kendrick v. Seaboard Air Line R., 121 Ga. 775; s. c. 49 S. E. Rep. 762; Seaboard Air Line R. v. Shigg, 117 Ga. 454; s. c. 43 S. E. Rep. 706; Illinois Cent. R. Co. v. Eicher, 202 Ill. 556; s. c. 67 N. E. Rep. 376; rev'g s. c. 100 Ill. App. 599; Belt R. Co. v. Banicki, 102 Ill. App. 642; Chicago &c. R. Co. v. Tice,

111 Ill. App. 161; Cleveland &c. R. Co. v. Cline, 111 Ill. App. 416, 424; Cleveland &c. R. Co. v. Largent, 108 Ill. App. 650; Griffin v. Chicago &c. R. Co., 101 Ill. App. 284; Kinnare v. Chicago &c. R. Co., 114 Ill. App. 230 (rule applies to children); McLaughlin v. Chicago &c. R. Co., 115 Ill. App. 262; Smith v. Chicago &c. R. Co., 99 Ill. App. 296; Union Stock Yard &c. Co. v. Goodman, 91 Ill. App. 426; Jordan v. Grand Rapids &c. R. Co., 162 Ind. 464; s. c. 70 N. E. Rep. 524; Cannon v. Cleveland &c. R. Co., 157 Ind. 682; s. c. 62 N. E. Rep. 8; Manning v. Illinois Cent. R. Co., 84 S. W. Rep. 565; s. c. 27 Ky. L. Rep. 142; Byrnes v. Boston &c. R., 181 Mass. 322; s. c. 63 N. E. Rep. 897; Trudell v. Grand Trunk R. Co., 126 Mich. 73; s. c. 85 N. W. Rep. 250; 7 Det. Leg. N. 695; Lando v. Chicago &c. R. Co., 81 Minn. 279; s. c. 83 N. W. Rep. 1089; Barmore v. Vicksburg &c. R. Co., 85 Miss. 426; s. c. 38 South. Rep. 210; Haltiwanger v. Columbia &c. R. Co., 64 S. C. 7; s. c. 41 S. E. Rep. 810; Hern v. Southern Pac. Co., 29 Utah 127; s. c. 81 Pac. Rep. 902.

that in order to charge the defendant with willful negligence in running down and killing a trespasser it must be shown that he was on or so near the track as to be in danger of being struck by the engine; that he was seen by the engineer, that after he was seen, his conduct was such that the engineer should have known he either did not hear the approaching engine or did not intend to get out of the way, and that after discovering that such person was not going to get out of the way the engineer made no effort to avert the injury by stopping or slackening the speed of the engine, but recklessly and wantonly ran upon and injured him.²² A railroad company was held liable in a case where the conductor of a picnic train run by it, directed the excursionists to cross a trestle to reach the picnic ground, and while they were doing so backed his train over the trestle and injured the plaintiff, a member of the party.²³ Authorities are not wanting which hold a railroad company liable on the ground of willfulness for injuries caused by running its trains through thickly populated city districts in violation of laws governing speed and signals.²⁴

§ 1715. What is not Gross, Reckless, Wanton or Willful Negligence within the Meaning of this Rule.—It has been held that a railroad company was not to be charged with wanton or willful negligence by the mere fact that it failed to comply with a statute requiring railroad companies to equip cars with good and sufficient brakes attached to the rear or hindmost car of a train and have trusty and skillful brakemen stationed on such cars.²⁵ It has been held that negligence of this degree and kind was not shown where the conductor on the rear car of a backing train failed to see a traveller on the track in time to avoid injury to him, because his attention at the time was occupied with the condition of switches set for other trains;²⁶ nor where the engineer's view of a traveller, who suddenly, and without reason, stepped on the track, was obstructed by the front of his engine;²⁷ nor where an engineer, without reason to anticipate the presence of a person on the track at a station where he did not stop, failed to see a person thereon until within a few feet of him, because the track was shaded

²² *McLaughlin v. Chicago &c. R. Co.*, 115 Ill. App. 262.

²³ *Chicago Terminal Transfer R. Co. v. Kotoski*, 101 Ill. App. 300; s. c. *aff'd*, 199 Ill. 383; 65 N. E. Rep. 350.

²⁴ *Stevens v. Yazoo &c. R. Co.*, 81 Miss. 195; s. c. 32 South. Rep. 311; *Southern R. Co. v. Drake*, 107 Ill. App. 12.

²⁵ *Cleveland &c. R. Co. v. Cline*, 111 Ill. App. 416, 424.

²⁶ *King v. Illinois Cent. R. Co.*, 114 Fed. Rep. 855; s. c. 52 C. C. A. 489 (conductor stationed on rear car of backing train failed to see traveller because his attention was occupied with condition of switches).

²⁷ *Illinois Cent. R. Co. v. Eicher*, 202 Ill. 556; s. c. 67 N. E. Rep. 376; *rev'g* s. c. 100 Ill. App. 599.

and he immediately put forth every effort to avoid striking him but without avail.²⁸

§ 1716. Injuries to Trespassers Coming Suddenly upon the Track.

—The engineer of an approaching train, seeing a person in a safe place at the side of the track, has a right to presume that he will not leave it, and is not negligent in failing to anticipate that he will suddenly turn and step on the tracks in front of his train. He has the further right to presume that a person safely situated at the side of the track has sufficient intelligence to avoid danger, in the absence of evidence that he knew to the contrary.²⁹ So an engineer of a train on a side-track was held not negligent in failing to sound signals to warn a person on the main track of his danger from a train approaching him from the rear, since he had a right to assume that the person was aware of the approach of the train and would, at the proper time, step aside.³⁰

§ 1717. Injuries to Trespassers in Making the "Running" or "Flying Switch."³¹

§ 1718. Who are Trespassers and Bare Licensees within the Meaning of these Rules.—The term trespasser broadly includes all persons using the tracks of a railroad for purposes of their own at places other than street or highway crossings,³² and this is the case though the railroad company operating the road does not actually own the right of way.³³ In the late cases this status has been ascribed to one using a hand car on the track by permission of an employé who had no authority to loan it;³⁴ to a person using the rails to bend wires to a desired shape;³⁵ to a person walking along the railroad track to meet a telegraph operator coming from his house to the station;³⁶ to a

²⁸ *Zumault v. Kansas City &c. R. Co.*, 175 Mo. 288; s. c. 74 S. W. Rep. 1015.

²⁹ *Jackson v. Kansas City &c. R. Co.*, 157 Mo. 621; s. c. 58 S. W. Rep. 32.

³⁰ *Gregory v. Louisville &c. R. Co.*, 79 S. W. Rep. 238; s. c. 25 Ky. L. Rep. 1986.

³¹ Evidence from which the jury would find that the car which struck plaintiff while he was crossing defendant's track was suddenly and swiftly kicked back in obedience to a signal given by a yard-master at the time he saw plaintiff and others in the act of crossing, held sufficient to support a verdict for the plaintiff on the theory of active negligence: *Meneo v. Central R. Co.*, 84 N. Y. Supp. 448; *McCarty*

v. New York &c. R. Co., 73 App. Div. (N. Y.) 34; s. c. 76 N. Y. Supp. 321.

³² *Le Duc v. New York Cent. &c. R. Co.*, 92 App. Div. (N. Y.) 107; s. c. 87 N. Y. Supp. 364; *Yazoo &c. R. Co. v. Metcalf*, 84 Miss. 242; 36 South. Rep. 259.

³³ *Dorsey v. Louisville &c. R. Co.*, 80 S. W. Rep. 1131; s. c. 26 Ky. L. Rep. 232.

³⁴ *Louisville &c. R. Co. v. Wade*, 46 Fla. 197; s. c. 35 South. Rep. 863; *Rathbone v. Oregon R. Co.*, 40 Or. 225; s. c. 66 Pac. Rep. 909.

³⁵ *Cleveland &c. R. Co. v. Hibbsman*, 99 Ill. App. 405.

³⁶ *James v. Illinois Cent. R. Co.*, 195 Ill. 327; s. c. 63 N. E. Rep. 153; *aff'g* s. c. 93 Ill. App. 294.

person using the track as a path rather than await the passage of cars to allow him to cross at a public crossing;³⁷ to a person crossing railroad switch yards at each end of which notices warning trespassers to keep out were posted;³⁸ to a person going to sleep on the railroad track away from a public crossing;³⁹ to a person who turned aside from a public crossing and loitered on the tracks;⁴⁰ to an employé loitering around railroad premises after quitting service and receiving his pay.⁴¹ A person injured on the right of way beyond a public crossing is none the less a trespasser by reason of the fact that it is difficult at the particular point to determine the crossing boundaries; nor is the intention of the person in this situation material.⁴² A licensee has been defined as a person who is neither a passenger, a servant, or a trespasser, and not standing in a contractual relation to the railroad, and is permitted by the company to come on its premises for his own interests or gratification.⁴³ This character has been ascribed to a person using the track as a path to reach a station at which he expected to meet an incoming passenger;⁴⁴ to one given leave by a yard master to learn the duties of a certain occupation in the railroad yard with the expectation that he will be taken into employment on becoming competent;⁴⁵ to one in the habit of using the space between parallel tracks in proximity to a public crossing as a footpath, with the tacit consent of the employés of the railroad company.⁴⁶

§ 1719. **Who are not Trespassers and Bare Licensees within the Meaning of these Rules.**—Courts have refused to ascribe the status of trespasser or bare licensee to persons on the grounds of a railroad company by invitation of the company;⁴⁷ to one injured on a public

³⁷ *Gunter v. New York & C. R. Co.*, 81 App. Div. (N. Y.) 606; s. c. 81 N. Y. Supp. 395; *De La Pena v. International & C. R. Co.*, 32 Tex. Civ. App. 241; s. c. 74 S. W. Rep. 58.

³⁸ *Koegel v. Missouri Pac. R. Co.*, 181 Mo. 379; s. c. 80 S. W. Rep. 905.

³⁹ *Maysville & C. R. Co. v. McCabe*, 82 S. W. Rep. 233; s. c. 26 Ky. L. Rep. 532; *Sentell v. Southern R.*, 70 S. C. 183; s. c. 49 S. E. Rep. 215.

⁴⁰ *Over v. Missouri & C. R. Co.* (Tex. Civ. App.), 73 S. W. Rep. 335.

⁴¹ *Hern v. Southern Pac. Co.*, 29 Utah 127; s. c. 81 Pac. Rep. 902.

⁴² *Cleveland & C. R. Co. v. Cline*, 111 Ill. App. 416, 424. But see *Monahan v. Chicago & C. R. Co.*, 88 Minn. 325; s. c. 92 N. W. Rep. 1115, where it is held that a trespasser in a railroad yard intending to pass

over a highway, crossing the same, and continue on the right of way, may cease to remain a trespasser if, when entering upon the highway, he changes his purpose and uses the highway as an exit from the railroad grounds.

⁴³ *Northwestern El. R. Co. v. O'Malley*, 107 Ill. App. 599.

⁴⁴ *Pennsylvania R. Co. v. Martin*, 111 Fed. Rep. 586; s. c. 49 C. C. A. 474; 55 L. R. A. 361.

⁴⁵ *Collier v. Michigan C. R. Co.*, 27 Ont. App. 630.

⁴⁶ *Winn v. New York & C. R. Co.*, 65 App. Div. (N. Y.) 572; s. c. 72 N. Y. Supp. 899.

⁴⁷ *Chicago & C. R. Co. v. Kotoski*, 101 Ill. App. 300; s. c. aff'd, 199 Ill. 383; 65 N. E. Rep. 350.

crossing,⁴⁸ or a path crossing the track, which had been commonly used by the public for a long time without objection by the railroad company;⁴⁹ to persons passing over the premises to carry meals to train employes;⁵⁰ to one on premises adjoining a railroad right of way and struck by a timber projecting for an excessive distance from a car in a passing train, though the injured person was a trespasser on the premises where he received his injuries;⁵¹ to the servant of a construction company operating a railroad velocipede over tracks who had used the machine with such frequency as to charge the company with knowledge of the fact and it had made no objection thereto.⁵² Under a Louisiana statute declaring all railways to be public highways a person using the railroad track as a footpath is not considered a trespasser in that State.⁵³

§ 1720. **Circumstances which do not Amount to a License to Establish Footways upon or Across Railway Tracks.**—It is held that a general license to cross the tracks of a railroad company at a place other than a public crossing will not be implied unless the path is so well defined as to attract public attention and of itself be an invitation to the public to cross, and its use must be so continuous and for such length of time that it may be said that the company knew, or with care could have known, of such general public use and impliedly consented thereto.⁵⁴ But the habitual use of railroad tracks as a convenience in passing from one point to another without the express or implied permission of the railroad company will not create a license.⁵⁵

⁴⁸ *Illinois &c. R. Co. v. Mitchell*, 214 Ill. 151; s. c. 73 N. E. Rep. 449; *St. Louis &c. R. Co. v. Matthews*, 34 Tex. Civ. App. 302; s. c. 79 S. W. Rep. 71.

⁴⁹ *Texas &c. R. Co. v. Ball*, 96 Tex. 622; s. c. 75 S. W. Rep. 4; rev'g s. c. 73 S. W. Rep. 420; *Gulf &c. R. Co. v. Matthews*, — Tex. —; s. c. 88 S. W. Rep. 192; *Fitzgerald v. New York &c. R. Co.*, 84 App. Div. (N. Y.) 59; s. c. 81 N. Y. Supp. 1109; s. c. aff'd, 179 N. Y. 559; 71 N. E. Rep. 1131.

⁵⁰ *Illinois Cent. R. Co. v. Hopkins*, 100 Ill. App. 594; s. c. aff'd, 200 Ill. 122; 65 N. E. Rep. 656; *Wencker v. Missouri &c. R. Co.*, 169 Mo. 592; s. c. 70 S. W. Rep. 145.

⁵¹ *Missouri &c. R. Co. v. Scarborough*, 29 Tex. Civ. App. 194; s. c. 68 S. W. Rep. 196.

⁵² *Trinity &c. R. Co. v. Simpson*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 1034.

⁵³ *McClanahan v. Vicksburg &c. R.*

Co., 111 La. 781; s. c. 35 South. Rep. 902.

⁵⁴ *Atchison &c. R. Co. v. Potter*, 64 Kan. 13; s. c. 67 Pac. Rep. 534. See also, *Chesapeake &c. R. Co. v. See*, 79 S. W. Rep. 252; s. c. 25 Ky. L. Rep. 1995; *Goodman v. Louisville &c. R. Co.*, 116 Ky. 900; s. c. 77 S. W. Rep. 174; 25 Ky. L. Rep. 1086; 63 L. R. A. 657. In Texas the view is taken that a railroad company knowingly permitting the public to use its track within the limits of a city as a walkway for a number of years cannot claim that persons so using the track were trespassers and not licensees: *Gulf &c. R. Co. v. Matthews*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 192.

⁵⁵ *Illinois Cent. R. Co. v. O'Connor*, 189 Ill. 559; s. c. 59 N. E. Rep. 1098; rev'g s. c. 90 Ill. App. 142; *Wagner v. Chicago &c. R. Co.*, 122 Iowa 360; s. c. 98 N. W. Rep. 141; *St. Louis &c. R. Co. v. Shiflet*, 98 Tex. 326; s. c. 83 S. W. Rep. 677;

It follows that continued use for a long time will not operate as an implied license where the railroad company has issued repeated protests or warnings,⁵⁶ and posted signs⁵⁷ against such use of its right of way. It is not conclusive on the question of acquiescence that no active objection was made to such use of its tracks by the railroad company.⁵⁸ The presumption is against the authority of trainmen to grant this permission.⁵⁹ The fact that a railroad company provides walks alongside its tracks, which it invites the public to use, clearly rebuts any presumption that it assents to the use of the space between its tracks for this purpose.⁶⁰

§ 1722. Doctrine that Railway Company Owes no Special Duty to Bare Licensees.⁶¹

§ 1724. Doctrine that Railway Company does Owe a Special Duty to Bare Licensees.⁶²

Smalley v. Southern R. Co., 57 S. C. 243; s. c. 35 S. E. Rep. 489.

⁵⁶Denver &c. R. Co. v. Buffehr, 30 Colo. 27; s. c. 69 Pac. Rep. 582; Ringstaff v. Lancaster &c. R. Co., 64 S. C. 546; s. c. 43 S. E. Rep. 22.

⁵⁷Hamlin v. Columbia &c. R. Co., 37 Wash. 448; s. c. 79 Pac. Rep. 991.

⁵⁸St. Louis &c. R. Co. v. Shiflet, 98 Tex. 326; s. c. 83 S. W. Rep. 677; Wilmurth v. Illinois Cent. R. Co., 76 S. W. Rep. 193; s. c. 25 Ky. L. Rep. 671; Chesapeake &c. R. Co. v. See, 79 S. W. Rep. 252; s. c. 25 Ky. L. Rep. 1995.

⁵⁹St. Louis &c. R. Co. v. Shiflet, 98 Tex. 326; s. c. 83 S. W. Rep. 677. But see Chicago &c. Transfer Co. v. Kotoski, 199 Ill. 383; s. c. 65 N. E. Rep. 350; aff'g s. c. 101 Ill. App. 300, where it was held a question for the jury whether a person in passing over a trestle in order to reach a train on which he intended to take passage upon the advice of the conductor to use the trestle was a trespasser thereon.

⁶⁰Wagner v. Chicago &c. R. Co., 122 Iowa 360; s. c. 98 N. W. Rep. 141.

⁶¹That a railroad company owes to a mere licensee on its premises no duty except not to injure him willfully or wantonly, see: Means v. Southern California R. Co., 144 Cal. 473; s. c. 77 Pac. Rep. 1001 (licensee in freight depot injured by explosion of tank of sulphuric acid); Grady v. Georgia &c. Banking Co., 112 Ga. 668; s. c. 37 S. E.

Rep. 861 (person passing through open space between cars and injured when cars were pushed together); Illinois Cent. R. Co. v. Hopkins, 100 Ill. App. 594; s. c. aff'd, 200 Ill. 122; 65 N. E. Rep. 656 (person injured on station platform); Griswold v. Boston &c. R., 183 Mass. 434; s. c. 67 N. E. Rep. 354 (licensee crossing railroad tracks on path used by numerous persons living in that section of town); Wencker v. Missouri &c. R. Co., 169 Mo. 592; s. c. 70 S. W. Rep. 145 (child delivering lunches to employés and thrown from caboose by running out of the slack when the train stopped); Norfolk &c. R. Co. v. Wood, 99 Va. 156; s. c. 37 S. E. Rep. 846; 3 Va. Sup. Ct. Rep. 96 (person injured on station platform); McConkey v. Oregon R. &c. Co., 35 Wash. 55; s. c. 76 Pac. Rep. 526 (traveller injured by falling through bridge that railroad company allowed persons to use as pathway).

⁶²That a railroad company owes toward a licensee or person on its premises by invitation, express or implied, the duty of exercising reasonable care to avoid injuring him, see: Morris v. Florida Cent. &c. R. Co., 43 Fla. 10; s. c. 29 South. Rep. 541; Southern R. Co. v. Drake, 107 Ill. App. 12; Williamson v. Southern R. Co., 104 Va. 146; s. c. 51 S. E. Rep. 195. That a licensee on the tracks of a railroad may recover for a personal injury caused by an act of active negligence on the part of

§ 1725. Duty to Use Care in Favor of Persons using a Railway Track as a Footpath.—Where a portion of a railroad track is commonly used as a footway to the knowledge of the railroad company, persons so using it are regarded as using it rightfully, and trainmen are bound to use reasonable diligence to avoid injuring them.⁶³ The duties of both parties are reciprocal and the foregoing rule will not relieve the licensee from the exercise of ordinary care for his own safety while on the tracks.⁶⁴ There is a holding that such a person is entitled to the same benefit from an ordinance limiting the speed of trains as a person at a crossing.⁶⁵ On the question of the right of the injured person to walk along such a path, evidence is admissible that the track at the place in question was much used as a walkway to the knowledge of the railroad company.⁶⁶

§ 1726. Duty of Special Care where People are to be Expected on the Track.—The doctrine is well supported that where a number of persons with the knowledge and without the disapproval of a railroad company, habitually cross or traverse its tracks at a given place, the employés in charge of trains who are aware of this custom are bound to anticipate their presence at this point, and they are under a duty to exercise ordinary care and diligence to prevent injury to such persons.⁶⁷

the railroad's servants, see: *Meneo v. Central R. Co.*, 84 N. Y. Supp. 448. In one jurisdiction it is announced as a rule that as to active or unstable surroundings or conditions, put in motion or caused by a railroad company, it owes to a licensee on its right of way a degree of care reasonably commensurate to the known danger; but as to mere accommodations for travel and dangers incident to fixed and long established conditions or surroundings, it owes such a person no duty: *Illinois Cent. R. Co. v. Parkhurst*, 106 Ill. App. 467; *Illinois Cent. R. Co. v. Eicher*, 100 Ill. App. 599 (railroad liable to pedestrian walking on strip between two parallel tracks in general use as a walk and struck by end of pilot beam projecting over walk). In another jurisdiction it is the rule that if a licensee, using a path, knows of dangers therein, he uses it at his own risk, but the company will be liable to one using such a path with its acquiescence and injured thereon in ignorance of the dangers if the railroad company has not safe-

guarded the dangerous place or otherwise notified the public of its existence: *Matthews v. Seaboard Air Line R.*, 67 S. C. 499; s. c. 46 S. E. Rep. 335.

⁶³ *Corbett v. Oregon Short Line R. Co.*, 25 Utah 449; s. c. 71 Pac. Rep. 1065; *Texas & C. R. Co. v. Barrett*, 23 Tex. Civ. App. 545; s. c. 57 S. W. Rep. 602.

⁶⁴ *King v. Illinois Cent. R. Co.*, 114 Fed. Rep. 855; s. c. 52 C. C. A. 489.

⁶⁵ *Gulf & C. R. Co. v. Matthews*, 28 Tex. Civ. App. 92; s. c. 66 S. W. Rep. 588; 67 S. W. Rep. 788.

⁶⁶ *McCall v. Southern R. Co.*, 129 N. C. 298; s. c. 40 S. E. Rep. 67; *Hord v. Southern R. Co.*, 129 N. C. 305; s. c. 40 S. E. Rep. 69.

⁶⁷ See generally: *Tutt v. Illinois Cent. R. Co.*, 104 Fed. Rep. 741; s. c. 44 C. C. A. 320; *Bullard v. Southern R. Co.*, 116 Ga. 644; s. c. 43 S. E. Rep. 39; *Gunn v. Felton*, 108 Ky. 561; s. c. 57 S. W. Rep. 15; *Koegel v. Missouri Pac. R. Co.*, 181 Mo. 379; s. c. 80 S. W. Rep. 905; *Arrowood v. South Carolina & C. R. Co.*, 126 N. C. 629; s. c. 36 S. E. Rep. 151;

§ 1727. **Effect of Statutory Duty to Give Signals with Reference to the Safety of Trespassers.**—Under the rule that a railroad owes a licensee the duty of exercising reasonable care to prevent injuring him upon its premises, persons rightfully using a railroad track as a thoroughfare have a right to presume that approaching trains will sound signals required by law.⁶⁸ But the running of a train at a rate slightly in excess of the speed limited by ordinance,⁶⁹ and the failure to ring a bell continuously as required by another ordinance, have been held not to impute a railroad company with willful or wanton negligence so as to enable a trespasser to recover notwithstanding his contributory negligence.⁷⁰

§ 1727a. **Breach of Statutory Duty to Maintain Lookout.**—Under the express provision of an Arkansas statute it is the duty of the operatives of a train to keep a constant lookout for persons and property upon the track, and the railroad company is liable for all damages resulting from neglect of this precaution, and the railroad company has the burden of proof to show that such lookout was maintained.⁷¹

§ 1728. **Neglect of Statutory Precautions must have been the Proximate Cause of the Injury.**⁷²

§ 1729. **Duty toward Trespassers under the Tennessee Statute.**—It is not a sufficient defense that the lookout did not see the person on the track. It must be shown that the lookout could not have seen him by the exercise of due care and watchfulness.⁷³ The provision that the signal shall be sounded when any person or other obstruction appears on the road intends that the person or object should be near

Keller v. Erie R. Co., 98 App. Div. (N. Y.) 550; s. c. 100 App. Div. (N. Y.) 509; 90 N. Y. Supp. 236; Cleveland & C. R. Co. v. Gahan, 24 Ohio Cir. Ct. R. 277; Cooper v. Charleston & C. R. Co., 65 S. C. 214; s. c. 43 S. E. Rep. 682; Fleming v. Louisville & C. R. Co., 106 Tenn. 374; s. c. 61 S. W. Rep. 58; San Antonio & C. R. Co. v. Brock, 35 Tex. Civ. App. 155; s. c. 80 S. W. Rep. 422.

⁶⁸ Peters v. Southern R. Co., 135 Ala. 533; s. c. 33 South. Rep. 332; Illinois Terminal R. Co. v. Mitchell, 214 Ill. 151; s. c. 73 N. E. Rep. 449; Southern R. Co. v. Drake, 107 Ill. App. 12; Gulf & C. R. Co. v. Matthews, 28 Tex. Civ. App. 92; s. c. 66 S. W. Rep. 588; 67 S. W. Rep. 788.

⁶⁹ Tanner v. Missouri Pac. R. Co., 161 Mo. 497; s. c. 61 S. W. Rep. 826.

⁷⁰ Illinois Cent. R. Co. v. O'Con-

nor, 189 Ill. 559; s. c. 59 N. E. Rep. 1098; rev'g s. c. 90 Ill. App. 142.

⁷¹ Prescott & C. R. Co. v. Brown, — Ark. —; s. c. 86 S. W. Rep. 809.

⁷² Where the rear brakeman, from his position on the side of the car, was in plain sight of the front brakeman, and there was no causal connection between such rear brakeman's position and death of decedent, a licensee, by the derailment of a car, it was held not important that he was away from his usual station on top of the car at that time, though a city ordinance required brakemen to be at their posts and so stationed as to be able to see danger signals and hear signals from the engine: Harper v. St. Louis & C. Terminal Co., 187 Mo. 575; s. c. 86 S. W. Rep. 99.

⁷³ Felton v. Newport, 105 Fed. Rep. 332; s. c. 44 C. C. A. 530.

enough to be struck by a passing train.⁷⁴ One Federal Court has held that the duty to maintain the lookout on the locomotive is obligatory only where such lookout would be effective, and is not required where the engine employed in switching pushes the cars instead of pulling them.⁷⁵ Contributory negligence does not necessarily restrict a recovery to nominal damages, but the jury are given a wide discretion to fix the damages in accordance with their estimate of the relative negligence of the parties where both are negligent.⁷⁶ It has been held that the statute did not apply in favor of a foreman of a railroad construction gang killed as a result of being struck by a locomotive which he had seen approaching when he was standing near the track clearing it for the train to pass.⁷⁷

§ 1730. Questions of Evidence in the Case of Injuries to Trespassers and Licensees.—Generally the mere fact that a person was found dead on the right of way of a railroad company near the tracks with the appearance of having been run over is not sufficient of itself to establish actionable negligence.⁷⁸ In Georgia, where a statutory presumption of negligence prevails in cases where persons are killed on railroad tracks, it is held that the plaintiff in such an action will have established a *prima facie* case when he has shown that the deceased was killed on the defendant's tracks by its engines and cars.⁷⁹ Where the railroad company had knowingly permitted the public to use its roadbed as a walkway for a number of years, evidence of a general manager that the railroad company had never consented to such use by persons other than those having business with the company on its right of way was held inadmissible.⁸⁰

§ 1731. Duty of Operatives of Hand Car toward Trespassers.—The operator of a hand car, seeing a trespasser on a bridge ahead of him, has a right to assume that he will step to one side like other persons in possession of their faculties have done. He owes no duty to such trespasser until he discovers by his behavior and conduct that he cannot or does not intend to leave the track, and his behavior to have this effect must manifest itself positively.⁸¹

⁷⁴ *Rogers v. Cincinnati & C. R. Co.*, 136 Fed. Rep. 573; s. c. 69 C. C. A. 321.

⁷⁵ *Towles v. Southern R. Co.*, 103 Fed. Rep. 405.

⁷⁶ *Felton v. Newport*, 105 Fed. Rep. 332; s. c. 44 C. C. A. 530.

⁷⁷ *Rogers v. Cincinnati & C. R. Co.*, 136 Fed. Rep. 573; s. c. 69 C. C. A. 321.

⁷⁸ *Southern R. Co. v. Back*, 103 Va. 778; s. c. 50 S. E. Rep. 257.

⁷⁹ *Kemp v. Central of Georgia R. Co.*, 122 Ga. 559; s. c. 50 S. E. Rep. 465.

⁸⁰ *Gulf & C. R. Co. v. Matthews*, — Tex. —; s. c. 88 S. W. Rep. 192.

⁸¹ *Wright v. Southern R. Co.*, 132 N. C. 327; s. c. 43 S. E. Rep. 845.

§ 1734. **Liable for Failing to use Ordinary Care to Avoid Injuring Him after Discovering his Exposed Position.**⁸²—In one case—an action for injuries to a child trespasser—no fault was found with an instruction that the operatives of the train should exercise all the means at their command to stop the train after they saw the child on the track.⁸³ Another instruction receiving judicial sanction states it as the law that the engineer is held to that degree of care which a person of ordinary prudence would exercise under like conditions, and the more dangerous the indications, the more prudence he must exercise, and when the indications are very slight the degree of care may not be so high, but when the indications become a manifestation of approaching danger his prudence must rise up to that manifestation. This is a somewhat prolix statement of the rule that ordinary care is care commensurate with the danger to be avoided.⁸⁴ A railroad company is not absolved from the duty to exercise ordinary care to avoid injuring a trespasser, after discovering his exposed position, by the fact that a statute declares that all persons walking on tracks at other places than public crossings shall be deemed trespassers, since the only effect of the statute was to declare the conduct of such a person negligence *per se*, that is, such negligence as would defeat a recovery where contributory negligence would defeat it.⁸⁵

§ 1735. **Explanations and Illustrations of this Doctrine.**⁸⁶

§ 1736. **How Far Act on Presumption that Trespasser will Get Out of the Way.**—A locomotive engineer who sees a person on or approaching the track ahead of his train is required to stop or slacken the speed of his train only after seeing that he is taking no measures for

⁸² To the effect that a railroad company is liable where its servants fail to use ordinary care to avoid injuring a trespasser after discovering his exposed position, see: *Goodman v. Louisville & C. R. Co.*, 116 Ky. 900; s. c. 77 S. W. Rep. 174; 25 Ky. L. Rep. 1086; 63 L. R. A. 657; *Louisville & C. R. Co. v. Hocker*, 111 Ky. 707; s. c. 64 S. W. Rep. 638; 65 S. W. Rep. 119; 23 Ky. L. Rep. 982; *Koegel v. Missouri Pac. R. Co.*, 181 Mo. 379; s. c. 80 S. W. Rep. 905; *Missouri & C. R. Co. v. Cowles*, 29 Tex. Civ. App. 156; s. c. 67 S. W. Rep. 1078; *International & C. R. Co. v. Woodward*, 26 Tex. Civ. App. 389; s. c. 63 S. W. Rep. 1051.

⁸³ *Thomas v. Chicago & C. R. Co.*, 114 Iowa 169; s. c. 86 N. W. Rep. 259.

⁸⁴ *Stewart v. Long Island R. Co.*, 54 App. Div. (N. Y.) 623; s. c. 66 N. Y. Supp. 436.

⁸⁵ *Morgan v. Wabash R. Co.*, 159 Mo. 262; s. c. 60 S. W. Rep. 195.

⁸⁶ Switchyard employes finding a drunken man sleeping on the tracks in their switchyard should either rouse him and see him safely out of the yard or watch out for him so long as he remains in the yard. Their duty is not fulfilled by merely rousing him and starting him along the track in the direction of a highway, and where this is all that is done the company will be liable if such a person staggers back onto the track and again goes to sleep and is run over: *Cincinnati & C. R. Co. v. Marrs*, — Ky. —; s. c. 85 S. W. Rep. 188; 27 Ky. L. Rep. 388.

his own protection. He has a right to presume until the contrary is indicated that such a person will take ordinary precautions for his own safety;⁸⁷ and may act on this presumption up to the last moment.⁸⁸ Where, however, the person's manner clearly indicates that he is unconscious of his danger or helpless the presumption ceases, and the engineer will be guilty of actionable negligence if he runs him down.⁸⁹

§ 1738. What Do or not Do after Discovering Peril of Trespasser.

—In this situation it is the duty of the engineer to use all reasonable efforts to avoid inflicting injury, such as sounding signals, slackening the speed, and stopping if that is necessary.⁹⁰ If he has used all efforts to stop the train save that of sanding the track, he will not be imputed with negligence on this ground if this would have been unavailing.⁹¹ So, if the engineer, compelled to act quickly, uses all his efforts to stop the train by reversing the engine, sanding the track and putting on full air, he will not be charged with negligence because he did not at the same time sound the alarm whistle, that being impossible because of his occupation with these other precautions.⁹²

§ 1739. When not Liable for Running upon Trespasser after Discovering Him.⁹³

⁸⁷ Central of Georgia R. Co. v. Forshee, 125 Ala. 199; s. c. 27 South. Rep. 1006; Louisville & C. R. Co. v. Lewis, 141 Ala. 466; s. c. 37 South. Rep. 587; St. Louis & C. R. Co. v. Purcell, 135 Fed. Rep. 499; s. c. 68 C. C. A. 211; Chicago & C. R. Co. v. Thompson, 99 Ill. App. 277; Ward v. Illinois Cent. R. Co. (Ky.), 22 Ky. L. Rep. 191; s. c. 56 S. W. Rep. 807; Hebert v. Louisiana & C. R. Co., 104 La. 483; s. c. 29 South. Rep. 239; Trudell v. Grand Trunk R. Co., 126 Mich. 73; s. c. 85 N. W. Rep. 250; 7 Det. Leg. N. 695 (doctrine applied to a child seven years and four months old); Carrier v. Missouri Pac. R. Co., 175 Mo. 470; s. c. 74 S. W. Rep. 1002; Shetter v. Ft. Worth & C. R. Co., 30 Tex. Civ. App. 536; s. c. 71 S. W. Rep. 31; Rodriguez v. International & C. R. Co., 27 Tex. Civ. App. 325; s. c. 64 S. W. Rep. 1005; Savage v. Southern R. Co., 103 Va. 422; s. c. 49 S. E. Rep. 484; Humphreys v. Valley R. Co., 100 Va. 749; s. c. 42 S. E. Rep. 882; Teel v. Ohio River R. Co., 49 W. Va. 85; s. c. 38 S. E. Rep. 518.

⁸⁸ McArver v. Southern R. Co., 129

N. C. 380; s. c. 40 S. E. Rep. 94; Givens v. Louisville & C. R. Co. (Ky.), 72 S. W. Rep. 320; s. c. 24 Ky. L. Rep. 1796.

⁸⁹ Clegg v. Southern R. Co., 133 N. C. 303; s. c. 45 S. E. Rep. 657; 43 S. E. Rep. 836; Reyburn v. Missouri Pac. R. Co., 187 Mo. 565; s. c. 86 S. W. Rep. 174.

⁹⁰ Wilmurth v. Illinois Cent. R. Co., 76 S. W. Rep. 193; s. c. 25 Ky. L. Rep. 671; Becker v. Louisville & C. R. Co., 110 Ky. 474; s. c. 61 S. W. Rep. 997; 22 Ky. L. Rep. 1893; 53 L. R. A. 267 (trespasser on bridge); Fitzgibbons v. Manhattan R. Co., 88 N. Y. Supp. 341; Green v. Southern R. Co., 102 Va. 791; s. c. 47 S. E. Rep. 819.

⁹¹ Hasie v. Alabama & C. R. Co., 78 Miss. 413; s. c. 28 South. Rep. 941.

⁹² Humphreys v. Valley R. Co., 100 Va. 749; s. c. 42 S. E. Rep. 882.

⁹³ A railroad company owes no duty to a trespasser on its track, where his presence is not discovered in time to avoid injuring him: Chesapeake & C. R. Co. v. See, 79 S. W. Rep. 252; s. c. 25 Ky. L. Rep. 1995.

§ 1741. Duty to Give Warning Signals to Trespasser after Discovering Him.⁹⁴

§ 1744. Care Due to Trespassers after the Injury.—The authorities generally agree that a railroad company, free from negligence in injuring a trespasser, cannot be made liable on the ground that its servants were negligent in caring for him after the accident. The railroad company is under no legal obligation—however strong the moral obligation—to take charge of the wounded man.⁹⁵ If the law were otherwise “no humane or gratuitous act could be done without subjecting the doer of it to an action on the ground that the defendant ought to have acted more quickly or with more judgment. It is a doctrine which would allow an action against a good Samaritan and let a priest and a Levite go free.”⁹⁶ If, however, a railroad company is liable to the injured person on the ground of negligence under any of the foregoing principles, then the failure of the operatives of the train to take charge of the wounded man may be considered by the jury as aggravating the damages.⁹⁷

§ 1747. Trespassers Deemed Guilty of Negligence Per Se.⁹⁸

§ 1751. Rule where the Railway Company by the Exercise of Ordinary Care, could have Avoided the Consequences of the Negligence of the Person Killed or Injured on its Track.—It is the duty of a railroad company, without regard to whether a trespasser in a dangerous situation is guilty of contributory negligence, to use every reasonable means consistent with the safe operation of the train to avoid injuring him after discovering his peril, and it will be liable for injuries

⁹⁴ That it is the duty of the engineer to give proper warnings by signal or otherwise to trespassers in a dangerous situation, see: *McCall v. Southern R. Co.*, 129 N. C. 298; s. c. 40 S. E. Rep. 67; *St. Louis & C. R. Co. v. Allen*, 35 Tex. Civ. App. 355; s. c. 80 S. W. Rep. 240; *Law v. Missouri & C. R. Co.*, 29 Tex. Civ. App. 134; s. c. 67 S. W. Rep. 1025; *Teel v. Ohio River R. Co.*, 49 W. Va. 85; s. c. 38 S. E. Rep. 518. Thus where plaintiff was crossing a railroad bridge on a walk at the side of the track for pedestrians, six feet wide, and a freight train was coming from the opposite direction at three miles an hour, and the engineer, on noticing that she was close to the track, hallooed “Look out!” the engineer was not guilty of negligence in not sounding the whistle, since the words of caution

were as effective to warn plaintiff of the danger as the sounding of the whistle: *Skipton v. St. Joseph & C. R. Co.*, 82 Mo. App. 134.

⁹⁵ *Griswold v. Boston & C. R.*, 183 Mass. 434; s. c. 67 N. E. Rep. 354; *Union Pac. R. Co. v. Cappier*, 66 Kan. 649; s. c. 72 Pac. Rep. 281.

⁹⁶ *Lathrop, J.*, in *Griswold v. Boston & C. R.*, 183 Mass. 434; s. c. 67 N. E. Rep. 354.

⁹⁷ *Union Pac. R. Co. v. Cappier*, 66 Kan. 649; s. c. 72 Pac. Rep. 281; *Whitesides v. Southern R. Co.*, 128 N. C. 229; s. c. 38 S. E. Rep. 878.

⁹⁸ That trespasser is deemed guilty of contributory negligence *per se*, see: *Louisville & C. R. Co. v. McClish*, 115 Fed. Rep. 268; *Collins v. Illinois Cent. R. Co.*, 77 Miss. 855; s. c. 27 South. Rep. 837; *St. Louis & C. R. Co. v. Shiflet*, 98 Tex. 326; s. c. 83 S. W. Rep. 677.

inflicted where these reasonable efforts are not put forth.⁹⁹ In some jurisdictions the railroad company will be liable under this rule where the trainmen, by exercising due care, could have seen the dangerous situation of the trespasser in time to have avoided injuring him.¹⁰⁰ It is not necessary to the operation of the doctrine of discovered peril that the failure to use reasonable precautions to avoid injury should have been willful and wanton.¹⁰¹ The plaintiff has the burden of proving that the accident could have been avoided by the exercise of ordinary care after discovery of the trespasser's peril.¹⁰² The "last clear chance" doctrine does not obtain in Nebraska.¹⁰³

§ 1753. Contributory Negligence of Trespassers or Licensees in the Use of Defective Railway Premises.—A licensee went to a railroad

⁹⁹ *St. Louis &c. R. Co. v. Townsend*, 69 Ark. 380; s. c. 63 S. W. Rep. 994; *Lampkin v. McCormick*, 105 La. 418; s. c. 29 South. Rep. 952; *Gulf &c. R. Co. v. Miller*, 30 Tex. Civ. App. 122; s. c. 70 S. W. Rep. 25; *Kroeger v. Texas &c. R. Co.*, 30 Tex. Civ. App. 122; s. c. 70 S. W. Rep. 25; *Kroeger v. Texas &c. R. Co.*, 30 Tex. Civ. App. 87; s. c. 69 S. W. Rep. 809; *Humphreys v. Valley R. Co.*, 100 Va. 749; s. c. 42 S. E. Rep. 882. If plaintiff's intestate was negligent in driving up to a station platform to leave some freight to be shipped when a freight train was upon the track, so that his horse became frightened, and the deceased took hold of its bridle and attempted to hold him, and another train coming in, the horse made a plunge toward the track a few feet in front of the engine, and threw the deceased onto the track, still a recovery may be had, notwithstanding such negligence, if, after the deceased was in danger by reason of the fright of the horse, the engineer of the approaching train saw the danger and failed to exercise due care, which the situation demanded, by stopping his train: *Ward v. Maine Cent. R. Co.*, 96 Me. 136; s. c. 51 Atl. Rep. 947. A locomotive engineer was absolved from the charge of gross negligence under the Michigan rule in not seeing a trespasser on the track, where at the time of the approach of the locomotive the engineer was on the outside of the curve so that he could see but a short distance, and the fireman's attention was

chiefly directed to the station they were approaching, and which was somewhat obstructed by smoke from a passing train on an intersecting track: *Finnegan v. Michigan Cent. R. Co.*, 127 Mich. 15; s. c. 86 N. W. Rep. 395; 8 Det. Leg. N. 213. The "last clear chance" doctrine is without application where the trainmen were ignorant of the presence of the trespasser in a dangerous situation: *Dotta v. Northern Pac. R. Co.*, 36 Wash. 506; s. c. 79 Pac. Rep. 32. The care demanded under the rule is that of a man of reasonable skill and experience and of ordinary care and prudence under the same or similar circumstances: *Woods v. Wabash R. Co.*, 188 Mo. 229; s. c. 86 S. W. Rep. 1082.

¹⁰⁰ *St. Louis &c. R. Co. v. Evans*, — Ark. —; s. c. 86 S. W. Rep. 426. It was held that a company was not liable where the trespasser reached the track by crawling onto a trestle which crossed above a highway and then fell asleep, since the train operatives were not to be charged with the duty to expect to find a person in such a place and asleep: *Dugan v. Chesapeake &c. R. Co.*, 72 S. W. Rep. 291; 24 Ky. L. Rep. 1754.

¹⁰¹ *Gregory v. Wabash R. Co.*, 126 Iowa 230; s. c. 101 N. W. Rep. 761.

¹⁰² *St. Louis &c. R. Co. v. Townsend*, 69 Ark. 380; s. c. 63 S. W. Rep. 994; *Koegel v. Missouri Pac. R. Co.*, 181 Mo. 379; s. c. 80 S. W. Rep. 905.

¹⁰³ *Chicago &c. R. Co. v. Lilley*, 4 Neb. (unoff.) 286; s. c. 93 N. W. Rep. 1012.

yard at night to unload horses which he was required to take from the cars under the contract of carriage, and, having paid the freight, started to walk along platforms of uneven width, which were used in transferring freight from cars to the freight house, and was injured by stepping or falling from a jog in one of the platforms by reason of its not being lighted. It was held that he was not entitled to recover for these injuries, it appearing that the railroad had furnished other means of approach to the part of the yard beyond the freight houses where the cars to be unloaded by consignee were left.¹⁰⁴

§ 1754. Injury from Neglect of Statutory Precautions—When Contributory Negligence not a Defense.¹⁰⁵

§ 1759. Contributory Negligence of Persons Riding on Hand-Cars.—A trespasser, riding a railroad tricycle over tracks before daylight and in a dense fog, and run over by a train running at its usual speed and on regular time, was held guilty of such contributory negligence as to prevent a recovery for the injuries received.¹⁰⁶

§ 1760. Contributory Negligence of Persons Injured in Railway Yards.¹⁰⁷

§ 1761. Contributory Negligence of Persons Loading and Unloading Cars.—A person engaged in unloading cars has a right to assume that the operatives of switch engines moving in his neighborhood will warn him of an intention to shunt cars in his direction.¹⁰⁸ But a person unloading a car cannot recover for injuries where he knew, or by the exercise of ordinary care, should have known of the danger from collision in time to have protected himself from injury, and yet negligently failed to do so.¹⁰⁹ The doctrine which relaxes the strict rule of

¹⁰⁴ *Hathaway v. New York & C. R. Co.*, 182 Mass. 286; s. c. 65 N. E. Rep. 387.

¹⁰⁵ *Skipton v. St. Joseph & C. R. Co.*, 82 Mo. App. 134; *Glenn v. Norfolk & C. R. Co.*, 128 N. C. 184; s. c. 38 S. E. Rep. 812. Where the trespasser knows of the approach of the train he cannot recover on the ground that warning signals were not given him: *Louisville & C. R. Co. v. Penrod*, 108 Ky. 172; s. c. 56 S. W. Rep. 1.

¹⁰⁶ *Dilas v. Chesapeake & C. R. Co.* (Ky.), 71 S. W. Rep. 492; s. c. 24 Ky. L. Rep. 1347.

¹⁰⁷ *Pratt v. New York & C. R. Co.*, 187 Mass. 5; s. c. 72 N. E. Rep. 328 (employé of shipper going between uncoupled cars to move one of them with a crowbar not guilty of contributory negligence in failing to

note the fact that another car was following him by force of gravity). A person jumping on the footboard at the rear of a switch engine without invitation was held guilty of such gross contributory negligence as to preclude a recovery for injuries received in a collision, though the engine at the time of the accident was running at a rate of speed in excess of that allowed by ordinance: *Kansas City & C. R. Co. v. Williford*, 115 Tenn. 108; s. c. 88 S. W. Rep. 178.

¹⁰⁸ *Chicago & C. R. Co. v. Shaw*, 116 Fed. Rep. 621. See also *Baltimore & C. R. Co. v. Charvat*, 94 Md. 569; s. c. 51 Atl. Rep. 413.

¹⁰⁹ *Louisville & C. R. Co. v. Smith*, — Ky. —; s. c. 84 S. W. Rep. 755; 27 Ky. L. Rep. 257.

contributory negligence in cases where the injured person is required to act hurriedly in the presence of a sudden emergency is applicable in this connection, and hence a person engaged in loading or unloading a car will not necessarily be denied a recovery for injuries caused by jumping from the car to avoid what he believed to be an impending collision on the ground that his act was not necessary.¹¹⁰ Broadly speaking a consignee has a right to rely on the statement of the station agent that the place where the goods are to be unloaded is safe for that purpose.¹¹¹

§ 1766. Going upon the Track Without Looking and Listening.—

A trespasser or bare licensee walking on a railroad track must keep a constant lookout for approaching trains, and if he fails in this duty he is precluded by his own negligence from recovering damages in case he is injured by an approaching train, and this is so though the train is approaching without sounding signals.¹¹² And when the approaching train was plainly visible to the trespasser he will be conclusively presumed, in the absence of other evidence, to have seen the train and solicited his injuries.¹¹³

§ 1768. Duty to Look Behind.—Persons walking along railroad tracks must look to the rear as well as to the front, and cannot throw upon the trainmen the entire duty of securing their safety through unusual vigilance and extraordinary promptness.¹¹⁴ On the question

¹¹⁰ *Atlanta &c. R. Co. v. Roberts*, 116 Ga. 505; s. c. 42 S. E. Rep. 753; *Gulf &c. R. Co. v. Bryant*, 30 Tex. Civ. App. 4; s. c. 66 S. W. Rep. 804.

¹¹¹ *Bachant v. Boston &c. R.*, 187 Mass. 392; s. c. 73 N. E. Rep. 642.

¹¹² *Chattanooga &c. R. Co. v. Downs*, 106 Fed. Rep. 641; s. c. 45 C. C. A. 511; *Hines v. Texas &c. R. Co.*, 119 Fed. Rep. 157; s. c. 55 C. C. A. 654; *Pittsburgh &c. R. Co. v. Seivers*, 162 Ind. 234; s. c. 67 N. E. Rep. 680; *Schmitt v. Missouri Pac. R. Co.*, 160 Mo. 43; s. c. 60 S. W. Rep. 1043; *Koegel v. Missouri Pac. R. Co.*, 181 Mo. 379; s. c. 80 S. W. Rep. 905 (trespasser in railroad yard); *Bateholder v. Boston &c. R.*, 72 N. H. 528; s. c. 57 Atl. Rep. 926; *White v. New York &c. R. Co.*, 68 App. Div. (N. Y.) 561; s. c. 73 N. Y. Supp. 827; s. c. aff'd, 174 N. Y. 543; 67 N. E. Rep. 1091 (carrier of mail struck by overhang of a snow plow which he could have seen); *Pharr v. Southern R. Co.*, 133 N. C. 610; s. c. 45 S. E. Rep. 1021; *Cleveland &c. R. Co. v. Stein*,

24 Ohio Cir. Ct. R. 643; *Chesapeake &c. R. Co. v. Rogers*, 100 Va. 324; s. c. 41 S. E. Rep. 732; *Savage v. Southern R. Co.*, 103 Va. 422; s. c. 49 S. E. Rep. 484. The fact that a trespasser is hard of hearing does not operate to relax the rule. In such a case the duty to exercise care is greater: *Carrier v. Missouri Pac. R. Co.*, 175 Mo. 470; s. c. 74 S. W. Rep. 1002.

¹¹³ *St. Louis &c. R. Co. v. Purcell*, 135 Fed. Rep. 499; s. c. 68 C. C. A. 211; *Garlich v. Northern Pac. R. Co.*, 131 Fed. Rep. 837; s. c. 67 C. C. A. 237; *Louisville &c. R. Co. v. Mitchell*, 134 Ala. 261; s. c. 32 South. Rep. 735; *Dwajakowski v. Central R. Co.*, 69 N. J. L. 601; s. c. 55 Atl. Rep. 100; *Keller v. Erie R. Co.*, 98 App. Div. (N. Y.) 550; s. c. 100 App. Div. (N. Y.) 509; 90 N. Y. Supp. 236; *Winn v. New York Cent. &c. R. Co.*, 65 App. Div. (N. Y.) 572; s. c. 72 N. Y. Supp. 899.

¹¹⁴ *White v. Illinois Cent. R. Co.*, 114 La. 825; s. c. 38 South. Rep. 574. That a traveller is imputed with

whether a person injured on the track at a place used by the public as a crossing to the knowledge of the railroad company is to be imputed with contributory negligence in relying on signals, evidence is admissible to show that it was the usual custom of the railroad company to sound signals at the place in question.¹¹⁵

§ 1771. Failing to Get Off the Track after Discovering the Danger.¹¹⁶

§ 1773. Getting Caught upon Trestles.—The duty of the trespasser to look and listen is stronger in this situation than where he uses a railroad track proper from which there is an easy escape.¹¹⁷ Though a person is negligent in going on the trestle of a railroad yet the company will be liable for injuring him if the engineer, by the exercise of ordinary care, could have discovered his danger and prevented the accident.¹¹⁸ This principle, known as the doctrine of discovered peril, has no application in cases where there is no evidence that the injured person was seen, or could have been seen by the trainmen;¹¹⁹ nor is it applicable to a case where a person on a trestle, fearing the approach of a train, jumped from the trestle and sustained injury at a time when the locomotive had stopped and the engineer had no present intention to advance.¹²⁰

§ 1774. Going upon the Track and thereby Exposing Himself.¹²¹

contributory negligence in failing to keep a watchful lookout to the rear, see: *Dunworth v. Grand Trunk Western R. Co.*, 127 Fed. Rep. 307; *King v. Illinois Cent. R. Co.*, 114 Fed. Rep. 855; s. c. 52 C. C. A. 489; *Denver & C. R. Co. v. Buffehr*, 30 Colo. 27; s. c. 69 Pac. Rep. 582; *Southern R. Co. v. Barfield*, 112 Ga. 181; s. c. 37 S. E. Rep. 386; *Hill v. Indianapolis & C. R. Co.*, 31 Ind. App. 98; s. c. 67 N. E. Rep. 276; *Spavin v. Lake Shore & C. R. Co.*, 130 Mich. 579; s. c. 90 N. W. Rep. 325; 9 Det. Leg. N. 163 (injury to semaphore tender); *Davis v. Boston & C. R.*, 70 N. H. 519; s. c. 49 Atl. Rep. 108; *Hudson v. Erie R. Co.*, 61 App. Div. (N. Y.) 134; s. c. 70 N. Y. Supp. 350; *Bessent v. Southern R. Co.*, 132 N. C. 934; s. c. 44 S. E. Rep. 648; *Neal v. Carolina Cent. R. Co.*, 126 N. C. 634; s. c. 36 S. E. Rep. 117; 49 L. R. A. 684; *Gulf & C. R. Co. v. Miller*, 30 Tex. Civ. App. 122; s. c. 70 S. W. Rep. 25.

¹¹⁶ *International & C. R. Co. v. Woodward*, 26 Tex. Civ. App. 389; s. c. 63 S. W. Rep. 1051.

¹¹⁵ A servant of a contractor opening ditches on a railroad was imputed with contributory negligence, where after being warned of the approach of the train, instead of stepping off the track, he stood still and looked in the opposite direction: *White v. Atchison & C. R. Co.*, 84 Mo. App. 411.

¹¹⁷ *Provost v. Yazoo & C. R. Co.*, 52 La. Ann. 1894; s. c. 28 South. Rep. 305; *International & C. R. Co. v. De Ollos* (Tex. Civ. App.), 76 S. W. Rep. 222.

¹¹⁸ *Bogan v. Carolina Cent. R. Co.*, 129 N. C. 154; s. c. 39 S. E. Rep. 808; 55 L. R. A. 418.

¹¹⁹ *Whitesides v. Southern R. Co.*, 128 N. C. 229; s. c. 38 S. E. Rep. 878.

¹²⁰ *Weeks v. Wilmington & C. R. Co.*, 131 N. C. 78; s. c. 42 S. E. Rep. 541.

¹²¹ A person fishing from the retaining wall of a river four feet from a railroad company's track, was imputed with contributory negligence where he left his line and unnecessarily walked to a track in

§ 1775. Walking or Driving along the Track.¹²²

§ 1776. Walking on a Track where it is Laid upon the Surface of a Public Street.—One court has laid down the rule that where tracks are laid in a public street, and there is room to travel along the street outside the tracks, and there is no reason for going on the tracks, a person so using the tracks will be imputed with such negligence for injuries received by him thereon notwithstanding the negligence of the railroad company.¹²³

§ 1778. Going upon the Track Knowing that a Train is Due and Failing to Look and Listen.¹²⁴

§ 1779. Going upon the Track with Ears Muffled, Vision Obstructed, etc.¹²⁵

§ 1780. Going upon the Track to Rescue Persons in Danger.—A parent, seeing his two-year-old child on a railroad track a short distance in front of a rapidly advancing train, who runs on the track toward his child to rescue it, is not a trespasser and guilty of contributory negligence,¹²⁶ though he was wrongfully on the track when he discovered his child's peril.¹²⁷ The fact that those in charge of the train saw the peril of the rescuer in time to avoid injuring him can be proved by circumstantial evidence.¹²⁸ For like reasons a boy be-

the rear of a freight car, and while there was struck by a car which was moved by the force of other cars coming in contact with it: *Lagerman v. New York Cent. & C. R. Co.*, 53 App. Div. (N. Y.) 283; s. c. 65 N. Y. Supp. 764. A person stopping on a track for several minutes to engage in conversation with another man, and run over by an engine while thus engaged, is chargeable with contributory negligence, since his right on the tracks was one of immediate crossing only, and by lingering he made himself a trespasser: *Tennessee Coal & C. R. Co. v. Hansford*, 125 Ala. 349; s. c. 28 South. Rep. 45. See also *Zirkle v. Missouri Pac. R. Co.*, 67 Kan. 77; s. c. 72 Pac. Rep. 539.

¹²² Contributory negligence was imputed to a person crossing a bridge which had a space on each side of the track six feet wide for the use of pedestrians, and he walked so close to the track that he was hit by the pilot beam of an engine, which extended two feet eight inches beyond the side of the track,

and the traveller knew of the approach of the engine by reason of seeing it enter the bridge: *Skipton v. St. Joseph & C. R. Co.*, 82 Mo. App. 134.

¹²³ *Atchison & C. R. Co. v. Schwindt*, 67 Kan. 8; s. c. 72 Pac. Rep. 573.

¹²⁴ *Tanner v. Missouri Pac. R. Co.*, 161 Mo. 497; s. c. 61 S. W. Rep. 826 (traveller, thoroughly familiar with time of arrival of trains at station, took and maintained position on tracks without looking or listening, and was struck by a train—guilty of contributory negligence).

¹²⁵ *Carlson v. Atchison & C. R. Co.*, 66 Kan. 768; s. c. 71 Pac. Rep. 587 (trespasser encumbered with a heavy load which obstructed his sight and hearing).

¹²⁶ *San Antonio & C. R. Co. v. Gray*, 95 Tex. 424; s. c. 67 S. W. Rep. 763; rev'g s. c. 66 S. W. Rep. 229.

¹²⁷ *San Antonio & C. R. Co. v. Gray*, 95 Tex. 424; s. c. 67 S. W. Rep. 763; rev'g s. c. 66 S. W. Rep. 229.

¹²⁸ *San Antonio & C. R. Co. v. Gray*, 95 Tex. 424; s. c. 67 S. W. Rep. 763; rev'g s. c. 66 S. W. Rep. 229.

tween twelve and fourteen years of age was not imputed with contributory negligence in remaining on a railroad bridge and attempting to rescue his companion, a girl about the same age, who had fallen between the ties though he saw the approaching train in time to escape.¹²⁹

§ 1781. **Going upon the track to Rescue Chattels.**—A person who voluntarily leaves a place of safety, and attempts to rescue his horse and buggy from a place of danger on a railroad track and is run over and killed by a passing train, is guilty of such reckless exposure of himself as to preclude a recovery by his personal representative.¹³⁰

§ 1782. **Deaf Men, Blind Men and Idiots going Upon the Track.**¹³¹—The fact that the injured person was old or his hearing defective will not excuse him from the obligation to use due care for his safety. He is bound to exercise that degree of care that an ordinarily prudent person whose hearing is likewise defective should have exercised under the circumstances.¹³²

§ 1783. **Walking upon the Track at Night.**—A person walking along a railroad track under an implied license in the night when it was so dark that he could not see where he was walking, and he knew before starting that he must necessarily walk over a high bridge, and he was injured by falling through a hole in the bridge, was held guilty of contributory negligence as a matter of law.¹³³

§ 1784. **Stepping on One Track to Avoid a Train on Another.**¹³⁴

§ 1786. **Going upon the Track Immediately in Front of a Moving Train.**¹³⁵

¹²⁹ *Becker v. Louisville & C. R. Co.*, 110 Ky. 474; s. c. 61 S. W. Rep. 997; 22 Ky. L. Rep. 1893; 53 L. R. A. 267.

¹³⁰ *Baltimore & C. R. Co. v. Driskell*, 101 Ill. App. 137.

¹³¹ Cases where deaf or partially deaf trespasser imputed with contributory negligence in going on track before approaching train without looking: *Turner v. Yazoo & C. R. Co. (Miss.)*, 33 South. Rep. 283; *Heckney v. Illinois Cent. R. Co. (Miss.)*, 33 South. Rep. 723; *Roach v. Atlanta & C. R. Co.*, 119 Ga. 98; s. c. 45 S. E. Rep. 963.

¹³² *Toledo & C. R. Co. v. Hammett*, 115 Ill. App. 268; *Hamlin v. Columbia & C. R. Co.*, 37 Wash. 448; s. c. 79 Pac. Rep. 991.

¹³³ *McConkey v. Oregon R. & C. Co.*, 35 Wash. 55; s. c. 76 Pac. Rep. 526.

¹³⁴ A person walking on a switch track in a railroad yard, and familiar with the tracks, looked and saw a train starting, and thinking it was moving upon the track on which he was walking, stepped over to another track and was injured by the train, which was really moving on that track. He was held guilty of contributory negligence: *Burns v. St. Louis & C. R. Co.*, — Ark. —; s. c. 88 S. W. Rep. 824.

¹³⁵ *Nichols v. Gulf & C. R. Co.*, 83 Miss. 126; s. c. 36 South. Rep. 192 (licensee crushed between standing cars and backing train whose approach he saw); *Garlich v. Northern Pac. R. Co.*, 131 Fed. Rep. 837; s. c. 67 C. C. A. 237 (person walking in safety on space between railroad tracks and banks of river, left this place and crossed over the first

§ 1788. Struck while Standing or Walking Between Two Tracks.¹³⁶

§ 1789. Sitting down upon Railway Track.¹³⁷

§ 1790. Lying Down on Railway Track.¹³⁸

§ 1791. Going to Sleep on Railway Track.¹³⁹

§ 1792. Drunk and Asleep on Railway Track.—Generally speaking an intoxicated man, who seats himself on a railroad track and there sinks into a drunken stupor, is guilty of contributory negligence as a matter of law.¹⁴⁰ It seems a very proper holding that a railroad company is not required to equip moving cars with lights similar to lights of a locomotive to enable the trainmen to discern the presence of drunken trespassers on the track ahead of a backing train.¹⁴¹ In a case where an intoxicated person was ejected from a signal tower by the operator, and wandering along the track was struck by a train, it was held that neither the ejection of the trespasser from the tower, nor operator's failure to warn the train crews about to pass of the likelihood of encountering such trespasser, was negligence.¹⁴²

§ 1796. Standing or Walking too Near the Track.¹⁴³

track and was injured by moving train on adjoining track).

¹³⁶ *Chinn v. Chesapeake &c. R. Co.*, 74 S. W. Rep. 215; s. c. 24 Ky. L. Rep. 2350 (coal picker, in place of safety between tracks, stepped to one side and was struck by passing engine).

¹³⁷ That a person killed by a train while sitting down upon railroad track is guilty of contributory negligence as a matter of law, see: *Clegg v. Southern R. Co.*, 133 N. C. 303; s. c. 45 S. E. Rep. 657; 43 S. E. Rep. 836; *Upton v. South Carolina &c. R. Co.*, 128 N. C. 173; s. c. 38 S. E. Rep. 736; *St. Louis S. W. R. Co. v. Shiflet*, 94 Tex. 131; s. c. 58 S. W. Rep. 945; rev'g s. c. 56 S. W. Rep. 697; *Texas &c. R. Co. v. McDonald*, — Tex. —; s. c. 88 S. W. Rep. 201.

¹³⁸ That a person lying on a railroad track is guilty of contributory negligence as a matter of law, see: *Carter v. Southern R. Co.*, 135 N. C. 498; s. c. 47 S. E. Rep. 614; *Gulf &c. R. Co. v. Matthews*, 32 Tex. Civ. App. 137; s. c. 73 S. W. Rep. 413; 74 S. W. Rep. 803; *Smith v. International &c. R. Co.*, 34 Tex. Civ. App. 209; s. c. 78 S. W. Rep. 556; *Hall v. Western &c. R. Co.*, 123 Ga. 213; s. c. 51 S. E. Rep. 311.

¹³⁹ That a person going to sleep on a railroad track is guilty of contributory negligence as a matter of law, see: *Lyons v. Illinois Cent. R. Co.*, 59 S. W. Rep. 507; s. c. 22 Ky. L. Rep. 1032; *Hughes v. Louisville &c. R. Co.*, 67 S. W. Rep. 984; s. c. 23 Ky. L. Rep. 2288; *Kendall v. Louisville &c. R. Co.*, 76 S. W. Rep. 376; s. c. 25 Ky. L. Rep. 793 (injured person went under stationary cars to escape rain and fell asleep); *Zumault v. Kansas City Suburban Belt R. Co.*, 175 Mo. 288; s. c. 74 S. W. Rep. 1015; *Smith v. International &c. R. Co.*, 34 Tex. Civ. App. 209; s. c. 78 S. W. Rep. 556; *Teel v. Ohio River R. Co.*, 49 W. Va. 85; s. c. 38 S. E. Rep. 518.

¹⁴⁰ *Ayers v. Wabash R. Co.*, 190 Mo. 228; s. c. 88 S. W. Rep. 608.

¹⁴¹ *Gilliam v. Texas &c. R. Co.*, 114 La. 272; s. c. 38 South. Rep. 166.

¹⁴² *Southern R. Co. v. Back*, 103 Va. 778; s. c. 50 S. E. Rep. 257.

¹⁴³ That a trespasser is guilty of contributory negligence in standing or walking in such close proximity to a railroad track as to be struck by passing trains, see: *Mizzell v. Southern R. Co.*, 132 Ala. 504; s. c. 31 South. Rep. 86 (walking on cross-ties of track); *Lea v. Durham &c. R. Co.*, 129 N. C. 459; s. c.

§ 1798. Other Illustrative Cases where Contributory Negligence has been Imputed to the Person Injured.¹⁴⁴

§ 1799. Other Illustrative Cases where Contributory Negligence was not Conclusively Imputed to the Person Injured.—Contributory negligence was not conclusively imputed to the injured person under these circumstances:—Where the traveller before stepping on the track looked, sufficiently to have seen a moving train, but failed to note one standing at a depot several hundred feet away, and he entered on the track to walk only a few steps thereon and he was injured;¹⁴⁵ where a boy standing at a safe distance from a track was struck and injured by a piece of ice kicked from the platform of a passing caboose by a brakeman;¹⁴⁶ where the injured person was thoroughly familiar with the surroundings of the approach to a depot, and in the night time walked along a cinder path between tracks, which was commonly used by the public for this purpose, with the knowledge and implied consent of the railroad, and he was struck by a bar which was negligently permitted to protrude from an engine rapidly backing into the depot over one of the tracks.¹⁴⁷

§ 1801. Epileptic Going upon the Track.—There is authority for the proposition that it is such contributory negligence for an epileptic to walk on a railroad track that he cannot recover damages where he falls in a fit thereon and is struck by a train.¹⁴⁸

§ 1805. Doctrine that Railway Company owes no Duty to Trespassing Children except to Abstain from Injuring them Wantonly, Willfully or Intentionally.¹⁴⁹

§ 1806. Measure of Care Required toward Trespassing Children.—The more humane view exacts from a railroad company the duty to exercise such care for the protection of an infant on its property as would be reasonable under all the circumstances, having in mind the

40 S. E. Rep. 212 (walking on cross-ties of track); *Loughrey v. Pennsylvania R. Co.*, 201 Pa. 297; s. c. 50 Atl. Rep. 972.

¹⁴⁴ *Rodriguez v. International & C. R. Co.*, 27 Tex. Civ. App. 325; s. c. 64 S. W. Rep. 1005 (trespasser in switch yards injured while attempting to crawl between cars of a train which was being made up).

¹⁴⁵ *Gulf & C. R. Co. v. Miller*, 98 Tex. 270; s. c. 83 S. W. Rep. 182; aff'g s. c. 79 S. W. Rep. 1109.

¹⁴⁶ *Willis v. Maysville & C. R. Co.*, — Ky. —; s. c. 85 S. W. Rep. 716; 27 Ky. L. Rep. 459.

¹⁴⁷ *Yazoo & C. R. Co. v. Metcalf*, 84 Miss. 242; s. c. 36 South. Rep. 259.

¹⁴⁸ *Marks v. Atlantic Coast Line R. Co.*, 133 N. C. 89; s. c. 45 S. E. Rep. 468.

¹⁴⁹ That he is entitled only to protection from wanton or willful injury, see: *Riordan v. New York & C. R. Co.*, 41 Misc. (N. Y.) 399; s. c. 84 N. Y. Supp. 1046 (boy injured while picking coal along tracks); *Williamson v. Gulf & C. R. Co.*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 279 (child trespassing on railroad bridge abutment).

immaturity of the child, his capacity to appreciate the danger, and his familiarity with the surroundings, but this doctrine does not make the company an insurer of the infant's safety.¹⁵⁰ The rule that a trespasser is deemed guilty of negligence *per se* is a doctrine applicable to adults, and does not apply in full force to children.¹⁵¹ The trainmen are not charged with the duty to use all reasonable means to avoid injury to a child on the track until they are aware of his presence thereon and his peril.¹⁵² Thus in a case where a railroad company posted warning notices along its yard limits, notifying all persons to keep off the tracks, it was held not liable for injuries to a child going on a track therein filled with cars liable to be moved at any time, on mere proof that children were in the habit of playing on or near the tracks, without showing that the employes knew the child was on the track.¹⁵³

§ 1807. Whether a Duty to Erect Fences to Keep Away Trespassing Children.—There is authority that statutes requiring the construction and maintenance of right-of-way fences enure to the benefit of children of tender years injured by reason of negligence in that respect.¹⁵⁴ In all cases, however, the defect in the fence or its absence must have been the proximate cause of the injury. Otherwise there can be no recovery.¹⁵⁵

§ 1808. No Duty to Keep a Lookout for Trespassing Children.—Where this view prevails the railroad company, resting under no obligation to keep a lookout for trespassing children on its tracks and property, is only required to exercise reasonable care and diligence to avoid injuring them after their discovery in a dangerous position.¹⁵⁶

§ 1809. Doctrine that there is a Duty to Keep a Lookout for Trespassing Children.¹⁵⁷—Negligence in the matter of lookout is not ex-

¹⁵⁰ Tully v. Philadelphia &c. R. Co., 3 Pen. (Del.) 455; s. c. 50 Atl. Rep. 95.

¹⁵¹ St. Louis &c. R. Co. v. Bolton, 36 Tex. Civ. App. 87; s. c. 81 S. W. Rep. 123.

¹⁵² Nashville &c. R. Co. v. Harris 142 Ala. 249; s. c. 37 South. Rep. 794.

¹⁵³ Katzinski v. Grand Trunk R. Co., — Mich. —; s. c. 104 N. W. Rep. 409; 12 Det. Leg. N. 356.

¹⁵⁴ Marengo v. Great Northern R. Co., 84 Minn. 397; s. c. 87 N. W. Rep. 1117; Nickolson v. Northern Pac. R. Co., 80 Minn. 508; s. c. 83 N. W. Rep. 454. But see Byrnes v. Boston &c. R., 181 Mass. 322; s. c. 63 N. E. Rep. 897.

¹⁵⁵ Fezler v. Willmar &c. R. Co., 85 Minn. 252; s. c. 88 N. W. Rep. 746; Lake Shore &c. R. Co. v. Llidtke, 69 Ohio St. 384; s. c. 69 N. E. Rep. 653.

¹⁵⁶ Northwestern El. R. Co. v. O'Malley, 107 Ill. App. 599; Union Stock-Yards &c. Co. v. Butler, 92 Ill. App. 166; Thomas v. Chicago &c. R. Co., 114 Iowa 169; s. c. 86 N. W. Rep. 259; Wagner v. Chicago &c. R. Co., 122 Iowa 360; s. c. 98 N. W. Rep. 141; Wagner v. Chicago &c. R. Co., 124 Iowa 462; s. c. 100 N. W. Rep. 332.

¹⁵⁷ That it is the duty of trainmen to use ordinary care to discover the presence of children on the track and keep a reasonable lookout for

cused by efforts to stop the train after the peril of the child on the track is discovered, but not in time to prevent running over him.¹⁵⁸ In Texas it is held not error for a court to charge that a railroad company's failure to keep a lookout for trespassing children is negligence *per se*.¹⁵⁹

§ 1810. **Nature and Extent of this Duty.**—The supreme court of North Carolina announces the wholesome doctrine that the duty of an engineer to check the speed of his train in order to avoid injuring a child on the track will arise when, in the exercise of reasonable care, the engineer should have perceived the child, and not at the time when he actually saw it, though his attention was distracted by his duties, as in that event it was incumbent upon the railroad company's assistants to maintain a proper lookout.¹⁶⁰

§ 1811. **Duty of the Railway Company after Discovering the Child on the Track.**—The engineer's duty is not fulfilled merely by the use of due care to avoid the accident after the child is actually on the track;¹⁶¹ but he must take note of children approaching in such proximity to the track as to indicate to a person of ordinary prudence that they will run upon the track ahead of his train.¹⁶² Thus a railroad company was held liable for its engineer's mistake of judgment in supposing that a child would get off a bridge in time, and he did not put forth efforts to check the train in time to avoid killing the child.¹⁶³ Again the rule relieving a railroad company from liability to one who suddenly and unexpectedly comes upon the track and is injured, will not apply where the injured person is a child not capable of exercising any care for his own safety, unless the railroad company was free from negligence.¹⁶⁴

that purpose, see: *Mason v. Southern R. Co.*, 58 S. C. 70; s. c. 36 S. E. Rep. 440; *Missouri & c. R. Co. v. Hammer*, 34 Tex. Civ. App. 354; s. c. 78 S. W. Rep. 708; *Olivares v. San Antonio & c. R. Co.*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 248; *Texas & c. R. Co. v. Harby*, 28 Tex. Civ. App. 24; s. c. 67 S. W. Rep. 541.

¹⁵⁸ *Texas & c. R. Co. v. Harby*, 28 Tex. Civ. App. 24; s. c. 67 S. W. Rep. 541.

¹⁵⁹ *Missouri & c. R. Co. v. Hammer*, 34 Tex. Civ. App. 354; s. c. 78 S. W. Rep. 708.

¹⁶⁰ *Jeffries v. Seaboard & c. R. Co.*, 129 N. C. 236; s. c. 39 S. E. Rep. 836.

¹⁶¹ *Livingston v. Wabash R. Co.*,

170 Mo. 452; s. c. 71 S. W. Rep. 136.

¹⁶² *Livingston v. Wabash R. Co.*, 170 Mo. 452; s. c. 71 S. W. Rep. 136. The broad statement that the law does not demand of an engineer that he stop to inquire the intention of persons near the track, while abstractly correct, has no application to a child of tender years, and should not be embodied in an instruction to the jury: *Livingston v. Wabash R. Co.*, 170 Mo. 452; s. c. 71 S. W. Rep. 136.

¹⁶³ *Louisville & c. R. Co. v. Vanarsdell*, 77 S. W. Rep. 1103; s. c. 25 Ky. L. Rep. 1432.

¹⁶⁴ *Illinois Cent. R. Co. v. Jernigan*, 101 Ill. App. 1; s. c. aff'd, 198 Ill. 297; 65 N. E. Rep. 88. An in-

§ 1814. Contributory Negligence of the Child in these Cases.—

The law lays upon the child the duty to exercise the degree of care for his safety in this situation which would be exercised by persons of his years and capacity under like circumstances.¹⁶⁵ On this inquiry the jury may take into consideration the fact that the injured child, because of undevelopment, lacked the discretion belonging to one even of his years.¹⁶⁶ The question is, did the child understand the danger threatening him. Intelligent children of seven,¹⁶⁷ fourteen,¹⁶⁸ and fifteen¹⁶⁹ years of age, have been held to possess such knowledge and hence have been imputed with contributory negligence. Children of twenty months,¹⁷⁰ three and a half years,¹⁷¹ and seven years of age¹⁷² have been held incapable of contributory negligence in the absence of evidence as to their intelligence or capacity.

§ 1815. Various Acts of Children Trespassing upon Railway Tracks, to which Contributory Negligence was Ascribed.¹⁷³

§ 1818. Whether Children of Tender Years can be Treated as Trespassers.—A boy eight years old, who climbed on a box car to look

struction that the law will not "hold a railroad company responsible for the sudden impulse of any spectator, who, from fright or panic, rushes suddenly and unexpectedly within two to four feet, and in front of a moving train," was not applicable to a case where a child ran fifty feet diagonally across a depot platform toward the track, its course indicating that it was aiming to reach a trunk platform on the other side of the track: *Livingston v. Wabash R. Co.*, 170 Mo. 452; s. c. 71 S. W. Rep. 136.

¹⁶⁵ *Thompson v. Missouri & C. R. Co.*, 93 Mo. App. 548; s. c. 67 S. W. Rep. 693.

¹⁶⁶ *Texas & C. R. Co. v. Ball* (Tex. Civ. App.), 73 S. W. Rep. 420; s. c. rev'd in 96 Tex. 622; 75 S. W. Rep. 4, on other grounds.

¹⁶⁷ *Givens v. Louisville & C. R. Co.* (Ky.), 72 S. W. Rep. 320; s. c. 24 Ky. L. Rep. 1796; *Trudell v. Grand Trunk R. Co.*, 126 Mich. 73; s. c. 85 N. W. Rep. 250; 7 Det. Leg. N. 695.

¹⁶⁸ *Cleveland & C. R. Co. v. Gahan*, 24 Ohio Cir. Ct. R. 277.

¹⁶⁹ *Bess v. Atchison & C. R. Co.*, 62 Kan. 299; s. c. 62 Pac. Rep. 996.

¹⁷⁰ *Missouri & C. R. Co. v. Hammer*, 34 Tex. Civ. App. 354; s. c. 78 S. W. Rep. 708.

¹⁷¹ *Livingston v. Wabash R. Co.*, 170 Mo. 452; s. c. 71 S. W. Rep. 136.

¹⁷² *Watson v. Southern R.*, 66 S. C. 47; s. c. 44 S. E. Rep. 375.

¹⁷³ *Southern R. Co. v. Eubanks*, 117 Ga. 217; s. c. 43 S. E. Rep. 487 (child in custody of sister and in place of safety, broke away and ran in front of rapidly approaching train); *Haecker v. Chicago & C. R. Co.*, 91 Ill. App. 570 (girl seven years old in company with others crossed railroad track in safety, and then turned back and was struck by a rapidly approaching train); *Fezler v. Willmar & C. R. Co.*, 85 Minn. 252; s. c. 88 N. W. Rep. 746 (boy injured while running beside train trying to keep up with it); *International & C. R. Co. v. Wear*, 33 Tex. Civ. App. 492; s. c. 77 S. W. Rep. 272 (children in place of safety waited until train was nearly opposite and then raced to see which would get across track first). In a case where plaintiff, a child, being frightened by the approach of a train operated with due care by the defendant, ran on the track of another company and was there injured by an approaching train, it was held that the defendant company was not liable: *Illinois Cent. R. Co. v. Haecker*, 110 Ill. App. 102.

at a sale of stock in an adjacent stockyard and was thrown therefrom by the movement of the car was held a trespasser.¹⁷⁴

§ 1819. Injuries to Children through "Kicking" or "Shunting" Cars, Making the "Flying Switch," etc.¹⁷⁵

§ 1820. Precautions in the Favor of Children with Respect to Switch-Yards, to Cars on Side-Tracks, etc.—It is not generally required that trainmen should make a careful inspection of the train before starting it to ascertain whether children are under the cars, in the absence of circumstances suggesting the likelihood of finding them thus exposed.¹⁷⁶ In a case where a railroad company negligently allowed a pile of cinders to remain by the side of its tracks, and a boy nine years old stumbled over it and fell under the train, without negligence on his part, it was held that the negligence of the company was the proximate cause of the accident.¹⁷⁷

§ 1821. Duty of Care toward Children Residing near the Track.¹⁷⁸

§ 1825. Extent of Duty to Children Climbing upon Engines or Cars, "Stealing Rides," etc.—Generally speaking a railroad company owes no duty to trespassers jumping on and off its trains and stealing rides, except not to injure them wantonly after their peril is discovered.¹⁷⁹ The fact that boys were in the habit of jumping off and on the trains without remonstrance will not amount to an invitation from a railroad company to a particular boy to jump off and on moving cars, so as to make the company liable for his injuries while thus engaged.¹⁸⁰ In a case where a boy was invited to a car by the car re-

¹⁷⁴ *Jordan v. Grand Rapids & C. R. Co.*, 162 Ind. 464; s. c. 70 N. E. Rep. 524.

¹⁷⁵ Under the allegation that defendant's employes ran moving cars against the standing car on which plaintiff was injured by a flying switch, evidence only that the moving cars were run against the standing car, without showing the manner in which it was done, does not prevent a recovery, as the variance, if any, is not material; the substantial issue being the striking of the standing car, which plaintiff was on, with moving cars: *Houston & C. R. Co. v. Ollis*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 850.

¹⁷⁶ *Flores v. Atchison & C. R. Co.* (Tex. Civ. App.), 66 S. W. Rep. 709. Where children are in the habit of playing about the switchyard of a railroad and the cars therein, with the knowledge and ac-

quiescence of the company, its agents and employes, the company owes them the duty to use ordinary care to discover their presence in the switchyard and on the cars and to avoid injuring them: *Ollis v. Houston & C. R. Co.*, 31 Tex. Civ. App. 601; s. c. 73 S. W. Rep. 30.

¹⁷⁷ *Anderson v. Union Terminal R. Co.*, 161 Mo. 411; s. c. 61 S. W. Rep. 874.

¹⁷⁸ *West Virginia Cent. & C. R. Co. v. State*, 96 Md. 652; s. c. 54 Atl. Rep. 669; 61 L. R. A. 574 (company liable for the death of a boy injured by derailed cars which ran into his parents' yard and there inflicted the fatal injuries).

¹⁷⁹ *Wilson v. Atchison & C. R. Co.*, 66 Kan. 183; s. c. 71 Pac. Rep. 282.

¹⁸⁰ *Wilson v. Atchison & C. R. Co.*, 66 Kan. 183; s. c. 71 Pac. Rep. 282; *Horn v. Chicago & C. R. Co.*, 124 Iowa 281; s. c. 99 N. W. Rep. 1068.

pairer to help in some work, and after its completion he left the car and thereafter was injured while jumping on passing cars, it was concluded that the negligence of the car repairer in inviting the boy into the car was not the proximate cause of the injury.¹⁸¹ So a railroad company was held not liable for injury to a child trespasser twelve years old merely because its watchman at the place of the accident had employed him to perform an errand, but at the time of the accident the errand had been fully performed and he was injured while playing.¹⁸² In another case it was held that the doctrine of discovered peril was not involved though the trainmen saw the boy playing on a slowly moving car, but there was no evidence that these employes knew that he had fallen under the car until too late to save him, and an instruction submitting that question was improper.¹⁸³

§ 1836. **Care Required toward Persons Using the Track for Passage.**—Generally where a railroad track has been constantly used as a pathway by the public for a considerable period of time, and this use is well known to the railroad company and its employes, the law will imply an acquiescence in such use and regard travellers thereon not as trespassers but as licensees,¹⁸⁴ toward whom the company owes the duty to use reasonable care to discover their presence in dangerous situations in time to avoid injuring them.¹⁸⁵ Thus where a railroad

¹⁸¹ *Horn v. Chicago &c. R. Co.*, 124 Iowa 281; s. c. 99 N. W. Rep. 1068.

¹⁸² *Fitzgerald v. Chicago &c. R. Co.*, 114 Ill. App. 118.

¹⁸³ *Missouri &c. R. Co. v. Haltom*, 95 Tex. 112; s. c. 65 S. W. Rep. 625.

¹⁸⁴ *Illinois Cent. R. Co. v. Hopkins*, 200 Ill. 122; s. c. 65 N. E. Rep. 656; *aff'g* s. c. 100 Ill. App. 594 (injured person had carried meals to employes over track for eight years before accident); *Illinois Cent. R. Co. v. Eicher*, 100 Ill. App. 599; *McCarty v. New York &c. R. Co.*, 73 App. Div. (N. Y.) 34; s. c. 76 N. Y. Supp. 321; *Jones v. Charleston &c. R. Co.*, 61 S. C. 556; s. c. 39 S. E. Rep. 758; *St. Louis &c. R. Co. v. Bolton*, 36 Tex. Civ. App. 87; s. c. 81 S. W. Rep. 123; *International &c. R. Co. v. Woodward*, 26 Tex. Civ. App. 389; s. c. 63 S. W. Rep. 1051 (track so used for more than twenty-five years without objection). Where railroad tracks were laid in an alley between packing house buildings, and defendant had knowledge that for many years employes in the packing house had

been in the habit of crossing the tracks at all points along the alley between the buildings, and that such practice was more common than the use of the crossing at one end of the platforms, and no objection was ever made thereto, an employe killed by a train while crossing such tracks was a licensee thereon, and not a trespasser: *Booth v. Union Terminal R. Co.*, 126 Iowa 8; s. c. 101 N. W. Rep. 147. An acquiescence in the use of a track for a roadway may be implied from a constant use for twenty-four years though there was a sign up warning people off, but it had never been obeyed and the railroad company had knowledge of this disobedience of the notice: *Murrell v. Missouri Pac. R. Co.*, 105 Mo. App. 88; s. c. 79 S. W. Rep. 505.

¹⁸⁵ *Elgin &c. R. Co. v. Thomas*, 115 Ill. App. 508; s. c. *aff'd* 215 Ill. 158; 74 N. E. Rep. 109; *Lampkin v. McCormick*, 105 La. 418; s. c. 29 South. Rep. 952; *Heck v. New York Cent. &c. R. Co.*, 94 App. Div. (N. Y.) 562; s. c. 88 N. Y. Supp. 154; *Boggero v. Southern R. Co.*, 64 S. C. 104;

company knowing of the public use of a road which crossed its track, and built approaches thereto, but left them in a dangerous condition for travel, and a person using ordinary care was injured on account of this defective condition, the company was held liable without regard to whether the road was technically a public or a private road.¹⁸⁶ A person using a pathway with the tacit acquiescence of the company does not become a trespasser as a matter of law, merely by reason of a slight deviation therefrom, when the path is blocked, but the question should be submitted to the jury.¹⁸⁷

§ 1837. Rule where such Persons Use the Track for Passage by the bare Tolerance of the Company.—An invitation to use the tracks for passage will not be implied from a use for a short time without formal objection by the railroad company;¹⁸⁸ such persons are regarded as trespassers, and cannot require the railroad company to protect them from open and apparent dangers.¹⁸⁹

§ 1839. Care Required in Favor of Persons Lawfully at Work upon the Track.—The failure of operatives to signal the approach of a train to a place where men and teams are at work about the track may amount to negligence as a matter of fact, though not negligence *per se*, under a statute requiring signals to be given on approach to crossings.¹⁹⁰ It has been held a question of fact for the jury whether a railroad company was negligent in a particular case in failing to signal the approach of a train to a crossing beyond which persons were at work.¹⁹¹ Persons at work around railroad yards are presumed to know the methods of work employed in such yards—especially of the fact that cars are frequently bumped together with great force—and are required to anticipate this danger and to protect themselves therefrom.¹⁹² In one case contributory negligence defeating a recovery for injuries was ascribed to the act of an experienced clerk, employed in a yard to take car numbers, in standing with one foot between the rails of a parallel track while engaged in this work, without looking or listening for approaching trains on this track.¹⁹³

s. c. 41 S. E. Rep. 819; *Law v. Missouri & c. R. Co.*, 29 Tex. Civ. App. 134; s. c. 67 S. W. Rep. 1025; *Chesapeake & c. R. Co. v. Rogers*, 100 Va. 324; s. c. 41 S. E. Rep. 732.

¹⁸⁶ *Yazoo & c. R. Co. v. Watson*, 82 Miss. 89; s. c. 33 South. Rep. 942.

¹⁸⁷ *Scott v. St. Louis & c. R. Co.*, 112 Iowa 54; s. c. 83 N. W. Rep. 818.

¹⁸⁸ *Illinois Cent. R. Co. v. Eicher*, 202 Ill. 556; s. c. 67 N. E. Rep. 376; *rev'g* s. c. 100 Ill. App. 599.

¹⁸⁹ *Louisville & c. R. Co. v. Mitchell*, 134 Ala. 261; s. c. 32 South. Rep.

735; *Schreiner v. Great Northern R. Co.*, 86 Minn. 245; s. c. 90 N. W. Rep. 400; *Egan v. Montana Cent. R. Co.*, 24 Mont. 569; s. c. 63 Pac. Rep. 831.

¹⁹⁰ *O'Leary v. Chicago & c. R. Co.*, —Iowa —; s. c. 103 N. W. Rep. 362.

¹⁹¹ *Galveston & c. R. Co. v. Levy*, 35 Tex. Civ. App. 107; s. c. 79 S. W. Rep. 879.

¹⁹² *Rock Island & c. R. Co. v. Dormady*, 103 Ill. App. 127; *O'Day v. Chicago & c. R. Co.*, 97 Ill. App. 632.

¹⁹³ *Wilson v. Illinois Cent. R. Co.*,

The duty of a railroad company to keep its tracks free from unnecessary danger at places where the public are allowed to use such tracks as a pathway does not extend to one using the tracks for other purposes, since such a person cannot claim that his presence on the track was induced by the fact that it was used for public travel.¹⁹⁴

§ 1840. **Employés of Contractors Entitled to this Measure of Care.**¹⁹⁵—Under this principle it is the duty of servants of a switch company operating trains in its yards to keep a lookout for car repairers who are permitted by the switch company to repair the cars of their employers in the switch yard.¹⁹⁶ The duty to use reasonable care is reciprocal, and the servant of a contractor cannot recover for injuries the result of an accident to which his negligence contributed,¹⁹⁷ as for example, where the servant of an ice company, employed to ice cars, ventured onto the roof of a car to be iced at a time when it was slippery with ice—in this case he assumed the danger of an obvious risk.¹⁹⁸ An employé of a contractor may become a trespasser by venturing on premises to which he has not been invited, as where a painter on a freight depot, without any invitation from the railroad company, attempted to cross between the parts of a broken train and was injured by their sudden coming together.¹⁹⁹

210 Ill. 603; s. c. 71 N. E. Rep. 398; aff'g s. c. 109 Ill. App. 542.

¹⁹⁴ Cleveland &c. R. Co. v. Marsh, 63 Ohio St. 236; s. c. 58 N. E. Rep. 821; 52 L. R. A. 142.

¹⁹⁵ That it is the duty of operatives of trains to exercise due care to avoid injury to employés of contractors on railroad premises, see: *Sheltrawn v. Michigan Cent. R. Co.*, 128 Mich. 669; s. c. 87 N. W. Rep. 893; 8 Det. Leg. N. 806. Where a railroad company furnished and hauled a car loaded with concrete for a contractor who was building piers in the company's yard for an overhead highway bridge, the car being loaded and unloaded by the contractor's employés, such employés were rightfully about the car while unloading, and as well entitled to safety from any unusual danger in being near it as a consignee unloading and taking away freight at a depot: *Ryan v. New York &c. R. Co.*, 115 Fed. Rep. 197. Employés of a railroad contractor working on a passage track constructed on the right of way of a railroad company are not trespassers while leaving a dirt train on the passage track and crossing the main track, where the passage track was located by the

railroad company for the contractor's use and such use was by the railroad's permission: *Southern R. Co. v. Drake*, 107 Ill. App. 12.

¹⁹⁶ *Kentucky &c. Bridge &c. Co. v. Sydor*, — Ky. —; s. c. 82 S. W. Rep. 989; 26 Ky. L. Rep. 951; 68 L. R. A. 183.

¹⁹⁷ Contributory negligence was imputed to a servant of a lime company working in a yard which was upon uniformly recurring occasions given up to the business of switching cars, by a railroad company defendant, and who was on such occasions directed to cease work until the switching operations were completed, and who, notwithstanding notice that switching was in progress, voluntarily assumed a position of danger, where he was injured by being pinched between a car which was suddenly moved and a bumper: *Johnson v. Minneapolis &c. R. Co.*, 140 Mich. 292; s. c. 103 N. W. Rep. 594; 12 Det. Leg. N. 149.

¹⁹⁸ *Baker v. Louisville &c. Co.*, 106 Tenn. 490; s. c. 61 S. W. Rep. 1029; 53 L. R. A. 474.

¹⁹⁹ *Furey v. New York &c. R. Co.*, 67 N. J. L. 270; s. c. 51 Atl. Rep. 505.

§ 1841. **Injuries to Persons Engaged in Loading and Unloading Cars.**—Shippers and consignees on depot grounds for the purpose of loading or unloading freight are properly there, and the railroad company is bound to use proper care to avoid injuring them while so engaged.²⁰⁰ Switching crews with knowledge,²⁰¹ or the means of knowledge, that persons are loading or unloading cars should warn them of an intention to switch cars over the tracks on which their car is placed;²⁰² such persons do not assume the risk of injuries from this source.²⁰³ This means that the persons at work should be notified; it is not sufficient to notify their employer.²⁰⁴ Again the railroad company owes to persons thus engaged the duty to furnish cars in such repair that they may be used with reasonable safety.²⁰⁵ The duty

²⁰⁰ *Ward v. Maine Cent. R. Co.*, 96 Me. 136; s. c. 51 Atl. Rep. 947; *Bachant v. Boston & C. R.*, 187 Mass. 392; s. c. 73 N. E. Rep. 642.

²⁰¹ *Chicago & C. R. Co. v. Shaw*, 116 Fed. Rep. 621; *Elgin & C. R. Co. v. Thomas*, 115 Ill. App. 508; s. c. aff'd, 215 Ill. 158; 74 N. E. Rep. 109; *Fisher v. New York Dock Co.*, 91 App. Div. (N. Y.) 526; s. c. 87 N. Y. Supp. 117; *St. Louis & C. R. Co. v. Kennemore* (Tex. Civ. App.), 81 S. W. Rep. 802; *Copley v. Union Pac. R. Co.*, 26 Utah 361; s. c. 73 Pac. Rep. 517. Where a railroad company left a car at the top of a grade siding without setting the brakes thereon, and, if the brakes had been set, the car could not have been moved even with a bar, but, by reason of defendant's failure to set the brakes, the car was caused to move down the grade by the blowing of a high wind, and struck the servant of a shipper while moving another car down the grade, defendant was negligent, though the first car in the string moved by plaintiff was held on the grade by brakes. *Pratt v. New York & C. R. Co.*, 187 Mass. 5; s. c. 72 N. E. Rep. 328.

²⁰² *Central of Georgia R. Co. v. Duffy*, 116 Ga. 346; s. c. 42 S. E. Rep. 510.

²⁰³ *Kansas City Southern R. Co. v. Moles*, 121 Fed. Rep. 351; s. c. 58 C. C. A. 29; *Lake Erie & C. R. Co. v. Gaughan*, 26 Ind. App. 1; s. c. 58 N. E. Rep. 1072; *Louisville & C. R. Co. v. Smith*, — Ky. —; s. c. 84 S. W. Rep. 755; 27 Ky. L. Rep. 257; *St. Louis & C. R. Co. v. Kennemore* (Tex. Civ. App.), 81 S. W. Rep. 802.

A railroad company owning and operating a grain elevator is liable to an employé of a contractor, engaged to place and load cars under the loading spout of the elevator and remove such loaded cars therefrom, for an injury caused by the negligence of the company's employés in failing to set the brake upon a car standing lowest on an inclined track leading to the elevator, where it had been the custom of the company for years prior to the accident in placing cars upon such track to set the brake upon the lowest car, and the company knew that the work to be performed by the contractor's employés was dangerous unless this was done with customary and reasonable care, and that such employés habitually relied upon this care to protect them from danger: *O'Leary v. Erie R. Co.*, 169 N. Y. 289; s. c. 62 N. E. Rep. 346; rev'g s. c. 51 App. Div. (N. Y.) 25; 64 N. Y. Supp. 511.

²⁰⁴ *Central of Georgia R. Co. v. Duffy*, 116 Ga. 346; s. c. 42 S. E. Rep. 510.

²⁰⁵ *Cincinnati & C. R. Co. v. Vaught*, 78 S. W. Rep. 859; s. c. 25 Ky. L. Rep. 1766, 1870 (unloader had hand mashed by door slamming against it when car was hastily pulled away from its place by an engine without notice to him); *Sheltrawn v. Michigan Cent. R. Co.*, 128 Mich. 669; s. c. 87 N. W. Rep. 893; s. c. 8 Det. Leg. N. 806; *Sykes v. St. Louis & C. R. Co.*, 88 Mo. App. 193; *Tateman v. Chicago & C. R. Co.*, 96 Mo. App. 448; s. c. 70 S. W. Rep. 514 (consignee's servant injured by fall of

of reasonable care in this situation is a reciprocal one. A person engaged in this work will not be allowed to recover for injuries toward which his own negligence has contributed. Thus, a recovery was denied to a shipper, who crawled under cars to repair a leak, and he was injured by cars bumping against his car and the shipper was well acquainted with the danger of doing this very thing.²⁰⁶ In a case where an employé of a stone quarry was injured while at work on stone already loaded on a car billed out to leave on a train then being made up, it was held that such employé was a mere licensee and entitled to no more care at the hands of the trainmen in moving cars than other licensees—in other words he could recover only for injuries the result of their active misconduct.²⁰⁷

§ 1844. Injuries by Railway Companies to their own Passengers Afoot on their Tracks.²⁰⁸

§ 1845. Injuries to Persons upon Streets on which Railway Tracks are Laid.—Subject to the reciprocal duty to use reasonable care to avoid probable danger the public has a right to use the whole of a street or highway in which a railroad is laid, and the railroad company has the right to operate its trains over the same.²⁰⁹ The railroad company whose tracks occupy public streets is charged with the duty to employ reasonable means and exercise reasonable care in un-

door opened by him to inspect contents of car and it was held that the occurrence of the accident was evidence of a defective condition).

²⁰⁶ Chicago &c. R. Co. v. Pettit, 209 Ill. 452; s. c. 70 N. E. Rep. 591.

²⁰⁷ Chicago &c. R. Co. v. Martin, 31 Ind. App. 308; s. c. 65 N. E. Rep. 591.

²⁰⁸ A complaint in an action for injuries caused by falling over a stake on the right of way traversed by a passenger who left a train at the wrong station, through the mistake of a conductor, which did not allege that plaintiff was wrongfully put off at that place, was construed as an action for an injury in tort and not on the contract of carriage, and hence on the face of the complaint, the plaintiff was a trespasser for whom the railroad company was not bound to make its right of way safe, and his complaint did not state a cause of action: Indiana R. Co. v. Feirick, 158 Ind. 621; s. c. 64 N. E. Rep. 221. A shipper of live stock pending the transfer of his cars to a

connecting carrier at a junction point went along the tracks to examine his cars and was killed while passing around the ends of other cars on a switch track as he was returning to the caboose in which he was to continue his journey. He was held not a trespasser at the time of the accident: Elgin &c. R. Co. v. Thomas, 215 Ill. 158; s. c. 74 N. E. Rep. 109. The yard about a passenger depot is a public place, and one seeking to board a train as a passenger is not a trespasser in following a beaten path to reach a train about to leave, though the path is some feet from the depot: Willis v. Vicksburg &c. R. Co., 115 La. 53; s. c. 38 South. Rep. 892.

²⁰⁹ Southern R. Co. v. Crenshaw, 136 Ala. 573; s. c. 34 South. Rep. 913; Lampkin v. McCormick, 105 La. 418; s. c. 29 South. Rep. 952; Turney v. Southern Pac. Co., 44 Or. 280; s. c. 76 Pac. Rep. 1080; 75 Pac. Rep. 144; Rio Grande &c. R. Co. v. Martinez, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 853.

loading its cars to avoid injuring persons on the street at the side of the track,²¹⁰ and it is clear that a railroad company will be liable for an injury to a person passing along the street resulting from the negligence of its servants in making track repairs.²¹¹ There is authority that a railroad company which allows the public to use a portion of its right of way for highway purposes will not be liable to a traveller thereon for injuries caused by defects in the roadway, though the street leads to the station, if the municipality has taken jurisdiction over it and worked and repaired the way as a public street.²¹² A violation of an ordinance of a town limiting the speed of trains on public streets and requiring the bell of the engine to be rung continuously constitutes negligence but not actionable negligence, unless it contributes to the accident.²¹³

§ 1846. Care Required in Moving Trains through Crowded Cities, Towns, Villages, etc.²¹⁴

§ 1847. Injuries from Mail Bags Thrown from Passing Trains, and from Mail Cranes.²¹⁵

§ 1848. Care Demanded of Railway Companies with Reference to the Condition of their Tracks, Yards and Switches.—Generally speaking a railroad company is liable for injuries sustained by persons lawfully on its premises by reason of negligence in their construction or maintenance, provided the injured person is himself free from negligence.²¹⁶ In one case the railroad company was absolved from liabil-

²¹⁰ St. Louis &c. R. Co. v. Underwood, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 804.

²¹¹ Chesapeake &c. R. Co. v. Bercaw (Ky.), 65 S. W. Rep. 434; s. c. 23 Ky. L. Rep. 1509.

²¹² Neal v. Southern R. Co., 128 N. C. 143; s. c. 38 S. E. Rep. 474.

²¹³ Hall v. International &c. R. Co., 98 Tex. 100; s. c. 81 S. W. Rep. 520.

²¹⁴ Chesapeake &c. R. Co. v. Davis (Ky.), 60 S. W. Rep. 14; s. c. 22 Ky. L. Rep. 1156; modif'g s. c. 58 S. W. Rep. 698; 22 Ky. L. Rep. 748 (jury authorized to infer negligence from the fact that a train was run through a populous city with a piece of iron swinging in and out of the door of one of the cars). A railway company is not liable to a licensee who uses its right of way as a footpath, for injuries occasioned by a blow from a stone which formed a portion of the ballast of the company's track, and which was casually dislodged from its place

therein and hurled against him by a passing train: Clardy v. Southern R. Co., 112 Ga. 37; s. c. 37 S. E. Rep. 99.

²¹⁵ A railroad company is liable to a person injured while rightfully on the railroad company's platform by being struck by a mail bag thrown from a moving train by a mail clerk, where this custom has been so long continued as to charge the company with knowledge thereof, though the person throwing the mail bag was a postal clerk employed by the government and not a servant of the railroad company: Carver v. Minneapolis &c. R. Co., 120 Iowa 346; s. c. 94 N. W. Rep. 862.

²¹⁶ Gulf &c. R. Co. v. Bryant, 30 Tex. Civ. App. 4; s. c. 66 S. W. Rep. 804. A railroad company owes to the employes of an express company delivering freight at the train the duty to furnish a reasonably safe passageway from the depot to the

ity for injury to a person falling off a platform that was unguarded by a rail, where it appeared that he was familiar with all the surroundings, and knew of the unguarded condition of the platform, and yet attempted to traverse it on a dark night without a lantern.²¹⁷

§ 1851. **Injuries from Defects in "Foreign Cars."**—Where a railroad company receives a car from a connecting line it should use care compatible with efficient service and exercised by well-managed railroad companies generally, to see that the car is safe or set it out if it is not safe.²¹⁸ But a consignee or his servant engaged in unloading cars cannot rely on the presumption that such a car is safe where he has knowledge that other cars similarly received were defective in the particular responsible for his injury.²¹⁹

§ 1858. **Questions of Pleading in Such Actions: What Allegations have been Held Sufficient.**²²⁰—The declaration in an action by a trespasser must aver that after the railroad company discovered his peril it could in the exercise of ordinary care have avoided injuring him.²²¹ Where a recovery is sought on the ground that the injured person was a licensee, he should allege that the place was generally used by the public as a path with the knowledge and acquiescence of the railroad company.²²² Where willful and wanton injury is alleged it is not necessary that the plaintiff should aver that he exercised care for his own safety.²²³ An allegation that the injuries were received "at or near" a private crossing is construed to mean that he was injured at a place on the track other than a crossing.²²⁴ An allegation that plaintiff was standing on a platform in pursuit of his lawful business and without default on his part sufficiently shows that he was not a trespasser, and

train: *Harvey v. Louisiana Western R. Co.*, 114 La. 1065; s. c. 38 South. Rep. 859.

²¹⁷ *Sweet v. Union Pacific R. Co.*, 65 Kan. 812; s. c. 70 Pac. Rep. 883.

²¹⁸ *Sykes v. St. Louis & C. R. Co.*, 88 Mo. App. 193; *Tateman v. Chicago & C. R. Co.*, 96 Mo. App. 448; s. c. 70 S. W. Rep. 514. But see *White v. New York & C. R. Co.*, 25 R. I. 19; s. c. 54 Atl. Rep. 586.

²¹⁹ *Sykes v. St. Louis & C. R. Co.*, 178 Mo. 693; s. c. 77 S. W. Rep. 723.

²²⁰ A complaint alleging that plaintiff and his associates with defendant's consent were operating a hand-car on defendant's railroad; that while they were off the car repairing a defective telephone line one of the defendant's trains approached at a rapid rate of speed without signals; that to avoid a collision plain-

tiff lifted the hand-car from the track and in doing so he exerted and strained himself causing internal injuries, was held not to show on its face that plaintiff's own negligence was the proximate cause of the injury: *Houston & C. R. Co. v. Goodman*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 492.

²²¹ *Hortenstine v. Virginia-Carolina R. Co.*, 102 Va. 914; s. c. 47 S. E. Rep. 996.

²²² *Smalley v. Southern R. Co.*, 57 S. C. 243; s. c. 35 S. E. Rep. 489; *Dorn v. Georgia & C. R. Co.*, 58 S. C. 364; s. c. 36 S. E. Rep. 654.

²²³ *Pittsburgh & C. R. Co. v. Kinare*, 203 Ill. 388; s. c. 67 N. E. Rep. 826; aff'g s. c. 105 Ill. App. 566.

²²⁴ *Davis v. Chesapeake & C. R. Co.*, 116 Ky. 144; s. c. 75 S. W. Rep. 275; 25 Ky. L. Rep. 342.

that he was entitled to the rights and consideration due to a licensee.²²⁵ A declaration has been held sufficiently specific²²⁶ which alleged that, on a particular day and near a particular place, the defendant company wrongfully and negligently ran one of its engines and cars upon the plaintiff, and it need not set forth the hour at which the wrong occurred, the direction in which the train was moving, or which one of the defendant's cars caused the injury.²²⁷ Similarly a declaration has been upheld which averred that the defendant had wrongfully, carelessly and negligently run its cars against the deceased, thereby causing his death, since it gave notice that the defendant had been guilty of negligence, and that he must be prepared to show that he had never done, or omitted to do, any act which the law of the State made negligence.²²⁸ An allegation that the injuries were caused by the negligent propulsion of a train with great force is supported by evidence that the train was propelled with sufficient force to cause the injury complained of.²²⁹ So, where the declaration alleged a negligent propulsion of a train against a motionless freight car which the plaintiff was engaged in unloading, there was no variance in evidence that no warning of the approach of the train was given by ringing the bell or blowing the whistle. This evidence did not tend to prove a distinct act of negligence not alleged but was a circumstance proving that the train was negligently propelled.²³⁰ In a jurisdiction where stricter rules of pleading prevail, a count in a complaint averring that the defendant willfully and wantonly ran its train against

²²⁵ *Norfolk &c. R. Co. v. Wood*, 99 Va. 156; s. c. 37 S. E. Rep. 846; 3 Va. Super. Ct. Rep. 96.

²²⁶ Where a pedestrian in a highway was injured by the fall of timber from a passing car, an allegation that defendant negligently permitted the stick "to fall or be thrown" from a train on or against plaintiff was held not subject to a motion to make more definite by stating whether a stick fell or was thrown, as these facts were peculiarly within defendant's knowledge, and it was liable in either event: *Turney v. Southern Pac. Co.*, 44 Or. 280; s. c. 75 Pac. Rep. 144; 76 Pac. Rep. 1080. So a complaint, in an action for causing the death of a licensee by the derailment of defendant's train, alleging that, in running said train, said defendant and its employes negligently and carelessly operated a car the wheels of which were cracked, broken, and unsafe,

"and so negligently and carelessly operated said train, and the engine and cars attached thereto, that, by reason of said negligent and careless operation, * * * said car and other cars attached to the same jumped track," causing the injury complained of, states a cause of action, though the specific acts constituting the alleged negligence in the operation of the train are not set forth: *Cederson v. Oregon R. &c. Co.*, 38 Or. 343; s. c. 62 Pac. Rep. 637; 63 Pac. Rep. 763.

²²⁷ *Crowley v. Cincinnati &c. R. Co.*, 108 Tenn. 74; s. c. 65 S. W. Rep. 411.

²²⁸ *Illinois Cent. R. Co. v. Davis*, 104 Tenn. 442; s. c. 58 S. W. Rep. 296.

²²⁹ *Illinois Cent. R. Co. v. Aland*, 192 Ill. 37; s. c. 61 N. E. Rep. 450; aff'g s. c. 94 Ill. App. 428.

²³⁰ *Illinois Cent. R. Co. v. Aland*, 192 Ill. 37; s. c. 61 N. E. Rep. 450; aff'g s. c. 94 Ill. App. 428.

the plaintiff was held to aver a trespass, and hence was not supported by evidence that the injury was inflicted by the defendant's servants in charge of the train. The averment demanded proof of defendant's actual participation.²³¹

§ 1863. **Evidence which has been held Relevant and Admissible in these Actions.**—In a case where a child of tender years is run over by a train, the plaintiff may show that the engineer, after seeing the child, did not sound the whistle and it will be for the jury to determine whether this was a measure of prudence, and that the sounding of the whistle would have tended further to frighten the child and paralyze his actions.²³² On the question of the credibility of testimony of operatives of a train, the jury may consider the account given by the operatives of the train together with a previous contradictory account furnished by them to the railroad officials.²³³ So the testimony of the operatives as to the time when they became aware of the presence of a child in a dangerous position on the track is not conclusive, and evidence is admissible that alarm signals were given, having apparently reference to no other cause than the perceived presence of the child before the time stated by the operatives.²³⁴ On the question of care exercised by the trainmen it is proper to show the distance within which a train running at the speed of the train causing the injury may be stopped.²³⁵ On the question of the position of the trespasser at the time he was struck, evidence is relevant and material that a train striking a man would throw him off the track and not run over him unless he was lying down.²³⁶ A person injured near a right of way by the derailment of a train, cannot show that the defendant's cars had run off the track at other times and other places, as this evidence in no wise tends to prove negligence in the particular instance.²³⁷ It is proper for the defendant on his behalf to show that the accident did not occur as alleged in the complaint.²³⁸

²³¹ *Southern R. Co. v. Yancy*, 141 Ala. 246; s. c. 37 South. Rep. 341; *Central of Georgia R. Co. v. Freeman*, 140 Ala. 581; s. c. 37 South. Rep. 387.

²³² *Gregory v. Wabash R. Co.*, 126 Iowa 230; s. c. 101 N. W. Rep. 761.

²³³ *Marks v. Atlantic Coast Line R. Co.*, 133 N. C. 89; s. c. 45 S. E. Rep. 468.

²³⁴ *Gregory v. Wabash R. Co.*, 126 Iowa 230; s. c. 101 N. W. Rep. 761.

²³⁵ *Vanarsdell v. Louisville & C. R. Co. (Ky.)*, 65 S. W. Rep. 858; s. c. 23 Ky. L. Rep. 1666; *Davis v. Seaboard Air Line R.*, 136 N. C. 115; s. c. 48 S. E. Rep. 591.

²³⁶ *Gulf & C. R. Co. v. Matthews*, 28 Tex. Civ. App. 92; s. c. 66 S. W. Rep. 588; 67 S. W. Rep. 788.

²³⁷ *Illinois Cent. R. Co. v. Watson*, 117 Ky. 374; s. c. 78 S. W. Rep. 175; 25 Ky. L. Rep. 1360.

²³⁸ Thus where the complaint alleged that plaintiff's foot was caught in a defective plank on defendant's track, and that he was negligently run over while in this position, evidence that he was standing by the track as the train was passing, and slipped under the wheels on approaching nearer the track is admissible: *Galveston & C. R. Co. v. Washington*, 94 Tex. 510; s. c. 63

§ 1864. Questions of Fact for the Jury in these Actions.²³⁹

§ 1866. Instructions which have been Held not Erroneous.—An instruction in an action for injuries to a person alongside a right of way, caused by the derailment of a train, which stated that it was the defendant's duty to inspect cars, trucks and wheels thereof at reasonable periods, and that if the defendant did inspect the cars and trucks, and if the car, whose derailment caused the injury complained of, was found in good condition and safe, then the defendant cannot be held liable for defects not discoverable by ordinary inspection, has been held to state the measure of a railroad company's duty in the premises.²⁴⁰ An instruction that, if the company failed to station a man on the end of the train to keep a lookout, or did not give warning signals, and such omissions, if any, were the proximate cause of the accident, and that the employes were guilty of negligence as defined, and the injured person was not guilty of contributory negligence, the plaintiff was entitled to recover, was held not open to the objection that it stated the enumerated acts of omission to have been negligence as a matter of law and was in effect a comment on the evidence.²⁴¹ The defense of contributory negligence was held sufficiently covered by an instruction that if the injured person knew a train was approaching in time to have taken such action to avoid injury as a person of or-

S. W. Rep. 534; aff'g s. c. 25 Tex. Civ. App. 600; 63 S. W. Rep. 538.

²³⁹ *Clemans v. Chicago & C. R. Co.*, 128 Iowa 394; s. c. 104 N. W. Rep. 431; *Vanarsdell v. Louisville & C. R. Co.* (Ky.), 65 S. W. Rep. 858; 23 Ky. L. Rep. 1666 (whether trespasser was seen in time to enable engineer to avoid injuring him); *Becker v. Louisville & C. R. Co.*, 110 Ky. 474; s. c. 61 S. W. Rep. 997; 22 Ky. L. Rep. 1893; 53 L. R. A. 267 (whether engineer saw children on track in time to slacken speed of train); *Illinois Cent. R. Co. v. Wilson* (Ky.), 63 S. W. Rep. 608; s. c. 23 Ky. L. Rep. 684 (whether railroad company was negligent in leaving a hand-car unguarded and unlocked for almost a week at a place which it knew was used by small boys as a play ground); *Illinois Cent. R. Co. v. Crockett*, 79 S. W. Rep. 235; 25 Ky. L. Rep. 1989 (whether person having foot caught in frog at switch saw it and knew it was dangerous before stepping on it); *Hartford v. New York & C. R. Co.*, 184 Mass. 365; s. c. 68 N. E. Rep. 835 (whether sufficient time

was given loader of car to escape after signal that cars were to be thrown against car on which he was working); *Whitesides v. Southern R. Co.*, 128 N. C. 229; s. c. 38 S. E. Rep. 878 (whether a person, found beneath a trestle fatally injured, was in fact injured on the trestle, there being no direct evidence on the question); *Hord v. Southern R. Co.*, 129 N. C. 305; s. c. 40 S. E. Rep. 69 (whether deceased found lying at side of the track with head and arm crushed was killed by a train and if so by the negligence of the railroad company); *Houston & C. R. Co. v. Goodman*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 492 (whether it was the duty of engineer to sound whistle on approaching a curve to give warning to licensee on the track at or near the curve).

²⁴⁰ *Cederson v. Oregon R. Co.*, 38 Or. 343; s. c. 62 Pac. Rep. 637; 63 Pac. Rep. 763.

²⁴¹ *Rio Grande & C. R. Co. v. Martinez*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 853.

dinary prudence would have done, and failed to do so, and such failure contributed to the injury, the railroad company would not be liable.²⁴² An instruction in an action for injuries to a trespassing child that a railroad was bound to exercise ordinary care to discover the child upon the track has been held not contradicted by another instruction that the degree of care would vary as the known probabilities of danger varied along different portions of the road, as this latter instruction did not mean that the degree of care should be greater than ordinary care but rather that the amount of diligence or vigilance varied with the varying probabilities of danger.²⁴³

§ 1867. Instructions which have been Held Erroneous.—An instruction that a railroad company may be liable notwithstanding the contributory negligence of the plaintiff, if, after his peril was actually discovered, the operatives failed to use the greatest precaution to avoid injury to the trespasser, has been held erroneous in omitting the element of safety to the train itself in stopping.²⁴⁴ In another case where the evidence tended to show that a brakeman on the tender of a backing engine discovered the peril of a person ahead on the track, and signaled to the engineer in time to enable him to stop the engine if he had paid attention to the signals, it was held error for the court to instruct the jury to find for the plaintiff only in the event they believed the engineer did all he reasonably could to avoid injury after he became aware of the person's danger, as this instruction not only left out of view the duty of the engineer to keep a lookout himself while running his engine through a town, but also his duty to use reasonable diligence to receive and respect the signals of the brakeman.²⁴⁵ Since statutes requiring signals at crossings are intended for the sole benefit of persons using the highway, a court, in an action for the killing of a trespasser at a place remote from a crossing, should not charge that the deceased was bound to use reasonable care unless lulled into security by a failure of the engineer to observe the statutory requirements and rules of the company as to crossing signals.²⁴⁶

§ 1868. Evidence which has been held Inadmissible in these Cases.²⁴⁷

²⁴² *Texas &c. R. Co. v. Hamilton* (Tex. Civ. App.), 66 S. W. Rep. 797.

²⁴³ *Missouri &c. R. Co. v. Hammer*, 34 Tex. Civ. App. 354; s. c. 78 S. W. Rep. 708.

²⁴⁴ *Houston &c. R. Co. v. Ramsey*, 36 Tex. Civ. App. 285; s. c. 81 S. W. Rep. 825.

²⁴⁵ *Gunn v. Felton*, 108 Ky. 561; s. c. 57 S. W. Rep. 15.

²⁴⁶ *Cleveland &c. R. Co. v. Workman*, 66 Ohio St. 509; s. c. 64 N. E. Rep. 582.

²⁴⁷ Where a trespassing child was injured and it was claimed by the operatives of the train that they did not see the child in time to have stopped the train, evidence of the condition of the locomotive is clearly immaterial and outside the issue

§ 1869. Requests for Instructions which were Properly Refused.²⁴⁸

involved: *Thomas v. Chicago & C. R. Co.*, 114 Iowa 481; s. c. 86 N. W. Rep. 259. Where the sole question was whether a speed ordinance applied to a certain part of the town, evidence as to the reasonableness of the terms of the ordinance, not being responsive to the issue, was properly refused: *Gulf & C. R. Co. v. Matthews*, 28 Tex. Civ. App. 92; s. c. 67 S. W. Rep. 788. Evidence of conversations between a person subsequently injured and a train dispatcher of the company as to the speed of trains approaching the place where the plaintiff was injured are inadmissible, in the absence of evidence that the train dispatcher had authority to bind the railroad company in the matter: *Carpenter v. Chicago & C. R. Co.*, 126 Iowa 94; s. c. 101 N. W. Rep. 758.

²⁴⁸ An offered instruction should be refused which mingles two theories of defense, as the tendency of an instruction so framed would be to mislead the jury, as where an instruction mingled the defense that the injured person was a trespasser with the defense that he was walking across the tracks at the station

in a negligent manner: *Chicago & C. R. Co. v. Huston*, 95 Ill. App. 350; s. c. aff'd, 196 Ill. 480; 63 N. E. Rep. 1028. So an instruction in an action for injuries to a person at work on the tracks was refused which required a lookout and did not define the lookout, and was open to the construction that it required a constant and unceasing watch: *Baltimore & C. R. Co. v. Charvat*, 94 Md. 569; s. c. 51 Atl. Rep. 413. A requested instruction in an action for killing a child was properly refused which excluded the issue of the negligence of the defendant in failing to keep a proper lookout, and confined the jury's consideration solely to the issue of discovered peril: *Missouri & C. R. Co. v. Hammer*, 34 Tex. Civ. App. 354; s. c. 78 S. W. Rep. 708. So an instruction should be refused which requires a verdict for defendant in case plaintiff was himself negligent without regard to whether his negligence contributed to the accident: *Gulf & C. P. Co. v. Matthews*, 28 Tex. Civ. App. 92; s. c. 66 S. W. Rep. 588; 67 S. W. Rep. 788; *Texas & C. R. Co. v. Hamilton* (Tex. Civ. App.), 66 S. W. Rep. 797.

TITLE THIRTEEN.

OTHER PERSONAL INJURIES IN RAILWAY OPERATION.

[§§ 1873-1973.]

§ 1873. No Rate of Speed Negligent as Matter of Law.¹

§ 1875. Rate of Speed must be Adjusted to the Danger.—“Under the rules of the common law, a railroad company is required to exercise its franchise with due regard to the safety of its passengers and such persons as may travel on the highways, crossings, railroad tracks, and in establishing the rate of speed that its trains may be run due regard must be had not only to the safety of passengers, but also to the safety of all persons, in the exercise of ordinary care travelling on the highways over and across railroad tracks.”² The care required of a railroad company is the care which reasonably prudent persons would exercise under the circumstances.³ In cities and towns where the population is dense and, because of the number of persons using the crossing, the danger to life great, it is clearly the duty of the engineer to moderate the speed of his train on approach to street crossings not protected by watchmen or gates,⁴ and passenger stations in such cities.⁵ The case of negligence is specially plain where the engineer drives his engine at a high rate of speed on a parallel track

¹ In support of the principle that where the speed of trains is not regulated by law railroad companies may adopt such rates as they choose, provided the rate adopted does not endanger the safety of passengers or persons who may have occasion to cross the tracks in public highways, see: *Landon v. Chicago &c. R. Co.*, 92 Ill. App. 216; *Southern Indiana R. Co. v. Mes-sick*, 35 Ind. App. 676; s. c. 74 N. E. Rep. 1097; *Parkerson v. Louisville &c. R. Co.*, 80 S. W. Rep. 468; s. c. 25 Ky. L. Rep. 2260; *New York &c. R. Co. v. Kistler*, 66 Ohio St. 326; s. c. 64 N. E. Rep. 130; *Custer v. Baltimore &c. R. Co.*, 206 Pa. 529; s. c. 55 Atl. Rep. 1130; *Texas &c. R. Co. v. Short* (Tex. Civ. App.), 58 S. W. Rep. 56.

² *Craig, J.*, in *Partlow v. Illinois Cent. R. Co.*, 150 Ill. 321; s. c. 37 N. E. Rep. 663. See also *Boyd v. Chicago &c. R. Co.*, 103 Ill. App. 199; *Kinyon v. Chicago &c. R. Co.*, 118 Iowa 349; s. c. 92 N. W. Rep. 40; *Carpenter v. Chicago &c. R. Co.*, 126 Iowa 94; s. c. 101 N. W. Rep. 758; *Sundmaker v. Yazoo &c. R. Co.*, 106 La. 111; s. c. 30 South. Rep. 285.

³ *Reed v. Queen Anne's R. Co.*, — Del. —; s. c. 57 Atl. Rep. 529.

⁴ *Custer v. Baltimore &c. R. Co.*, 206 Pa. 529; s. c. 55 Atl. Rep. 1130; *Louisville &c. R. Co. v. Cummins*, 111 Ky. 333; s. c. 63 S. W. Rep. 594; 23 Ky. L. Rep. 681.

⁵ *Harvey v. Louisiana Western R. Co.*, 114 La. 1065; s. c. 38 South. Rep. 859.

past a station where a train is discharging and receiving passengers.⁶ In sparsely settled sections of the country, trains may be run over crossings without checking the speed if there is no obstruction to prevent the users of the highway from seeing and hearing the trains.⁷

§ 1876. Which Generally Presents a Question of Fact for a Jury.⁸

§ 1877. Negligence may be Predicated upon an Excessive Speed, although Other Precautions were Complied with.—So a railroad company will be liable for running over a pedestrian rightfully on its tracks, and not guilty of contributory negligence, if the servants of the company are negligent in running the train at an unlawful speed, and such negligence causes the injury, though the trainmen after discovering the peril of the traveller use every reasonable means to prevent the injury.⁹

§ 1878. The Unlawful or Excessive Speed must have been the Proximate Cause of the Injury.¹⁰

⁶ *Pennsylvania Co. v. Reidy*, 99 Ill. App. 477; s. c. aff'd, 198 Ill. 9; s. c. 64 N. E. Rep. 698.

⁷ *Atchison &c. R. Co. v. Judah*, 65 Kan. 474; s. c. 70 Pac. Rep. 346; *Carman v. Central R. Co.*, 10 Kulp (Pa.) 87.

⁸ That the question of negligent speed is a question of fact for the jury, see: *Landon v. Chicago &c. R. Co.*, 92 Ill. App. 216; *Boyd v. Chicago &c. R. Co.*, 103 Ill. App. 199; *Sundmaker v. Yazoo &c. R. Co.*, 106 La. 111; s. c. 30 South. Rep. 285; *Klockenbrink v. St. Louis &c. R. Co.*, 81 Mo. App. 351, 409; *Watson v. Erie R. Co.*, 8 Ohio N. P. 18; s. c. 10 Ohio S. & C. P. Dec. 454; *Risinger v. Southern R. Co.*, 59 S. C. 429; s. c. 38 S. E. Rep. 1; *Missouri &c. R. Co. v. Melugin* (Tex. Civ. App.), 63 S. W. Rep. 338.

⁹ *Kroeger v. Texas &c. R. Co.*, 30 Tex. Civ. App. 87; s. c. 69 S. W. Rep. 809.

¹⁰ That the unlawful or excessive speed must have been the proximate cause of the injury, see: *Kansas City Suburban Belt R. Co. v. Herman*, 187 U. S. 63; s. c. 23 Sup. Ct. Rep. 24; *Adv. S. U. S. 24*; *Chicago &c. R. Co. v. Crose*, 214 Ill. 602; s. c. 73 N. E. Rep. 865 (instruction defective for omitting this element); *Chicago &c. R. Co. v. Mochell*, 96 Ill. App. 178; s. c. aff'd, 193 Ill. 208; 61 N. E. Rep. 1028 (collision between

street car and passenger train approaching at unlawful speed—evidence held sufficient to show excessive speed proximate cause of collision); *Chicago &c. R. Co. v. Jamieson*, 112 Ill. App. 69; *Brooks v. Pittsburgh &c. R. Co.*, 158 Ind. 62; s. c. 62 N. E. Rep. 694; *Alabama &c. R. Co. v. Carter*, 77 Miss. 511; s. c. 27 South. Rep. 993; *Illinois Central R. Co. v. Watson*, — Miss. —; s. c. 39 South. Rep. 69; *Jackson v. Kansas City &c. R. Co.*, 157 Mo. 621; s. c. 58 S. W. Rep. 32; *Streets v. Grand Trunk R. Co.*, 76 App. Div. (N. Y.) 480; 78 N. Y. Supp. 729; s. c. aff'd, 178 N. Y. 553; 70 N. E. Rep. 1109; *International &c. R. Co. v. Mitchell* (Tex. Civ. App.), 60 S. W. Rep. 996 (the cutting loose of a helper engine, and running same onto switch at excessive rate of speed without warning, proximate cause of injury to traveller on crossing). In a case where a person walking along a track fell over a pile of cinders and was thrown under a train operated in violation of the speed ordinance it was held that though the existence of the cinder pile might have been a concurring cause of the injury, the facts did not show, as a matter of law, that the violation of the speed ordinance was not the proximate cause thereof: *Missouri &c. R. Co. v. Penny*, — Tex. Civ. App. —; s. c.

§ 1879. **What Rate of Speed has been Held not Negligent as Matter of Law.**—In the following cases under the circumstances it was the holding of the court that the rate of speed was not negligent as a matter of law:—Sixty to sixty-five miles an hour in the suburbs of a city;¹¹ fifty to sixty miles an hour away from public crossings and at places where the railroad company was not bound to anticipate the presence of persons on the track;¹² thirty-five to forty miles an hour through a village;¹³ thirty miles an hour outside of any city or town limits;¹⁴ four miles an hour by switch train running toward a crossing.¹⁵

§ 1880. **What Rate of Speed Affords Evidence of Negligence Merely.**—Where houses and other obstructions prevented those passing along streets from observing the approach of trains, a railroad company was imputed with negligence in maintaining a rate of speed as high as thirty miles.¹⁶

§ 1881. **Running at a High Rate of Speed without Giving Signals.**—The authorities generally regard it as negligence *per se* to propel a train over crossings in towns at a dangerous rate of speed without ringing the bell or sounding the whistle or giving any signal of its approach to crossings.¹⁷

87 S. W. Rep. 718. In a case where the evidence showed that the defendant was running its train over the streets of a city at an excessive rate of speed and that the plaintiff's team became frightened at the noise of the train and escaping steam, and threw the plaintiff upon the track in front of the engine and it ran over him, and the plaintiff testified that if the train had not been running at a speed in excess of that fixed by the ordinance, he could have gotten out of its way, it was held that a finding that the illegal speed was the direct and proximate cause of the injury would not be disturbed on the ground that the evidence did not sustain it: *Colorado Midland R. Co. v. Robbins*, 30 Colo. 449; s. c. 71 Pac. Rep. 371. That the question of proximate cause is a question of fact for the jury, see *Chicago & C. R. Co. v. Mochell*, 96 Ill. App. 178; s. c. aff'd, 193 Ill. 208; 61 N. E. Rep. 1028.

¹¹ *Golinvaux v. Burlington & C. R. Co.*, 125 Iowa 625; s. c. 101 N. W. Rep. 465.

¹² *Central of Georgia R. Co. v. Wil-*

liams Buggy Co., 121 Ga. 293; s. c. 48 S. E. Rep. 939.

¹³ *Cox v. Chicago & C. R. Co.*, 92 Ill. App. 15.

¹⁴ *Hajsek v. Chicago & C. R. Co.*, — Neb. —; s. c. 97 N. W. Rep. 327.

¹⁵ *Gaynor v. Louisville & C. R. Co.*, 136 Ala. 244; s. c. 33 South. Rep. 808.

¹⁶ *Lake Shore & C. R. Co. v. Johnston*, 25 Ohio Cir. Ct. R. 41.

¹⁷ *Evansville & C. R. Co. v. Clements*, 32 Ind. App. 659; s. c. 70 N. E. Rep. 554 (sixty miles an hour); *Gruebel v. Wabash R. Co.*, 108 Mo. App. 548; s. c. 84 S. W. Rep. 170 (twenty-five or thirty miles an hour). Where a train was backing down the track at a speed of forty or fifty miles an hour, without ringing a bell or giving any signal of its approach to the crossing and injured a traveller, it was proper to qualify a requested instruction that it was not negligence to operate the train with the tender ahead of the locomotive by adding, "If such train or cars are operated prudently, and with reasonable regard to the rights of travellers:" *Hecker v. Oregon R. Co.*, 40 Ore. 6; s. c. 66 Pac. Rep. 270.

§ 1882. **Other Circumstances under which Excessive Speed has been Judicially Condemned.**—A railroad company is guilty of a very reprehensible form of negligence where it runs a train at a high rate of speed in a place where, to the knowledge of the operatives of the train, there is a likelihood of encountering another train, and this is particularly so where the train running at this high rate of speed is heavy and does not easily respond to the control of the engineer, as, for instance, where it is running on a downgrade.¹⁸

§ 1883. **Duty to Slacken Speed on Approaching Crossings.**—Where the view of a crossing is obstructed and permits but a short view of the track by approaching travellers the railroad company should regulate the speed of its trains so as to make it possible for a driver to cross in safety if he has stopped, looked and listened at the proper place.¹⁹

§ 1885. **Effect of Absence of Gates, Flagmen, etc., in Connection with Speed of Trains.**²⁰

§ 1887. **Rate of Speed with Reference to Trespassers and Bare Licensees upon a Railway Track where they have no Right to be.**²¹

§ 1888. **Excessive Rate of Speed in Connection with Contributory Negligence of the Person Injured.**—Generally speaking the mere fact that the railroad train at the time it struck and injured a person was

¹⁸ Illinois Cent. R. Co. v. Leiner, 103 Ill. App. 438; s. c. aff'd, 202 Ill. 624; 67 N. E. Rep. 398.

¹⁹ Schwarz v. Delaware & c. R. Co., 211 Pa. 625; s. c. 61 Atl. Rep. 255.

²⁰ Clemans v. Chicago & c. R. Co., 128 Iowa 394; 104 N. W. Rep. 431; Smith v. Michigan Cent. R. Co., 35 Ind. App. 188; s. c. 73 N. E. Rep. 928 (negligence in opening gate at crossing in violation of ordinance, and in running second section of train at an excessive speed, proximate cause of death in crossing accident). Where a railroad company has erected gates at a dangerous crossing, it is its duty to slacken speed when the watchman is off duty and the gates open: Schwarz v. Delaware & c. R. Co., 211 Pa. 625; s. c. 61 Atl. Rep. 255.

²¹ That the rate of speed of a railroad train is not negligence with reference to trespassers generally, see: Gregory v. Louisville & c. R. Co., 79 S. W. Rep. 238; s. c. 25 Ky. L. Rep. 1986; Ward v. Illinois Cent. R. Co. (Ky.), 22 Ky. L. Rep. 191; s.

c. 56 S. W. Rep. 807. But see Ala. bama & c. R. Co. v. Carter, 77 Miss. 511; s. c. 27 South. Rep. 993, where it is held that the mere fact that one was a trespasser when injured by a train running at a speed greater than six miles an hour within a corporate town will not prevent him recovering therefor, if the speed was the proximate cause, since Code 1892, § 3546, enacting that railroad companies may only run their locomotives and cars through cities, towns and villages at the rate of six miles an hour, is for the protection of persons and property, whether trespassers or not, and Jackson v. Kansas City & c. R. Co., 157 Mo. 621; s. c. 58 S. W. Rep. 32, which holds that the fact that deceased was struck and killed while crossing defendant's tracks in its yards, at a place not used for crossing, does not absolve defendant from the observance of an ordinance regulating the speed of trains, since such ordinance applies to all parts of the city.

running in violation of a speed ordinance, while evidence of the company's negligence, does not affect the defense of contributory negligence in an action for the injury. Travellers have no right to omit the exercise of reasonable and ordinary care for their own safety in reliance on the proper observance of such ordinances.²² A finding that the plaintiff was not guilty of contributory negligence was held proper in a case where he alighted from the wagon which he was driving on a street on which railroad tracks were laid, as soon as he saw a train approaching, and took the horses by the head and endeavored to turn them into a cross street he had just passed, and could have done so, had not the train been running at an excessive rate of speed.²³ In Georgia where the doctrine of comparative negligence finds recognition, a person injured at a crossing by the running of a train at a rate of speed prohibited by ordinance is not deprived of a recovery by proof that his negligence contributed to the injury. There contributory negligence mitigates the damages and does not necessarily defeat the recovery unless greater than the negligence of the defendant.²⁴

§ 1890. What Rate of Speed is Wanton so as to Render Trespassing or Contributory Negligence Immaterial.²⁵

²² *Garlich v. Northern Pac. R. Co.*, 131 Fed. Rep. 837; s. c. 67 C. C. A. 237; *Sego v. Southern Pac. Co.*, 137 Cal. 405; s. c. 70 Pac. Rep. 279; *Illinois Cent. R. Co. v. Bartle*, 94 Ill. App. 57; *Pittsburgh & C. R. Co. v. Seivers*, 162 Ind. 234; s. c. 67 N. E. Rep. 680; 70 N. E. Rep. 133; *Peterson v. St. Louis & C. R. Co.*, 156 Mo. 552; s. c. 57 S. W. Rep. 709; *West v. Northern Pac. R. Co.*, — N. D. —; s. c. 100 N. W. Rep. 254; *Filiatrault v. Canadian P. R. Co.*, Rap. Jud. Que. 18 C. S. 491. Whether a person attempting to go over a railroad crossing, in front of a train, in the nighttime, who had stopped to pick up something she had dropped was negligent is for the jury; the speed of the train being thirty-five miles an hour, while an ordinance provided it should not exceed six miles per hour, and there being no evidence that she knew or had reason to apprehend that it was running faster than authorized: *Hutchinson v. Missouri Pac. R. Co.*, 161 Mo. 246; s. c. 61 S. W. Rep. 635, 852.

²³ *Colorado Midland R. Co. v. Robbins*, 30 Colo. 449; s. c. 71 Pac. Rep. 371.

²⁴ *Central of Georgia R. Co. v.*

Tribble, 112 Ga. 863; s. c. 38 S. E. Rep. 356.

²⁵ In a case where cars were kicked at a high rate of speed without signals along a track at a place which the operatives of the train knew persons were wont to use as a pathway, it was held that the railroad company was liable for the willful killing of a person on the track, though he was a trespasser and guilty of contributory negligence: *Alabama Great Southern R. Co. v. Guest*, 136 Ala. 348; s. c. 34 South. Rep. 968. On the question of negligent speed of a train which collided with a team at a crossing in a city, evidence that the speed was in excess of that provided by a contract of the railroad company with the city, under which it obtained the grant of its right of way, is admissible, equally with the violation of a speed ordinance: *Duval v. Atlantic Coast Line R. Co.*, 134 N. C. 331; s. c. 46 S. E. Rep. 750; 65 L. R. A. 722. In an action involving the question of unlawful speed, evidence of the daily custom of the defendant railroad company to run the same engine over the same road at an unlawful rate of speed was held admissible: *McKerley v. Red*

§ 1892. Relevancy of Evidence as to the Speed of Trains.²⁶

§ 1895. Constitutional Validity of Statutes and Municipal Ordinances Regulating Rate of Speed.²⁷

§ 1896. Reasonableness of Ordinances Regulating Speed of Trains.

—There is a presumption that speed ordinances are reasonable.²⁸ Ordinances restricting the speed of trains through populous sections of cities to six²⁹ and ten³⁰ miles an hour are not generally deemed unreasonable, in the absence of evidence indicating that the observance of such ordinances would interfere in any way with the proper operation of trains and the proper discharge of the railroad company's duty to the public. This conclusion was strengthened in one case by evidence of rules voluntarily adopted by the railroad company itself forbidding the running of trains within the city limits at a greater speed than that fixed by the ordinance.³¹ In determining the question of reasonableness it is not material that the observance of the ordinance will injure a road thus situated in its competition with the fast through trains of other roads running through sparsely settled parts of a city.³²

§ 1898. What Ordinances Limiting Speed have been Held Unreasonable and hence Void.—An ordinance limiting the speed of trains to six miles an hour was held unreasonable as to a part of the city where there were but few houses near the track, and where, to main-

River &c. R. Co. (Tex. Civ. App), 85 S. W. Rep. 499.

²⁶ Evidence of a passenger accustomed to ride on a particular train that it was going so fast that she thought something was wrong, was held sufficient evidence of negligent speed to go to the jury: *Lammers v. Great Northern R. Co.*, 82 Minn. 120; s. c. 84 N. W. Rep. 728.

²⁷ Speed ordinances are as binding on the railway companies as on the persons operating their engines and trains: *Missouri &c. R. Co. v. Owens* (Tex. Civ. App), 75 S. W. Rep. 579. The right of cities and towns to enact speed ordinances exists under laws conferring on municipal authorities control over streets and alleys and empowering them to declare what shall constitute a nuisance and to regulate things tending to endanger persons and property: *Baltimore &c. R. Co. v. Whiting*, 161 Ind. 228; s. c. 68 N. E. Rep. 266. The complaint in an action for death caused by a train

violating a speed ordinance need not allege a contract between the defendant and the city to comply with the ordinance, since such ordinance being valid as an exercise of the police power of the city is binding on all within the city: *Jackson v. Kansas City &c. R. Co.*, 157 Mo. 621; s. c. 58 S. W. Rep. 32.

²⁸ *Chicago &c. R. Co. v. Carlinville*, 200 Ill. 314; s. c. 65 N. E. Rep. 730; 60 L. R. A. 391.

²⁹ *Plattsburg v. Hagenbush*, 98 Mo. App. 669; s. c. 73 S. W. Rep. 725; *St. Louis &c. R. Co. v. Bolton*, 36 Tex. Civ. App. 87; s. c. 81 S. W. Rep. 123.

³⁰ *Chicago &c. R. Co. v. Carlinville*, 200 Ill. 314; s. c. 65 N. E. Rep. 730; 60 L. R. A. 391.

³¹ *St. Louis &c. R. Co. v. Bolton*, 36 Tex. Civ. App. 87; s. c. 81 S. W. Rep. 123.

³² *Chicago &c. R. Co. v. Carlinville*, 200 Ill. 314; s. c. 65 N. E. Rep. 730; 60 L. R. A. 391.

tain such slow speed, heavy trains would have to be doubled in order to pull up the grade.³³

§ 1900. Doctrine that Violation of Statute or Ordinance Limiting Rate of Speed is Negligence per se.³⁴

§ 1901. Doctrine that the Violation of such Statutes and Ordinances is merely Evidence of Negligence.³⁵

§ 1903. Construction of Various Statutes and Ordinances Limiting the Speed of Trains.—The term “person” is defined by the statutes of Indiana to extend to bodies politic and corporate, and hence a city speed ordinance making it unlawful for any engineer, conductor, or other person to run trains on tracks in the city at a rate of speed in excess of that limited by the ordinance covers a corporation owning a railroad.³⁶

§ 1905. Miscellaneous Holdings Relating to the Prohibited Speed of Trains.³⁷—Generally speaking the benefit of an ordinance limiting

³³ *Plattsburg v. Hagenbush*, 98 Mo. App. 669; s. c. 73 S. W. Rep. 725.

³⁴ See generally: *Knopf v. Philadelphia &c. R. Co.*, 2 Pen. (Del.) 392; s. c. 46 Atl. Rep. 747; *Central of Georgia R. Co. v. Tribble*, 112 Ga. 863; s. c. 38 S. E. Rep. 356; *Central of Georgia R. Co. v. Bond*, 111 Ga. 13; s. c. 36 S. E. Rep. 299; *Chicago &c. R. Co. v. Crose*, 214 Ill. 602; s. c. 73 N. E. Rep. 865; *Chicago &c. R. Co. v. Mochell*, 193 Ill. 208; s. c. 61 N. E. Rep. 1028; aff'g s. c. 96 Ill. App. 178; *Chicago &c. R. Co. v. Pulliam*, 111 Ill. App. 305; *Wabash R. Co. v. Kamradt*, 109 Ill. App. 203; *Illinois Cent. R. Co. v. Eicher*, 100 Ill. App. 599; *Kansas City Suburban Belt R. Co. v. Herman* (Kan. App.), 62 Pac. Rep. 543; *Edwards v. Chicago &c. R. Co.*, 94 Mo. App. 36; s. c. 67 S. W. Rep. 950; *Murrell v. Missouri Pac. R. Co.*, 105 Mo. App. 88; s. c. 79 S. W. Rep. 505; *Missouri &c. R. Co. v. Owens* (Tex. Civ. App.), 75 S. W. Rep. 579; *Texas &c. R. Co. v. Ball* (Tex. Civ. App.), 85 S. W. Rep. 456.

³⁵ That the presumption of negligence which arises from the fact that at the time of an accident the railroad train was running at an unlawful and excessive rate of speed is merely *prima facie* evidence of negligence, and as such subject to be rebutted, see: *Illinois*

Cent. R. Co. v. Eicher, 202 Ill. 556; s. c. 67 N. E. Rep. 376; rev'g s. c. 100 Ill. App. 599; *Chicago &c. R. Co. v. Stone*, 109 Ill. App. 517; *Chicago &c. R. Co. v. Beaver*, 96 Ill. App. 558; *Southern R. Co. v. Drake*, 107 Ill. App. 12; *Chicago &c. R. Co. v. Jamieson*, 112 Ill. App. 69; *Chicago &c. R. Co. v. Zerbe*, 110 Ill. App. 171; *Lake Shore &c. R. Co. v. Johnston*, 25 Ohio Cir. Ct. R. 41; *Watson v. Erie R. Co.*, 8 Ohio N. P. 18; s. c. 10 Ohio S. & C. P. Dec. 454; *Brown v. Chicago &c. R. Co.*, 109 Wis. 384; s. c. 85 N. W. Rep. 271.

³⁶ *Southern R. Co. v. Jones*, 33 Ind. App. 333; s. c. 71 N. E. Rep. 275.

³⁷ An instruction that if the train at the time it reached the crossing where the casualty occurred was running at a speed in excess of that limited by ordinance, and if the train had not been running at such a speed the injury would not have occurred, then the defendant was negligent, was held erroneous in that it restricted the consideration of the excessive speed to the actual point of the injury, while if the train had been previously running at an unlawful rate and could not be stopped in time to prevent the injury at the crossing, the actual speed at the crossing would not be material: *Edwards v. Atlantic Coast Line R. Co.*, 129 N. C.

the speed of trains may be claimed by any person coming within its protection,³⁸ including railroad employes such as brakemen,³⁹ engineers,⁴⁰ and flagmen.⁴¹ Speed ordinances are as applicable to private as to public tracks.⁴²

§ 1908. Railway Companies not Liable for Frightening Horses by their Usual and Necessary Operations.⁴³

§ 1910. Frightening Horses by Conduct that is Unnecessary and Wanton.—Actionable negligence may be predicated on the unnecessary sounding of signals and the making of unusual noises, where the operatives of the engine caused these sounds after knowing or having reason to believe that they would frighten horses.⁴⁴

78; s. c. 39 S. E. Rep. 730. In an action against a railroad to recover for injuries to a boy, where the plaintiff claims he was sucked under the train by the current of air put in motion by the train while running at a rate of speed prohibited by ordinance, the defendant can not be held liable where it is not shown that he knew that such excessive speed would have produced such a result, or that a reasonably prudent man would have apprehended it: *Graney v. St. Louis &c. R. Co.*, 157 Mo. 666; s. c. 57 S. W. Rep. 276; 50 L. R. A. 153. Evidence that the engineer who violated the ordinance was ignorant of the existence of the ordinance is incompetent: *Central of Georgia R. Co. v. Bond*, 111 Ga. 13; s. c. 36 S. E. Rep. 299.

³⁸ *Davenport &c. R. Co. v. De Yaeger*, 112 Ill. App. 537.

³⁹ *Martin v. Chicago &c. R. Co.*, 118 Iowa 148; s. c. 91 N. W. Rep. 1034; 59 L. R. A. 698.

⁴⁰ *Pittsburgh &c. R. Co. v. Martin*, 157 Ind. 216; s. c. 61 N. E. Rep. 229 (injured in collision with an engine violating the ordinance).

⁴¹ *Louisville &c. R. Co. v. Martin*, 113 Tenn. 266; s. c. 87 S. W. Rep. 418.

⁴² *Chicago &c. R. Co. v. Pollock*, 195 Ill. 156; s. c. 62 N. E. Rep. 831; aff'g s. c. 93 Ill. App. 483.

⁴³ That a railroad company is not liable for frightening a horse by its usual and necessary operations, see *Lake Erie &c. R. Co. v. Fike*, 35 Ind. App. 554; s. c. 74 N. E. Rep. 636 (whistle to warn employes of starting of train); *Central of*

Georgia R. Co. v. Black, 114 Ga. 389; s. c. 40 S. E. Rep. 247 (noise made in loading car); *Illinois Cent. R. Co. v. Klein*, 95 Ill. App. 220 (escaping steam); *Lake Shore &c. R. Co. v. Butts*, 28 Ind. App. 289; s. c. 62 N. E. Rep. 647 (noise of starting train in usual way); *Illinois Cent. R. Co. v. Schmitt*, 100 Ill. App. 490 (whistle and escaping steam); *Atchison &c. R. Co. v. Walkenshaw*. —Kan. —; s. c. 81 Pac. Rep. 463 (whistle for crossing); *Kentucky &c. Bridge Co. v. Montgomery (Ky.)*, 67 S. W. Rep. 1008; 24 Ky. L. Rep. 167; 57 L. R. A. 781 (operation of train over bridge used jointly by public and railroad company); *Hendricks v. Fremont &c. R. Co.*, 67 Neb. 120; s. c. 93 N. W. 141; *Webb v. Philadelphia &c. R. Co.*, 202 Pa. 511; s. c. 52 Atl. Rep. 5 (whistle and escape of steam of train running through cut frightened horse on highway above cut); *San Antonio &c. R. Co. v. Belt*, 24 Tex. Civ. App. 281; s. c. 59 S. W. Rep. 607; *Fares v. Rio Grande Western R. Co.*, 28 Utah 132; s. c. 77 Pac. Rep. 230.

⁴⁴ *Ft. Worth &c. R. Co. v. Partin* (Tex. Civ. App.), 76 S. W. Rep. 236; *McGrew v. St. Louis &c. R. Co.*, 32 Tex. Civ. App. 265; s. c. 74 S. W. Rep. 816. It is negligence to make the customary noises incident to the movement of a train where the servants in charge have reason to apprehend injury therefrom to the driver of a team near the track, whose perilous position they have discovered, unless it is reasonably necessary to do so for the protection of the property and lives in

§ 1911. **Negligence or Misconduct must have been the Proximate Cause of the Horse Taking Fright.**—A railroad company will not be liable for injuries from the frightening of a horse by the emission of steam from its engine unless this noise was the proximate cause of the horse taking fright.⁴⁶ In a case announcing this principle the driver of a vehicle stood at a railroad crossing for some time awaiting the reluctant moving of a locomotive across the track far enough to allow him to cross. While crossing and just opposite the locomotive, the engineer released a volume of steam. The horse reared and the right line became unsnapped without any negligence on the part of the driver. He jumped out and caught the bridle, and the horse in its plunging threw him to the ground, causing the injuries sued upon. On the trial he testified that he would not have been injured had the line not come unsnapped. It was the conclusion of the court that the jury were justified in the inference that the negligence of the defendant in frightening the horse caused the line to unsnap, so that this negligence was the proximate cause of the injury.⁴⁶

§ 1914. **Duty to Keep a Lookout so as to Avoid Frightening the Horses of Travellers.**—There is authority that it is the duty of the engineer and fireman to keep a lookout for frightened horses near the track and making the railroad company liable though the trainmen claim to have had no actual knowledge of the proximity of a team, if it could have been seen by a proper lookout.⁴⁷ In a case where a bridge company operated a bridge used both by trains and teams, it was held the duty of trainmen to keep a lookout for teams on the bridge, and in the event they were discovered to have become so fright-

their charge: *Louisville &c. R. Co. v. Penrod*, 66 S. W. Rep. 1013; s. c. 24 Ky. L. Rep. 50; 66 S. W. Rep. 1042; 24 Ky. L. Rep. 50.

⁴⁶ *Hinchman v. Pere Marquette R. Co.*, 136 Mich. 341; s. c. 99 N. W. Rep. 277; 11 Det. Leg. N. 38; 65 L. R. A. 553. That safety gates at a railroad crossing had been down for a time longer than allowed by ordinance, thus delaying the crossing of a team before the arrival of the train, is not the proximate cause of an accident occasioned by the frightening of the horse by the escape of steam from the engine and the blowing of the whistle: *Simmons v. Pennsylvania R. Co.*, 199 Pa. 232; s. c. 48 Atl. Rep. 1070. The driver of a vehicle was about to drive over a railroad at a crossing, when an engine suddenly came upon him, without warning, from a

direction in which his view was obstructed. To avoid a collision, plaintiff pulled his horse back with a jerk; and it, becoming unmanageable, started down parallel tracks, causing plaintiff to be thrown about in the buggy and injured. It was held that the injuries thus received were sufficient to form a basis for a recovery in an action against the railroad: *Wood v. New York Cent. &c. R. Co.*, 83 App. Div. (N. Y.) 604; s. c. 82 N. Y. Supp. 160.

⁴⁶ *Hinchman v. Pere Marquette R. Co.*, 136 Mich. 341; s. c. 99 N. W. Rep. 277; 11 Det. Leg. N. 38; 65 L. R. A. 553.

⁴⁷ *Brown v. Missouri Pac. R. Co.*, 89 Mo. App. 192; *Ft. Worth &c. R. Co. v. Partin*, 33 Tex. Civ. App. 173; s. c. 76 S. W. Rep. 236; *Missouri &c. R. Co. v. Bellew*, 26 Tex. Civ. App. 8; s. c. 62 S. W. Rep. 99.

ened as to become unmanageable, to cause no more noise than was necessary. In this situation greater care is required than toward persons driving on an ordinary highway parallel with a road.⁴⁸ Contrary to the foregoing is the doctrine of other jurisdictions that a railroad is under no duty to keep a lookout for teams at or near public crossings or stations and is not required to warn them of the movement of trains and engines, and is not liable for injuries resulting from horses frightened, unless its employes know of the horse's presence and notwithstanding cause the locomotive to emit unusual and unnecessary noises.⁴⁹

§ 1915. Frightening Horses by Leaving Cars Standing on or near the Highway.⁵⁰

§ 1916. Frightening Horses by Leaving Unusual Objects upon or near the Highway.—In one case it was held that culvert pipe piled on the right of way near a highway was an object calculated to frighten horses, but that a delay of four days in removing and placing it was not unreasonable.⁵¹ In another case a railroad company was held not liable for an injury occasioned by a team taking fright at the carcass of an animal which had been killed near the crossing only about two hours before.⁵² A mail crane suspending a mail bag has been held an object calculated to frighten horses of ordinary gentleness driven over a crossing on which it was placed.⁵³

§ 1921. Frightening Horses by the Operation of Hand-Cars.⁵⁴
—Where the view of the track is unobstructed and the traveller's eyesight is good the failure of the operatives to give notice of the approach of a hand-car to a crossing does not impute the railroad company with negligence and it is not liable for an injury caused by the traveller's horse taking fright at the car.⁵⁵

§ 1922. Frightening Horses by the Emission of Steam.—It is but a restatement of the doctrine with which this chapter is introduced to

⁴⁸ Kentucky &c. Bridge Co. v. Montgomery (Ky.), 67 S. W. Rep. 1008; s. c. 24 Ky. L. Rep. 167; 57 L. R. A. 781.

⁴⁹ Gulf &c. R. Co. v. Hord, — Tex. Civ. App. —; 87 S. W. Rep. 348; Fares v. Rio Grande Western R. Co., 28 Utah 132; s. c. 77 Pac. Rep. 230.

⁵⁰ A railway car is not of such a terrifying nature that its presence in a street is *per se* dangerous: Atchison &c. R. Co. v. Morris, 64 Kan. 411; s. c. 67 Pac. Rep. 837.

⁵¹ Witham v. Bangor &c. R. Co., 96 Me. 326; s. c. 52 Atl. Rep. 764.

⁵² Chicago &c. R. Co. v. Scranton, 95 Ill. App. 619.

⁵³ Cleghorn v. Western R., 134 Ala. 601; s. c. 33 South. Rep. 10; 60 L. R. A. 269.

⁵⁴ That a railroad company is not liable for injuries caused by horses taking fright at the ordinary operation of hand-cars, see: Chicago &c. R. Co. v. Roberts, 3 Neb. (unoff.) 425; s. c. 91 N. W. Rep. 707; Louisville &c. R. Co. v. Howerton, 115 Ky. 89; s. c. 72 S. W. Rep. 760; 24 Ky. L. Rep. 1905.

⁵⁵ Chicago &c. R. Co. v. Vremeister, 112 Ill. App. 346.

say that a railroad company will not be liable in damages to a person injured by his horse becoming frightened at the emission of steam, unless it is shown that the noise was unusual and unnecessary at the time and place where made.⁵⁶ A railroad company will be liable where it knowingly and unnecessarily allows a locomotive to remain with steam up and without attendants at a crossing, with the knowledge that it is liable to blow off steam, and thus cause unusual noises calculated to frighten horses driven over the street at this place,⁵⁷ or over roads parallel with the track;⁵⁸ and it is not necessary that the parallel road should have been actually condemned for a public road; it is sufficient that it has been used as a highway by the public without protest from the railroad company.⁵⁹

§ 1924. Frightening Horses by Letting off Steam from Automatic Safety Valves.⁶⁰

§ 1925. Frightening Horses by Blowing the Steam Whistle.—A railroad company may be held liable for an unnecessarily loud sounding of a locomotive whistle at street crossings which is calculated to and does frighten horses, and this is so, although the whistle was not sounded for the purpose of frightening the horse.⁶¹ The case is clearer where the engineer continues to sound the whistle after it has

⁵⁶ *Coleman v. Wrightsville & C. R. Co.*, 114 Ga. 386; s. c. 40 S. E. Rep. 247; *Hinchman v. Pere Marquette R. Co.*, 136 Mich. 341; s. c. 99 N. W. Rep. 277; 11 Det. Leg. N. 38; 65 L. R. A. 553; *San Antonio & C. R. Co. v. Belt*, 24 Tex. Civ. App. 281; s. c. 59 S. W. Rep. 607; *St. John v. St. Louis & C. R. Co.* (Tex. Civ. App.), 79 S. W. Rep. 603; *Miller v. Wellington & C. R. Co.*, 128 N. C. 26; s. c. 38 S. E. Rep. 29.

⁵⁷ *Texas Midland R. Co. v. Cardwell* (Tex. Civ. App.), 67 S. W. Rep. 157.

⁵⁸ *Brown v. Missouri Pac. R. Co.*, 89 Mo. App. 192.

⁵⁹ *Brown v. Missouri Pac. R. Co.*, 89 Mo. App. 192.

⁶⁰ *Chicago & C. R. Co. v. Bailey*, 66 Kan. 115; s. c. 71 Pac. Rep. 246 (steam escaping from cylinder cocks held the proximate cause of an injury caused by a frightened horse). Where plaintiff's horse was frightened by reason of the engineer of a passing train unnecessarily opening the cylinder cocks, causing the escape of steam with loud noises, the railway company was liable for the resultant injury,

and it was not necessary to plaintiff's right of recovery that the engineer should have seen his actual peril, if a reasonably prudent person would have anticipated that the opening of the cylinder cocks would frighten the horse and probably cause the plaintiff to be injured: *Texas & C. R. Co. v. Kennedy*, 29 Tex. Civ. App. 94; s. c. 69 S. W. Rep. 227. The question whether a particular strip of land used by the public as a highway was a street within the meaning of an ordinance prohibiting railroad companies from opening cylinder cocks, safety valves, etc., within one hundred feet of a street crossing, is a question of fact for the determination of the jury: *Pittsburg & C. R. Co. v. Robson*, 204 Ill. 254; s. c. 68 N. E. Rep. 468.

⁶¹ *Chalkley v. Central of Georgia R. Co.*, 120 Ga. 683; s. c. 48 S. E. Rep. 194; *Beopple v. Illinois Cent. R. Co.*, 104 Tenn. 420; s. c. 58 S. W. Rep. 231; *Texas & C. R. Co. v. Moseley* (Tex. Civ. App.), 58 S. W. Rep. 48; *Missouri & C. R. Co. v. Weatherford* (Tex. Civ. App.), 62 S. W. Rep. 101.

become reasonably apparent that horses are being frightened thereby.⁶² A company will not be liable for injuries caused by the fright of horses where the whistle signals are necessary to the operation of the train, and the presence of a team likely to be frightened is unknown to the engineer.⁶³

§ 1926. **Frightening Horses through Failure to Give the Statutory Signals.**—Statutes regulating the matter of signals impose that duty on trains only where they approach crossings and then as a measure of protection to approaching travellers. Hence a railroad company is not generally held liable for the fright of animals caused by the approach of a train to a place other than a crossing where the negligence relied on is the failure of the engineer to sound the statutory signals at a near-by crossing.⁶⁴ The rule is different where the tracks of the railroad company are laid in a street. Here the law very obviously requires a greater diligence to avoid injury to persons having equal rights with the railroad company, and it becomes the duty of the company to give full warning of the approach of its trains and keep the same under such control that travellers in vehicles going in the same direction with the train may not be injured.⁶⁵

§ 1928. **Frightening Horses through Sounding Whistle at Overhead Bridges.**—The reason for sounding signals at highway crossings to warn approaching travellers of danger does not exist where the railroad crosses the highway under or above grade, and here the railroad company may be guilty of negligence in sounding whistles at a time when horses below or above are using the highway;⁶⁶ particularly where the engineer is aware of this fact.⁶⁷ The traveller in this situation may himself be imputed with contributory negligence, as where he drives under a long overhead bridge in plain view of an approaching train on the bridge, and relaxes his control over his team, and the team is frightened and runs away because of whistle blasts given as a necessary signal.⁶⁸

⁶² *Houston &c. R. Co. v. Blan* (Tex. Civ. App.), 62 S. W. Rep. 552; *Gulf &c. R. Co. v. Milner*, 28 Tex. Civ. App. 86; s. c. 66 S. W. Rep. 574.

⁶³ *Illinois Cent. R. Co. v. Schmitt*, 100 Ill. App. 490.

⁶⁴ *Coleman v. Wrightsville &c. R. Co.*, 114 Ga. 386; s. c. 40 S. E. Rep. 247; *Illinois Cent. R. Co. v. Schmitt*, 100 Ill. App. 490; *Melton v. St. Louis &c. R. Co.*, 99 Mo. App. 282; s. c. 73 S. W. Rep. 231; *Lampman v. New York &c. R. Co.*, 72 App. Div. (N. Y.) 363; s. c. 76 N. Y. Supp.

492; s. c. aff'd, 179 N. Y. 536; 71 N. E. Rep. 1132. But see *Mitchell v. Union Terminal R. Co.*, 122 Iowa 237; 97 N. W. Rep. 1112.

⁶⁵ *Holt v. Pennsylvania R. Co.*, 206 Pa. 356; s. c. 55 Atl. Rep. 1055.

⁶⁶ *Cleveland &c. R. Co. v. David*, 105 Ill. App. 69; *Louisville &c. R. Co. v. Shearer* (Ky.), 59 S. W. Rep. 330; s. c. 22 Ky. L. Rep. 929.

⁶⁷ *Kelsey v. New York &c. R. Co.*, 181 Mass. 64; s. c. 63 N. E. Rep. 8.

⁶⁸ *Cowen v. Watson*, 91 Md. 344; s. c. 46 Atl. Rep. 996.

§ 1929. **Contributory Negligence of the Traveller whose Horses are Frightened.**—Where a railroad parallels a near-by highway the traveller and the railroad operatives should each regard the probability of the other using his respective place of travel at about the same time, and each should use reasonable care in managing his vehicle having in mind this situation. The traveller on his part will be held to have fulfilled the duty of reasonable care only where he has looked and listened,⁶⁹ and kept his team in hand so as to control it on the appearance of a train.⁷⁰ There is Canadian authority that one is **not**, as a matter of law, guilty of contributory negligence in driving a horse so near the track as to be unable to control the horse when a train which gave no signals of its approach passes by, even though by looking and listening he might have heard its approach in time to stop far enough away to be in safety.⁷¹ Here as elsewhere the contributory negligence of the driver to defeat a recovery for his injuries must have been the proximate cause of such injuries.⁷²

§ 1931. **Cases where Contributory Negligence was not Imputed to the Traveller as Matter of Law.**⁷³

⁶⁹ Yazoo &c. R. Co. v. Eakin, 79 Miss. 735; s. c. 31 South. Rep. 414.

⁷⁰ Brown v. Missouri Pac. R. Co., 89 Mo. App. 192.

⁷¹ Vallee v. Grand Trunk R. Co., 1 Ont. L. Rep. 224.

⁷² Hord v. Gulf &c. R. Co., 33 Tex. Civ. App. 163; s. c. 76 S. W. Rep. 227. A horse frightened by the approach of a train ran away, but was stopped by the driver and gotten under control and then the driver struck the horse and caused him to run away again. It was held that the negligence of the railroad company was not the proximate cause of the driver's injury, but that such injuries were proximately caused by his own negligent act: Neely v. Ft. Worth &c. R. Co., 96 Tex. 274; s. c. 72 S. W. Rep. 159.

⁷³ The driver of a gentle horse will not be imputed with contributory negligence by the mere fact of driving such horse in close proximity to a locomotive which suddenly let off steam and caused its fright, in the absence of anything to show that he knew that the engine was about to blow off steam: San Antonio &c. R. Co. v. Belt, 24 Tex. Civ. App. 281; s. c. 59 S. W. Rep. 607; Texas Midland R. Co. v. Cardwell (Tex. Civ. App.), 67 S. W.

Rep. 157; Texas &c. R. Co. v. Hamilton (Tex. Civ. App.), 66 S. W. Rep. 797. It was not contributory negligence, as a matter of law, for a mother occupying a vehicle with her child to jump out and attempt to grasp her horse's bridle and prevent him from running away when frightened by an approaching train: St. Louis &c. R. Co. v. Boback, 71 Ark. 427; s. c. 75 S. W. Rep. 473. Nor was a driver imputed with contributory negligence as a matter of law by the fact that when his horse took fright and ran in front of a moving engine, he retained his hold on the reins, and was dragged on the track and killed, when he could have escaped injury by jumping from the vehicle, as his act was within the principle relaxing the rules of contributory negligence in cases where one is required to act in the presence of an emergency: Doll v. Lehigh Val. R. Co., 52 App. Div. (N. Y.) 575; s. c. 65 N. Y. Supp. 454. The question of contributory negligence is a question of fact, unless there is no conflict in the evidence, in which event the question is for the court: Miller v. Wellington &c. R. Co., 128 N. C. 26; s. c. 38 S. E. Rep. 29.

§ 1932. **Duty of Engineer on Seeing Horses Frightened.**—Where the engineer sees horses near a crossing frightened and becoming unmanageable, it is his duty to refrain from giving statutory signals or doing any act tending to increase the fright of the team, and if by reasonable exertion he can avoid the accident by stopping the train, it is his duty to do so.⁷⁴

§ 1933. **Stopping Team Unhitched near by Railroad Track.**⁷⁵

§ 1938. **Questions of Pleading in Actions against Railway Companies for Frightening Travellers' Horses.**⁷⁶

§ 1939. **Questions of Evidence in Such Actions.**⁷⁷

§ 1940. **Questions for the Jury**⁷⁸ and **Instructions in these Cases.**⁷⁹

⁷⁴ *Nichols v. Baltimore & C. R. Co.*, 33 Ind. App. 229; s. c. 70 N. E. Rep. 183; 71 N. E. Rep. 170; *St. Louis & C. R. Co. v. Kilman*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 1050.

⁷⁵ *Western & C. R. Co. v. Strickland*, 114 Ga. 133; s. c. 39 S. E. Rep. 943 (railroad company not liable where horse hitched to a dray was left standing in an open street and the horse, frightened by the approach of train, ran away and dashed into the side of the train as it passed over a near-by crossing).

⁷⁶ A complaint was held not open to the objection that it did not show the defendant's negligence to have been the proximate cause of the injury which alleged plaintiff's rightful passage over a public road crossing and his needful view of the defendant's line of road at and near that point were wrongfully and unlawfully obstructed by one of its trains; that by that obstruction, and the conductor's frequent promises to remove it, he was detained in the public highway near the crossing with his team for nearly an hour; that while so detained another train of the defendant, without the usual and requisite notice, and when he could not see its approach, came up suddenly behind the first train, and to the crossing, and there, by making great and unnecessary noise from a concealed position, caused plaintiff's horses to run away and injure him: *Beopple v. Illinois Cent. R. Co.*, 104 Tenn. 420; s. c. 58 S. W. Rep. 231. A com-

plaint was held not open to the criticism that it showed plaintiff was guilty of contributory negligence, which alleged that plaintiff, in returning home with his team from a certain town, had to pass over a public crossing over defendant's road; that the crossing was obstructed by a hand-car which was too heavy for plaintiff to move, and, the road being fenced so that he could not drive around the crossing, he had to attempt to pass the hand-car, and that in so doing the wheels of his wagon went over the rails and ties; that plaintiff's team was gentle and he believed he could pass over safely, but that the team became frightened, and he was thrown out and injured: *International & C. R. Co. v. Locke* (Tex. Civ. App.), 67 S. W. Rep. 1082.

⁷⁷ In an action for injuries from fright of horses at a car on a railroad crossing, evidence of a third person that his horse shied at the same car at the same time with the plaintiff's horse is admissible: *International & C. R. Co. v. Mercer* (Tex. Civ. App.), 78 S. W. Rep. 562.

⁷⁸ *Nichols v. Baltimore & C. R. Co.*, 33 Ind. App. 229; s. c. 70 N. E. Rep. 183; 71 N. E. Rep. 170 (whether the engineer was justified in sounding an alarm signal, which tended to increase the fright of a team, after the engineer had discovered them).

⁷⁹ In an action where it was alleged that the engineer blew the whistle for a longer time than was necessary with the intent to

§ 1949. Other Statutory Precautions.⁸⁰

§ 1955. Liability as Against Lessor or Lessee of the Railway Company.—The late authorities generally agree that the owner of a railroad is liable for the negligent acts of its lessee,⁸¹ in the absence of

frighten the plaintiff's team, one of the witnesses testified that he had been working near the railroad for months and in that time "had never heard such blowing" before or since. Another witness testified that the whistle began by two short blasts followed by loud, continuous whistles which ceased only when plaintiff fell from the vehicle on which he was riding. It was held that there was sufficient circumstantial evidence tending to show that the engineer saw the plaintiff to justify an instruction that the jury were to decide this fact from "all the evidence positive and circumstantial." *Houston &c. R. Co. v. Blan* (Tex. Civ. App.), 62 S. W. Rep. 552. Where the action was based on the negligence of the defendant in unnecessarily blowing off steam it was held erroneous to instruct the jury as to the violation of a local statute forbidding trains to block the crossings longer than five minutes at a time, which act immediately preceded the negligence complained of: *Hinchman v. Pere Marquette R. Co.*, 136 Mich. 341; s. c. 99 N. W. Rep. 277; 11 Det. Leg. N. 38; 65 L. R. A. 553.

⁸⁰ Under a statute requiring trains to sound an alarm and put down brakes when any person is discovered on the track, and making every company that fails to observe these precautions responsible for all damages resulting from accidents or collisions that may occur, it was not error in an action for crossing injuries to instruct that if the brakes and other apparatus on the train were defective, or if the defendant failed to observe any other statutory requirement, its liability would be absolute, though the plaintiff might not be able to show that the accident was caused by the specific defect or default proven: *Walton v. Chattanooga Rapid-Transit Co.*, 105 Tenn. 415; s. c. 53 S. W. Rep. 737.

⁸¹ *Central of Georgia R. Co. v. Wood*, 129 Ala. 483; s. c. 29 South.

Rep. 775; *Hawkins v. Central of Georgia R. Co.*, 119 Ga. 159; s. c. 46 S. E. Rep. 82; *Chicago &c. R. Co. v. Doan*, 195 Ill. 168; s. c. 62 N. E. Rep. 826; aff'g s. c. 93 Ill. App. 247; *Anderson v. West Chicago St. R. Co.*, 200 Ill. 329; s. c. 65 N. E. Rep. 717; aff'g s. c. 102 Ill. App. 310; *Chicago &c. R. Co. v. Hart*, 104 Ill. App. 57; *Chicago U. T. Co. v. Stanford*, 104 Ill. App. 99; *Suburban R. Co. v. Balkwill*, 94 Ill. App. 454; *Louisville &c. R. Co. v. Breeden*, 111 Ky. 729; s. c. 64 S. W. Rep. 667; 23 Ky. L. Rep. 1021, 1763; *Anderson v. Union Terminal R. Co.*, 161 Mo. 411; s. c. 61 S. W. Rep. 874; *Perry v. Western N. C. R. Co.*, 129 N. C. 333; s. c. 40 S. E. Rep. 191; *Raleigh v. North Carolina R. Co.*, 129 N. C. 265; s. c. 40 S. E. Rep. 2; *Davis v. Atlanta &c. Ry. Co.*, 63 S. C. 370; s. c. 41 S. E. Rep. 468; *Harden v. North Carolina R. Co.*, 129 N. C. 354; s. c. 40 S. E. Rep. 184; 55 L. R. A. 784; *Perry v. Western North Carolina R. Co.*, 128 N. C. 471; s. c. 39 S. E. Rep. 27; *Missouri &c. R. Co. v. Owens* (Tex. Civ. App.), 75 S. W. Rep. 579; *Ray v. Pecos &c. R. Co.*, 35 Tex. Civ. App. 123; s. c. 80 S. W. Rep. 112; *Gulf &c. R. Co. v. Bryant* (Tex. Civ. App.), 66 S. W. Rep. 804. A railroad company maintaining tracks in a city street, and required to maintain the street in repair for twenty years, leased its line under a contract requiring the lessee to maintain the tracks. The lessor in a condition therein renounced all its duties to the public. The condition was held to vitiate the lease, rendering the lessor liable for injuries resulting from the neglectful act of the lessee in allowing an obstruction of the street: *Anderson v. Union Terminal R. Co.*, 161 Mo. 411; s. c. 61 S. W. Rep. 874. Under a Missouri statute authorizing foreign railroad corporations to lease or purchase lines of railroad within the State, and declaring a domestic corporation which so leases its lines to a for-

clear legislative exemption,⁸² though the injured person is a servant of the lessee,⁸³ unless in the latter case the negligence is solely that of his employer.⁸⁴ The rule does not exempt the lessee from liability. His liability is a primary liability,⁸⁵ and he will be liable though the accident may be attributed to a defect in the road, and not to negligence in its operation.⁸⁶ The decisions are not harmonious on the question whether an exemption is implied in a plain legislative authority to lease. The prevailing opinion is against such an implication. In Arkansas the opposite view is maintained. The court says: "We believe that the only theory that can be defended on principle is that, in granting authority to lease, the legislature conferred authority to execute an effective instrument, with all the qualities and incidents with which the law invests the lease. If this be true, then the lease does transfer possession and control from one party to the other for the term of the lease, and the rights and obligations of the parties are such, and such only, as the law annexes to the relation of lessor and lessee."⁸⁷ An Ohio statute declaring a railroad company leasing

eign corporation "liable as if it operated the road itself," a domestic corporation which has leased its road to a foreign corporation is liable for injuries inflicted by the lessee in the operation of the road: *Keller v. Kansas City & C. R. Co.*, 135 Fed. Rep. 202.

⁸² *Hawkins v. Central of Georgia R. Co.*, 119 Ga. 159; s. c. 46 S. E. Rep. 82; *Chicago & C. R. Co. v. Schmitz*, 211 Ill. 446; s. c. 71 N. E. Rep. 1050; aff'g s. c. 113 Ill. App. 295; *Harden v. North Carolina R. Co.*, 129 N. C. 354; s. c. 40 S. E. Rep. 184; 55 L. R. A. 784. A provision in the charter of a railroad corporation empowering the corporation to "make contracts with individuals, corporations and other railroad companies for the building, completion and operation of said road or any part thereof," empowered the corporation to lease its road, but not so as to relieve it from liability for the negligence of the lessee in the operation of a train whereby a person on the track was struck and killed: *McCabe v. Maysville & C. R. Co.*, 112 Ky. 861; s. c. 66 S. W. Rep. 1054; 23 Ky. L. Rep. 2328.

⁸³ *Southern R. Co. v. Sittasen*, — Ind. App. —; s. c. 74 N. E. Rep. 898; *Brown v. Atlanta & C. R. Co.*, 131 N. C. 455; s. c. 42 S. E. Rep. 911;

Smith v. Atlanta & C. R. Co., 130 N. C. 344; s. c. 42 S. E. Rep. 139, 976; *Chicago & C. R. Co. v. Hart*, 209 Ill. 414; s. c. 70 N. E. Rep. 654; 66 L. R. A. 75; aff'g s. c. 104 Ill. App. 57; *Markey v. Louisiana & C. R. Co.*, 185 Mo. 348; s. c. 84 S. W. Rep. 61.

⁸⁴ *Lewis v. Maysville & C. R. Co.*, 76 S. W. Rep. 526; s. c. 25 Ky. L. Rep. 948; *Williard v. Spartanburg & C. R. Co.*, 124 Fed. Rep. 796.

⁸⁵ *Illinois Terminal R. Co. v. Thompson*, 112 Ill. App. 463; s. c. aff'd, 210 Ill. 226; 71 N. E. Rep. 328; *Suburban R. Co. v. Balkwill*, 195 Ill. 535; s. c. 63 N. E. Rep. 389; aff'g s. c. 94 Ill. App. 454. Where a lessee of a railroad turns the operation of the road over to a construction partnership which has no charter or franchise for operating a railroad, such partnership is the servant or agent of such lessee; and the lessee cannot escape liability for the negligence of such agent on the claim that it is an intermediate lessee, and that the owner of the road is liable: *Suburban R. Co. v. Balkwill*, 195 Ill. 535; s. c. 63 N. E. Rep. 389; aff'g s. c. 94 Ill. App. 454.

⁸⁶ *St. Louis & C. R. Co. v. Rawley*, 90 Ill. App. 653.

⁸⁷ *Little Rock & C. R. Co. v. Daniels*, 68 Ark. 171; s. c. 56 S. W. Rep. 874.

its road jointly liable with the lessee on all rights of action accruing to any one for any negligence or default growing out of the operation or maintenance of the road, or in any wise connected therewith, is to be construed to apply only to liabilities growing out of duties as a carrier, and not out of duties as an employer.⁸⁸

§ 1955a. **Railroads in Hands of Receivers.**—The receiver of a railroad, exercising its franchises and operating the road, is subject to the same rules of liability in his official capacity that are applicable to the corporation itself when operated in its own right.⁸⁹ He is not liable for injuries received after his discharge.⁹⁰

§ 1956. **Injuries Arising in the Mixed Operation of Railway Properties by Several Companies.**⁹¹—Under a trackage agreement, providing that the premises included shall be maintained and operated by the grantor; that the grantee's trains shall be subject to the grantor's rules and control, and the train crews subject to the grantor's "exclusive" control, and no person employed therein except on the grantor's approval; and that any member of a crew may be forbidden to run on the lines at any time by the grantor, the grantor becomes responsible for the negligence of a crew in charge of the grantee's train, whereby a crossing accident is occasioned.⁹² But the bare fact that different railroads maintain a joint depot and railroad yards with a joint agent in charge does not make one of these companies liable for the negligence of the other on such premises.⁹³ Where two railroad companies by agreement use the same track, an engineer operating a train on this track has a right to presume that the track is clear in the absence of warning signals from trains ahead, and he is not bound to run his engine at such a rate of speed that he may be able to stop it short of a collision with another train standing on the track and not protected by the customary signals.⁹⁴ Nor will his recovery for in-

⁸⁸ *Beltz v. Baltimore &c. R. Co.*, 137 Fed. Rep. 1016.

⁸⁹ *Robinson v. Kirkwood*, 91 Ill. App. 54; *Thompson v. Dotterer*, 105 La. 37; s. c. 29 South. Rep. 483; *Memphis &c. R. Co. v. Glover*, 78 Miss. 467; s. c. 29 South. Rep. 89; *Stevens v. Atchison &c. R. Co.*, 87 Mo. App. 26.

⁹⁰ *Howe v. Harper*, 127 N. C. 356; s. c. 37 S. E. Rep. 505.

⁹¹ That liability is joint under trackage agreements, see: *Pennsylvania Co. v. Gresco*, 102 Ill. App. 252; *Chesapeake &c. R. Co. v. Davis*, 58 S. W. Rep. 698; 22 Ky. L. Rep. 748; 60 S. W. Rep. 14; 22 Ky. L.

Rep. 1156; *Louisville &c. R. Co. v. Breeden*, 111 Ky. 729; s. c. 64 S. W. Rep. 667; 23 Ky. L. Rep. 1021, 1763; *Keck v. Philadelphia &c. R. Co.*, 206 Pa. 501; s. c. 56 Atl. Rep. 47.

⁹² *Decker v. Erie R. Co.*, 85 App. Div. (N. Y.) 13; s. c. 82 N. Y. Supp. 895. But see, *Roganville Lumber Co. v. Gulf &c. R. Co.*, 36 Tex. Civ. App. 563; s. c. 82 S. W. Rep. 816.

⁹³ *Jolly v. Missouri &c. R. Co.*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 837.

⁹⁴ *Central of Georgia R. Co. v. Martin*, 138 Ala. 531; s. c. 36 South. Rep. 426.

juries be defeated by the fact that he failed to sound a crossing signal just before the collision, since such signals are intended solely for the protection of travellers.⁹⁵

§ 1957. **Duty of Lighting Tracks, Crossings, Stations, etc.**—A railroad company, by permitting persons to use a portion of its platform for purposes of their own not connected with the transaction of business with the railroad company, is not charged with the duty to reconstruct, guard or light such platform so as to render it safe for the permitted use.⁹⁶

§ 1959. **Liability for Wrongful Acts of Strangers.**⁹⁷

§ 1963. **Collisions between Railway Trains where the Tracks Cross Each Other.**—A statute imposing on the engineer the duty to stop before crossing tracks and making the railroad company liable "for all damages" resulting from a failure to comply with its provision can be invoked by a person injured by collision while walking by the side of an intersecting track.⁹⁸ These statutes do not apply to switchyards consisting of an intricate system of tracks all belonging to the same company.⁹⁹ The failure to obey the statute in this particular will not support a recovery unless it was the proximate cause of the injury.¹⁰⁰ In one case it was held that though the plaintiff was negligent in having its train across the defendant's track when it was time for the defendant's train to arrive, without taking precautions to warn it, yet, if the defendant's servants saw, or might have seen, by the exercise of ordinary care, the plaintiff's train in time to have avoided the accident, the defendant's negligence was the proximate cause thereof.¹⁰¹ An engineer is justified in relying on semaphore lights at a crossing which show a signal of safety, and is not charged with negligence as a matter of law in failing to look out for approaching trains on the intersecting track.¹⁰² It was held in an action for the death

⁹⁵ Central of Georgia R. Co. v. Martin, 138 Ala. 531; s. c. 36 South. Rep. 426 (example of sufficient complaint in action for injuries the result of negligence of this character).

⁹⁶ Cincinnati & C. R. Co. v. Aller, 64 Ohio St. 183; s. c. 60 N. E. Rep. 205; aff'g s. c. 56 Ohio St. 754; 49 N. E. Rep. 1114.

⁹⁷ A railroad company exercising no control over a private switch is not liable for the death of an employé of the owner of the switch by the negligent operation of the cars thereon by other employés of the owner: Sauls v. Chicago & C. R. Co.,

36 Tex. Civ. App. 155; s. c. 81 S. W. Rep. 89.

⁹⁸ Southern R. Co. v. Williams, — Ala. —; s. c. 38 South. Rep. 1013.

⁹⁹ St. Louis Nat. Stock Yards v. Godfrey, 198 Ill. 288; s. c. 65 N. E. Rep. 90; aff'g s. c. 101 Ill. App. 40.

¹⁰⁰ Chicago & C. R. Co. v. Raidy, 100 Ill. App. 506.

¹⁰¹ Missouri Pac. R. Co. v. Chicago R. Co., 98 Mo. App. 214; s. c. 71 S. W. Rep. 1081.

¹⁰² Where the semaphores on parallel tracks at a railroad crossing are operated by the same wire and with the same result, testimony that at the time of the accident complained

of a fireman in a collision at a crossing that a speed ordinance of the town was inadmissible to charge the fireman with negligence on the ground that the ordinance was violated, since the fireman was not in control of the speed of the engine, and hence not affected by the negligence of the engineer.¹⁰³

§ 1969. Duty of those Driving Trains to Stop, Look and Listen at the Crossings of Other Railroads.—The provision of a statute that an engineer after stopping and before proceeding to run a train over a railroad crossing, must know the way to be clear, is properly held to mean not only that he must know that the crossing is free from immediate obstruction, but free from danger of such obstructions as ought reasonably to be expected.¹⁰⁴

§ 1970. Injuries through Improper Equipments, Reparations, etc., of Engines or Cars.—A railroad company is liable to the owner of adjoining property for annoyance consisting of noise, smoke, etc., incident to the operation of the railroad only where such annoyance is the result of negligence in its operation.¹⁰⁶ Where the injury from this source is due to negligence a right of action immediately arises and each successive injury gives rise to a separate right of action.¹⁰⁷

§ 1972. Negligence in Operation of Elevated Railroads.¹⁰⁸

of a red light was displayed on one of the tracks tends to show that a red light was also displayed on the parallel track, there being no evidence that the semaphores were not in usual working order: *Chicago &c. R. Co. v. Vipond*, 212 Ill. 199; s. c. 72 N. E. Rep. 22; aff'g s. c. 112 Ill. App. 558.

¹⁰³ *Chicago &c. R. Co. v. Vipond*, 212 Ill. 199; s. c. 72 N. E. Rep. 22; aff'g s. c. 112 Ill. App. 558.

¹⁰⁴ *Southern R. Co. v. Bonner*, 141 Ala. 517; s. c. 37 South. Rep. 702. See also *Southern R. Co. v. Bryan*, 125 Ala. 297; s. c. 28 South. Rep. 445. Plaintiff, a locomotive engineer, as he approached the crossing of another road at right angles, stopped his train within sixty or seventy-five feet of the crossing, and looked straight ahead and to the right before starting up, but upon reaching the crossing was struck by the engine of the defendant company, approaching from the left, by reason of which he received permanent injuries. There was evidence that the headlight in plaintiff's locomotive had gone out on account

of failure of oil, and had been replaced by a lantern; that the engine of defendant had a bright headlight; that sparks were flying from the engine; that it could have been seen by plaintiff had he looked to the left before starting up, but that from his position his view to the left was obscured. It was held that plaintiff was guilty of negligence contributing proximately to his injury: *Louisville &c. R. Co. v. Morby*, 125 Ala. 341; s. c. 28 South. Rep. 43.

¹⁰⁶ *Kuhn v. Illinois Cent. R. Co.*, 111 Ill. App. 323; *Fisher v. Seaboard Air Line R. Co.*, 102 Va. 363; s. c. 46 S. E. Rep. 381; *Crowley v. Chicago &c. R. Co.*, 122 Wis. 287; s. c. 99 N. W. Rep. 1016.

¹⁰⁷ *Kuhn v. Illinois Cent. R. Co.*, 111 Ill. App. 323.

¹⁰⁸ An elevated railroad company owes the same affirmative duty of vigilance and care to prevent injury to licensees on its tracks that it does to a person on these tracks on business: *Wells v. Brooklyn Heights R. Co.*, 34 Misc. (N. Y.) 44; s. c. 68 N. Y. Supp. 305.

§ 1973. Various Facts in Railway Operation to which Negligence was and was not Ascribed.¹⁰⁹

¹⁰⁹ A person on the premises of a railroad company in good faith to consult a person who he had reason to believe was about to take the train, is a licensee and not a trespasser, and the company owed him the duty of ordinary care to avoid injuring him: *Klugherz v. Chicago &c. R. Co.*, 90 Minn. 17; s. c. 95 N. W. Rep. 586.

TITLE FOURTEEN.

RAILWAY INJURIES TO ANIMALS.

[§§ 1977-2224.]

§ 1977. **General Considerations.**—A statute making a railroad company liable for killing animals, whether the same is operated by the company or its lessee, assignee or other person, is closely construed, and does not cover the case of animals injured by locomotives or cars run by trespassers.¹

§ 1981. **Injury must have been the Proximate Result of the Negligence Complaind of.**²

§ 1985. **Degree of Care Required of the Company.**—The degree of care exacted of the railroad company in this relation is reasonable care, and if this care is exercised to avoid injury the company cannot be held liable.³

§ 1987. **Whether Answerable for Willful, Wanton or Malicious Act of Servant.**⁴

§ 1989. **When a Question for the Jury.**⁵

§ 1990. **Ownership of Animals.**—In a Tennessee case a person who had taken possession of an animal when a calf badly crippled, and had cared for it and raised it for two years without any adverse claim being made by any one, was held to have sufficient title to bring an ac-

¹Cleveland &c. R. Co. v. Wasson, 33 Ind. App. 316; s. c. 70 N. E. Rep. 821; 66 N. E. Rep. 1020.

²Central of Georgia R. Co. v. Neidlinger, 110 Ga. 329; s. c. 35 S. E. Rep. 364. In a case where a horse suddenly dashed against a locomotive while it was passing over a public crossing and was killed, the railroad company, having done nothing to cause the horse to so act, was not made liable by reason of the omission of the operatives of the locomotive to observe the law as to signals and speed: Georgia &c. R. Co. v. Cook, 114 Ga. 760; s. c. 40 S. E. Rep. 718.

³Atlantic Coast Line R. Co. v. Williams, 120 Ga. 1042; s. c. 48 S. E. Rep. 404. See also Arkansas &c. R.

Co. v. Sanders, 69 Ark. 619; s. c. 65 S. W. Rep. 428.

⁴A railway company is liable where its employés wantonly injure an animal on the track, which they see in ample time to prevent any injury: Spencer v. Missouri &c. R. Co., 90 Mo. App. 91.

⁵Pecos Valley &c. R. Co. v. Cazier, — N. M. —; s. c. 79 Pac. Rep. 714 (whether operatives of train were negligent); Ft. Worth &c. R. Co. v. Roberts, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 250 (whether owner of cattle camping on lands adjoining an unfenced right of way was negligent in the selection of his camping place, it appearing that he had passed a point where he might have enclosed the animals).

tion for its death.⁶ Under an Arkansas statute providing that the action may be brought by one having a special ownership in stock, a bailee, having charge of a mule for the purpose of sale, was held a proper person to sue and entitled to recover the full value of the animal, and not merely the amount he has expended in feeding and caring for it.⁷ In an action where the ownership of the animal depended upon the question whether a wife had accepted the gift of the animal from her husband, the question whether the gift was completed so as to deprive the husband of any right thereto was held one of fact for the jury.⁸

§ 1992. General Application of the Rule of Contributory Negligence.—The law imposes upon persons driving cattle along highways crossing railroad tracks the same obligation to look and listen for the approach of trains that it does upon the drivers of vehicles at the same place.⁹ So an owner of cattle will be imputed with contributory negligence defeating a recovery where he turns his stock loose with knowledge of their habit to go on a railroad track, and takes no means to prevent them from going on the track at a place where the railroad company is under no obligation to fence its right of way.¹⁰ Like rules govern the owners of fowls permitted to run at large and trespass on railroad tracks, and the railroad company will not be liable for killing them in the absence of recklessness or common-law negligence.¹¹

§ 1999. Jurisdictions in which this Common-Law Rule Prevails.—The common-law rule as to liability of railroad companies for injuries to stock applies in New Mexico except in so far as it has been modified by statute and judicial determination.¹² Under the Texas stock law, which provides that it shall be unlawful to permit stock to run at large, the bare presence of the stock at large on a railroad track is negligence on the part of the owner, and this more strongly where it appears that the railroad had fenced its track at the place where the cattle entered,¹³ and had exercised due care to stop the train as

⁶ *Southern R. Co. v. Hall*, 107 Tenn. 512; s. c. 64 S. W. Rep. 481.

⁷ *St. Louis & C. R. Co. v. Norton*, 71 Ark. 314; s. c. 73 S. W. Rep. 1095.

⁸ *Davis v. Seaboard Air Line R. Co.*, 134 N. C. 300; s. c. 46 S. E. Rep. 515.

⁹ *McGill v. Minneapolis & C. R. Co.*, 113 Iowa 358; s. c. 85 N. W. Rep. 620; *Snell v. Minneapolis & C. R. Co.*, 87 Minn. 253; s. c. 91 N. W. Rep. 1108; *Nolan v. Central R. Co.*, 67 N. J. L. 124; s. c. 50 Atl. Rep.

348; *Silcock v. Rio Grande & C. R. Co.*, 22 Utah 179; s. c. 61 Pac. Rep. 565.

¹⁰ *Wright v. Minneapolis & C. R. Co.*, 12 N. D. 159; s. c. 96 N. W. Rep. 324.

¹¹ *Nashville & C. R. Co. v. Davis* (Tenn.). 78 S. W. Rep. 1050.

¹² *Pecos Valley & C. R. Co. v. Cazier*, — N. M. —; s. c. 79 Pac. Rep. 714.

¹³ *Red River & C. R. Co. v. Dooley*, 35 Tex. Civ. App. 364; s. c. 80 S. W. Rep. 566.

soon as the danger to the animals was discovered.¹⁴ The fact that the stock is at large without the owner's knowledge does not alter the rule that their presence at large on the track charges the owner with negligence.¹⁵

§ 2013. Failure of Railway Company to Erect Statutory Fence not Excused by Contributory Negligence of Cattle-Owner.¹⁶

§ 2014. Failure of Railroad Company to Keep Gates Closed at Highway Crossings.—In one case the plaintiff drove through an open gate leading colts, and after he had passed through the gate and had gone some little distance the colts broke loose, and ran back through the open gate onto the track and were run over by a passing train. The plaintiff was refused a recovery on the ground of negligent failure to close the gate, and this though the gate was open when he went through and had been open for some time, and the adjoining fence was also broken down.¹⁷ In another case it was very properly held that the plaintiff was not to be denied a recovery because some days before the accident he had passed through the gate and left it open, the evidence showing that the gate had been opened and closed a number of times during the interval.¹⁸

§ 2015. Rule Otherwise where Plaintiff has been Guilty of Willful or Reckless Exposure of his Animals.—The owner's contributory negligence will preclude him from a recovery from a railroad company where, with full knowledge that right-of-way fences are in a decayed, dilapidated and unsafe condition, he nevertheless turns his stock into a field along the right of way, and the animals break down the fence and are killed.¹⁹ An Iowa statute makes a railroad company liable for stock killed by reason of a failure to fence its right of way unless the loss was caused by the willful act of the owner of the stock. It was held that willful negligence of the owner of the stock within the meaning of the statute was not proved in a case where the evidence merely showed that a gate had been broken down by the plaintiff's horse two

¹⁴ *Houston &c. R. Co. v. Atlas Press Brick Works* (Tex. Civ. App.), 71 S. W. Rep. 792.

¹⁵ *Red River &c. R. Co. v. Dooley*, 35 Tex. Civ. App. 364; s. c. 80 S. W. Rep. 566.

¹⁶ See generally in support of principle: *Chicago &c. R. Co. v. Hand*, 113 Ill. App. 144; *Hathaway v. Detroit &c. R. Co.*, 124 Mich. 610; s. c. 83 N. W. Rep. 598; 7 Det. Leg. N. 351; *Texas &c. R. Co. v. Seay* (Tex. Civ. App.), 69 S. W. Rep. 177.

¹⁷ *Dickinson v. Wabash R. Co.*, 103 Mo. App. 332; s. c. 77 S. W. Rep. 88.

¹⁸ *Atkinson v. Chicago &c. R. Co.*, 119 Wis. 176; s. c. 96 N. W. Rep. 529.

¹⁹ *Scowden v. Erie R. Co.*, 26 Pa. Super. Ct. 15; *Perrault v. Minneapolis &c. R. Co.*, 117 Wis. 520; s. c. 94 N. W. Rep. 348. But see *Chicago &c. R. Co. v. Bourne*, 105 Ill. App. 27.

days before the stock in question passed through the gate and onto the right of way, as this at most showed contributory negligence which is a different matter and not a defense under the statute.²⁰

§ 2019. **Defense of Contributory Negligence against Liability for Failure to Maintain Statutory Fence in Repair.**—There is authority that a railroad company which constructs a sufficient fence and gate therein along its right of way, and repairs substantial defects when they arise is not liable for the killing of stock owing to defects which the adjoining owner could repair without any great labor or expense, and which he assumed to repair and considers too trivial to bring to the attention of the railroad company.²¹

§ 2022. **Duty of Railway Company to Fence Arising out of Contract Express or Implied.**²²

§ 2025. **Liability for Injuries to Animals through Obstructed and Defective Crossings.**—Under a Canadian decision a railroad company, which permits the gates placed by it in a culvert through which flows a natural water course which dries up in summer to become out of repair, is liable for injuries to horses which escape from such culvert onto the adjoining land, from which they pass to an adjacent highway and thence onto the track.²³

§ 2028. **Statutes Valid which Require Railway Companies to Fence.**²⁴

§ 2035. **Doctrine that such Statutes are to be Construed Remedially.**—The existence of a general herd or stock law requiring stock owners to keep their stock enclosed in districts traversed by the railroad will not relieve the company from the duty to erect fences re-

²⁰ *Enix v. Iowa &c. R. Co.*, 114 Iowa 508; s. c. 87 N. W. Rep. 417.

²¹ *St. Louis &c. R. Co. v. Adams*, 24 Tex. Civ. App. 231; s. c. 58 S. W. Rep. 1035; *Missouri &c. R. Co. v. Bradshaw*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 897.

²² An agreement by a railroad company with a land-owner to fence its right of way through his premises and construct necessary cattle guards, in consideration of the grant of the right of way, is held by the supreme court of Alabama to render a company *prima facie* liable for the killing of stock belonging to the land-owner, and entering upon the track by reason of the failure of the company to maintain such

fences and cattle guards as agreed upon: *Evans v. Southern R. Co.*, 133 Ala. 482; s. c. 32 South. Rep. 138.

²³ *James v. Grand Trunk Ry. Co.*, 31 Ont. 672.

²⁴ That these statutes are a valid exercise of the police power of the State, see: *Sanger v. Chesapeake &c. R. Co.*, 102 Va. 86; s. c. 45 S. E. Rep. 750. A fence law is not rendered unconstitutional by the fact that it makes a railroad company liable in certain cases for failure to fence, regardless of negligence: *Louisville &c. R. Co. v. Kice*, 60 S. W. Rep. 705; s. c. 22 Ky. L. Rep. 1462.

quired by law.²⁵ So where the stock owner has enclosed his stock on all sides except along a right of way running through his land it is the duty of the railroad company to fence on that side of the enclosure, and to connect with the land-owner's fences so that cattle cannot escape onto the tracks.²⁶ The Texas statute, which provides that every railroad shall be liable for stock killed or injured on an unfenced right of way, is construed to render a railroad company that has not fenced its track absolutely liable for the killing or injuring of live stock.²⁷ The recovery under these statutes has been held not restricted to injuries caused by contact with the train. The owner may recover for other injuries to his stock,²⁸ and even for their loss by straying²⁹ where they would not have escaped but for this failure in the performance of a statutory duty.

§ 2036. **Doctrine that such Statutes are to be Construed Strictly.**— Elsewhere it is held that a statute making a railroad company liable for stock killed or injured by its locomotives and cars on an unfenced right of way is limited strictly to injuries inflicted in this way, and does not cover the case of animals injured on the right of way by reason of the condition of the roadbed.³⁰ The Georgia act, requiring railroad companies to keep in good order all private ways established by law across their track, is held not to apply to a private way not established by law, and hence cannot be invoked in actions for damages to stock killed on such private way.³¹

§ 2037. **Statutes Giving Double Damages Construed Strictly.**³²

²⁵ *Rabberman v. Hunt*, 88 Ill. App. 625.

²⁶ *Iola Electric R. Co. v. Jackson*, 70 Kan. 791; s. c. 79 Pac. Rep. 662.

²⁷ *Ft. Worth &c. R. Co. v. Swan*, 97 Tex. 338; s. c. 78 S. W. Rep. 920.

²⁸ *Oyler v. Quincy &c. R. Co.*, 113 Mo. App. 375; s. c. 88 S. W. Rep. 162.

²⁹ *Boggs v. Missouri &c. R. Co.*, 156 Mo. 389; s. c. 57 S. W. Rep. 550.

³⁰ *San Antonio &c. R. Co. v. Tamborello* (Tex. Civ. App.), 67 S. W. Rep. 926. An action cannot be maintained under a statute making railroads liable for the killing of stock on their unfenced track for the death of stock killed by falling into an unfenced cut. It must be shown that the stock was killed by a "moving train or engine or cars;" *Jones v. Nashville &c. R. Co.*, 104 Tenn. 119; s. c. 56 S. W. Rep. 852.

³¹ *Willingham v. Macon &c. R. Co.*, 113 Ga. 374; s. c. 38 S. E. Rep. 843.

³² The double damage law of Missouri does not allow a recovery if the point where the animals entered on the track was inside switch limits, and the erection of fences and cattle guards at such point would have made the track dangerous for operatives engaged in switching cars: *Ellis v. Mississippi River &c. R.*, 89 Mo. App. 241. But in another case where a cow escaped from a field onto a railroad right of way through a defect in a fence, of which the railroad company had notice, it was held liable in double damages for killing the cow, though she passed from the right of way to a public road and thence onto the railroad crossing: *Kimball v. St. Louis &c. R. Co.*, 99 Mo. App. 335; s. c. 73 S. W. Rep. 224. The Iowa law, allowing the recovery of double damages of any corporation operating a railroad and failing to fence the same, is construed to re-

§ 2040. **Construction of the Words "Running at Large."**—It has been held that cattle in a lane paralleling a right of way and leading from a pasture into a public highway are stock running at large within the meaning of a statute making a railroad company, failing to fence against live stock running at large or keep its fences in repair, liable for killing such stock.³³

§ 2041. **Construction of the words "Where the Same Pass Through, Along, or Adjoining Closed or Cultivated Fields, or Uninclosed Prairie Lands."**—It is held that the duty to fence uninclosed lands is owed to all stock owners generally while the duty as to inclosed lands is for the particular protection of the adjoining owner and may be waived by him so far as his own rights are concerned.³⁴ A horse which travels down a road, and from thence into a lane, and from thence on to a railroad's right of way, without encountering a fence, is held to go upon the right of way where the same passes through "uninclosed" land within the meaning of a statute requiring a railroad to fence its tracks where the same passes through uninclosed land.³⁵

§ 2043. **Failure to Fence Gives Right to Action for Damages, although not Given in Express Terms.**³⁶

§ 2046. **Doctrine that it Extends to Passengers.**³⁷

§ 2047. **Whether Extends to the Benefit of those who are not Adjoining Owners.**—Under the Missouri statute referred to in the main section a railroad company is liable to the owner of stock, pastured on lands adjoining lands adjacent to the railroad right of way, which get into the fields of the latter by reason of defective fences or entire want of division fences, and stray thence onto the track through a

quire the track, and not necessarily the right of way to be fenced, and hence it is inapplicable to a case where a railroad which crossed a stream near a highway which it also crossed, fenced its right of way up to the bridge and connected the fence with the bridge so that cattle could not go on the track, but could pass over the right of way under the bridge, and the company was held not liable in double damages for injuries to cattle which passed under the bridge and onto the highway where they were injured by the defendant's trains: *Cagwin v. Chicago & C. R. Co.*, 113 Iowa 175; s. c. 84 N. W. Rep. 1032.

³³ *Dailey v. Chicago & C. R. Co.*, 121 Iowa 254; s. c. 96 N. W. Rep. 778.

³⁴ *Reed v. Chicago & C. R. Co.*, 112 Mo. App. 575; s. c. 87 S. W. Rep. 65.

³⁵ *Reed v. Chicago & C. R. Co.*, 112 Mo. App. 575; s. c. 87 S. W. Rep. 65.

³⁶ See: *Parish v. Louisville & C. R. Co.*, 78 S. W. Rep. 186; s. c. 25 Ky. L. Rep. 1524.

³⁷ A passenger on a railroad train can avail himself of the statute requiring railroad companies to fence their rights of way and in an action for injuries caused by a collision with cattle on an unfenced right of way may show this violation of the statute: *International & C. R. Co. v. Thompson*, 34 Tex. Civ. App. 67; s. c. 77 S. W. Rep. 439.

defective right-of-way fence.³⁸ Where, however, a railroad company in that State fails to erect a sufficient fence, and the adjoining owner has a lawful fence around his lands and animals of a stranger break through such lawful fence, and passing thence are injured on the railroad track, the railroad company will not be liable for such injuries.³⁹ In New York,⁴⁰ Idaho,⁴¹ Virginia⁴² and Wisconsin⁴³ the statute is regarded as a police regulation for the protection of human life and property and for the benefit of the general public, and not solely for the benefit of the contiguous land-owner. In Texas,⁴⁴ Vermont⁴⁵ and New Hampshire⁴⁶ the contrary view prevails, and the fence law is regarded as for the benefit only of the adjoining proprietor.

§ 2048. Extends to Lessees and Others Rightfully on Adjoining Lands.⁴⁷

§ 2049. Liability Extends both to Lessor and Lessee of the Railroad and to Receivers.⁴⁸

§ 2050. Failure to Erect the Fence Required by Such Statutes Creates a Liability Independent of Negligence.⁴⁹—Where a sufficient fence is erected as required by the fence law a railroad company will be liable for stock killed or injured only when the injury results from

³⁸ *Brown v. Missouri &c. R. Co.*, 104 Mo. App. 691; s. c. 78 S. W. Rep. 273; *Farmers' Bank v. Chicago &c. R. Co.*, 109 Mo. App. 165; s. c. 83 S. W. Rep. 76; *Growney v. Wabash R. Co.*, 102 Mo. App. 442; s. c. 76 S. W. Rep. 671; *Litton v. Chicago &c. R. Co.*, 111 Mo. App. 140; s. c. 85 S. W. Rep. 978; *Phillips v. St. Louis &c. R. Co.*, 107 Mo. App. 203; s. c. 80 S. W. Rep. 926; *Rinehart v. Kansas City Southern R. Co.* (Mo. App.), 80 S. W. Rep. 910.

³⁹ *Farmers' Bank v. Chicago &c. R. Co.*, 109 Mo. App. 165; s. c. 83 S. W. Rep. 76.

⁴⁰ *Rubein v. Brooklyn Heights R. Co.*, 61 App. Div. (N. Y.) 478; s. c. 70 N. Y. Supp. 577.

⁴¹ *Johnson v. Oregon Short-Line R. Co.*, 7 Idaho 355; s. c. 63 Pac. Rep. 112.

⁴² *Sanger v. Chesapeake &c. R. Co.*, 102 Va. 86; s. c. 45 S. E. Rep. 750.

⁴³ *Atkinson v. Chicago &c. R. Co.*, 119 Wis. 159; s. c. 96 N. W. Rep. 529.

⁴⁴ *International &c. R. Co. v. Richmond*, 28 Tex. Civ. App. 513;

s. c. 67 S. W. Rep. 1029; *Texas &c. R. Co. v. Huffman* (Tex. Civ. App.), 71 S. W. Rep. 779; *Houston &c. R. Co. v. Hollingsworth*, 29 Tex. Civ. App. 306; s. c. 68 S. W. Rep. 724.

⁴⁵ *Delphia v. Rutland R. Co.*, 76 Vt. 84; s. c. 56 Atl. Rep. 279.

⁴⁶ *Flint v. Boston &c. R. Co.*, 73 N. H. 141; s. c. 59 Atl. Rep. 938.

⁴⁷ That the statutory duty to fence exists in favor of lessees of adjoining lands, see: *Yazoo &c. R. Co. v. Young* (Miss.), 28 South. Rep. 826; *Walther v. Sierra R. Co.*, 141 Cal. 288; s. c. 74 Pac. Rep. 840.

⁴⁸ *Little Rock &c. R. Co. v. Daniels*, 68 Ark. 171; s. c. 56 S. W. Rep. 874 (both lessor and lessee should be made parties where animal killed by negligence of lessee).

⁴⁹ Where there is an entire omission to construct the fence as required by law the railroad company is absolutely liable, and the question whether the train was operated with due care or a want of such care is not material: *Craig v. Wabash R. Co.*, 121 Iowa 471; s. c. 96 N. W. Rep. 965.

the want of ordinary care in the operation of its trains, or in failing to keep these fences in repair.⁵⁰

§ 2051. Failure to Fence must have been at the Point of Entry.—It is the place where the animal gets upon the railroad track, and not the place where it is killed or injured, that fixes the liability of a railroad company under these fence laws.⁵¹

§ 2052. And must have been the Proximate Cause of the Injury Complained of.—The absence of the fence is the proximate cause of the injury within the doctrine of this section, where it clearly appears that if the railroad company had fenced its track as required by the statute the plaintiff's animals would not have wandered on the railroad track and been injured.⁵² In one case it was held that the failure to construct the statutory fence was not the proximate cause of the injury to a licensee on the track who stepped aside to avoid an approaching train and was pushed back on the track by a stray cow on the right of way.⁵³

§ 2053. Places where the Company is Bound to Fence under these Statutes.⁵⁴

§ 2054. Duty to Erect Cattle-Guards and End Fences at Highway Crossings.—The New York railroad law providing for the construction of cattle-guards at road crossings is construed by the courts of that State to apply to interurban electric railroads, and to require the construction of cattle-guards where their tracks cross country roads.⁵⁵ An Iowa statute requiring railroad companies to construct cattle-

⁵⁰ Galveston &c. R. Co. v. Reitz, 27 Tex. Civ. App. 411; s. c. 65 S. W. Rep. 1088.

⁵¹ Bumpas v. Wabash R. Co., 103 Mo. App. 202; s. c. 77 S. W. Rep. 115; Acord v. St. Louis &c. R. Co., 113 Mo. App. 84; s. c. 87 S. W. Rep. 537; Sappington v. Chicago &c. R. Co., 95 Mo. App. 387; s. c. 69 S. W. Rep. 32; Chicago &c. R. Co. v. Seveck, — Neb. —; s. c. 101 N. W. Rep. 981. Where, in an action against a railway company for killing an animal, either by striking it or driving it on a trestle, it appears that the animal went on the road a few feet above the trestle, and that the right of way was not fenced at that point, an instruction is not improper which authorizes a recovery if the animal was injured at a place on the railroad where it was not fenced, without regard to the point

where it came on the track: Doughty v. St. Louis &c. R. Co., 92 Mo. App. 494.

⁵² Johnson v. Oregon Short-Line R. Co., 7 Idaho 355; s. c. 63 Pac. Rep. 112.

⁵³ Schreiner v. Great Northern R. Co., 86 Minn. 245; s. c. 90 N. W. Rep. 400.

⁵⁴ A government homestead after entry is private property within the meaning of a statute requiring railroad companies to fence their track when their right of way "passes through or along or abuts upon or is contiguous to private property": Johnson v. Oregon Short-Line R. Co., 7 Idaho 355; s. c. 63 Pac. Rep. 112.

⁵⁵ Evans v. Utica &c. R. Co., 44 Misc. (N. Y.) 345; s. c. 89 N. Y. Supp. 1089.

guards at private crossings upon request made to an officer whose duty includes the control of such cattle-guards is closely construed, and it is held that a railroad company cannot be held liable for injuries caused by a failure to construct these crossings where the request is not shown to have been made to officials having control of the cattle-guard department of the railroad company.⁵⁶ The failure of a railroad company to maintain a cattle-guard can only be considered where its absence is shown to have contributed to the injury sued upon.⁵⁷ The question whether a railroad company could have safely constructed cattle-guards at a given point is a question solely for the determination of the jury where the evidence on that issue is conflicting.⁵⁸

§ 2058. Duty to Erect Gates and Bars at Farm Crossings.—It is the view of the courts of Georgia that, where the owner of land induces a railroad company to build a private way across its track, it is not incumbent upon the company to keep and put such private way in such condition that an engineer on an approaching train can readily see live stock or persons on such crossing.⁵⁹

§ 2059. Duty to Keep them Closed, Whether upon the Company or the Land-Owner.—A railroad company having constructed proper farm gates and closed the same is not liable for injury to cattle passing through such gates after they have been carelessly left open by unknown persons unless the railroad company has actual or constructive knowledge that the gate is open;⁶⁰ and in one case it was held that the fact that such gates were open from eleven o'clock one morning to some time in the succeeding night when the accident occurred, was not sufficient to charge the company with notice of the fact.⁶¹ There is likewise authority that a railroad company will not be liable for killing animals which passed through a gate because of some trivial defect in the gate which could have been remedied by the land-owner with slight labor and at a trifling expense.⁶² A railroad com-

⁵⁶ McGill v. Minneapolis &c. R. Co., 113 Iowa 358; s. c. 85 N. W. Rep. 620.

⁵⁷ McGill v. Minneapolis &c. R. Co., 113 Iowa 358; s. c. 85 N. W. Rep. 620.

⁵⁸ Prather v. Kansas City &c. R. Co., 84 Mo. App. 86.

⁵⁹ Willingham v. Macon &c. R. Co., 113 Ga. 374; s. c. 38 S. E. Rep. 843.

⁶⁰ Mooers v. Northern Pac. R. Co., 80 Minn. 24; s. c. 82 N. W. Rep. 1085; Whaley v. Erie R. Co., 181 N. Y. 448; s. c. 74 N. E. Rep. 417; s. c. rev'g 88 App. Div. (N. Y.) 621; 84

N. Y. Supp. 1150; Kavanaugh v. Atchison &c. R. Co., 163 Mo. 54; s. c. 63 S. W. Rep. 374; Greer v. Nashville &c. R., 104 Tenn. 242; s. c. 56 S. W. Rep. 850; Missouri &c. R. Co. v. Bradshaw, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 897; St. Louis &c. R. Co. v. Adams, 24 Tex. Civ. App. 231; s. c. 58 S. W. Rep. 1035.

⁶¹ Greer v. Nashville &c. R., 104 Tenn. 242; s. c. 56 S. W. Rep. 850.

⁶² Missouri &c. R. Co. v. Bradshaw, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 897.

pany has been charged with knowledge that a gate leading to its tracks was open, where it appeared that the gate had been open for ten or fifteen days, though blocked with snow.⁶³ In a case where three parallel lines of railroad ran through a farm and a private crossing had been built over all three and gates had been erected between each track, and the two inner gates had been removed by the owner of the land, thus leaving a gate on each side of the right of way, and a cow belonging to a third person wandered on the track at the crossing, it was held that the railroad on whose track the cow was thereafter killed was not liable on the theory that it had failed to maintain a gate between its track and the middle track since the crossing was sufficiently guarded by the exterior gates.⁶⁴

§ 2061. Duty to Fence where the Railway Company Owns the Adjoining Lands.—A South Carolina decision is authority for the proposition that a railroad company is not required to maintain stock guards at points where its track crosses fence lines on its own lands.⁶⁵

§ 2067. General Statement of Doctrine Relating to Fence Statutes.—It is held that the fact that railroad tracks belonging to different companies are immediately adjacent and parallel to each other will not excuse either company from complying with the statutory obligation to fence their tracks for the benefit of the public.⁶⁶

§ 2069. Liability for Injuries at Public Places Governed by Common-Law Principles.—Where the animal is killed at a place where the railroad cannot be fenced,—as, for example, at a public highway or street,⁶⁷ or on necessary station and depot grounds,⁶⁸—the plaintiff to recover must show negligence of some character on the part of the servants of the railroad proximately causing the death of the animal. And this is the rule where a railroad running through a town crosses legally platted but unopened streets.⁶⁹

§ 2070. Construction of Statutes Excepting from their Operation Railway Tracks within Cities, Towns and Villages.—Generally speaking, the owner of stock is not entitled to recover damages for injuries

⁶³ *Bumpas v. Wabash R. Co.*, 103 Mo. App. 202; s. c. 77 S. W. Rep. 115.

⁶⁴ *Fowbel v. Wabash R. Co.*, 125 Iowa 215; s. c. 100 N. W. Rep. 1121.

⁶⁵ *Anderson v. Atlantic Coast Line R. Co.*, 59 S. C. 350; s. c. 37 S. E. Rep. 944.

⁶⁶ *Marengo v. Great Northern R. Co.*, 84 Minn. 397; s. c. 87 N. W. Rep. 1117.

⁶⁷ *Acord v. St. Louis &c. R. Co.*, 113 Mo. App. 84; s. c. 87 S. W. Rep. 537; *San Antonio &c. R. Co. v. Clark*, 26 Tex. Civ. App. 280; s. c. 62 S. W. Rep. 546.

⁶⁸ *Acord v. St. Louis &c. R. Co.*, 113 Mo. App. 84; s. c. 87 S. W. Rep. 537.

⁶⁹ *Marengo v. Great Northern R. Co.*, 84 Minn. 397; s. c. 87 N. W. Rep. 1117.

of this character where it appears that his animal entered on the railroad track within the limits of a town, or, if it entered on the railroad outside the limits of the town, it was at a place where the railroad company was not required to fence or maintain cattle-guards.⁷⁰ The New York fence laws do not require a railroad company to fence its right of way within the city of New York against animals pastured on certain city blocks separated from the right of way by a public highway.⁷¹

§ 2071. What Statutes not Construed as Requiring Track to be Fenced in Cities and Towns.—In Missouri a railroad company is required to fence its tracks within the limits of unincorporated towns, if it can do so without obstructing the streets, except where it is necessary to keep them open within reasonable switch limits for the convenient transaction of business and the safety of employes in handling cars.⁷²

§ 2075. Such Statutes do not Require Fences within Depot Grounds and Switch Limits.—A railroad company is not required by law to fence its tracks at its station where such a fence would interfere with the business of the road, and with the access of the public to the station, and would tend to endanger the lives and safety of employes in operating trains,⁷³ and this rule will apply to the smaller stations and elevator points.⁷⁴ Under this rule a stock owner will be refused a recovery where his stock went on the track within the switch limits of a station where the railroad company was not required to fence, though they were actually killed at a point beyond the switch limits at a place where it was required to fence.⁷⁵ Where,

⁷⁰ *Hurd v. Chappell*, 91 Mo. App. 317.

⁷¹ *Lee v. Brooklyn Heights R. Co.*, 97 App. Div. (N. Y.) 111; s. c. 89 N. Y. Supp. 652.

⁷² *Downey v. Mississippi River & C. R. Co.*, 94 Mo. App. 137; s. c. 67 S. W. Rep. 945. A railroad company was not required to construct such a fence in an unincorporated town where the fence would interrupt the intercourse between the two sections of the town, seriously incommode the public and greatly interfere with the operation of the road: *Hilleman v. Gray's Point & C. R. Co.*, 99 Mo. App. 271; s. c. 73 S. W. Rep. 220.

⁷³ *Redmond v. Missouri & C. R. Co.*, 104 Mo. App. 651; s. c. 77 S. W. Rep. 768.

⁷⁴ *Chicago & C. R. Co. v. Sevcek*, — Neb. —; s. c. 101 N. W. Rep. 981. Whether it was necessary for the railroad to leave sixty or seventy yards of unfenced track between the switch head and cattle guard, at a very small place, where the railroad did very little business, and maintained its side track chiefly for the accommodation of one small mill, was a question for the jury, in the absence of evidence showing that it would endanger the lives or limbs of trainmen to place the cattle guard nearer the switch head: *Acord v. St. Louis & C. R. Co.*, 113 Mo. App. 84; s. c. 87 S. W. Rep. 537.

⁷⁵ *Redmond v. Missouri & C. R. Co.*, 104 Mo. App. 651; s. c. 77 S. W. Rep. 768.

however, the railroad company has actually fenced its yards and installed guards, it cannot claim exemption from liability on the ground that it was not legally required to fence, since the act of construction indicated a recognition of the necessity for such fences and guards.⁷⁶

§ 2076. **What Depot Grounds Include, within this Rule.**⁷⁷—The station intended by the fence laws is the station for the transaction of general railroad business. The fact that railroad trains sometimes stop at a point to take freight and the company maintains a small spur switch at the place does not make the place a station within these laws.⁷⁸ It is held that the fact that there were switches to a limited extent several hundred feet from where an accident occurred on which the switching was merely incidental to the movement of trains does not constitute the place a yard within the meaning of a statute exempting a railroad company from the duty of fencing railroad yards.⁷⁹

§ 2079. **What Deemed a Sufficient Fence within the Meaning of these Statutes.**—A railroad company must comply with the statute as to the sufficiency of the fence. It must not only build the fence of the proper height with the posts firmly set, but the fence must be of such a character as to resist horses, cattle, swine and live stock;⁸⁰ it is not required that it should be so constructed as to keep out persons.⁸¹ A natural barrier may take the place of a legal fence where it will answer that purpose, but a barrier consisting of a steep hill or bank along one side of a railroad track with a fill on the other side, there being free access at each end of the barriers, will not satisfy the legal requirements.⁸² Again, a stone abutment may take the place of a fence and will continue to have that effect unless the ground adjoining is raised by natural accretions so that the abutment no longer has the effect to exclude animals from the right of way.⁸³ Where two fences are built along one side of the track, the remoter fence from

⁷⁶ *Hathaway v. Detroit &c. R. Co.*, 124 Mich. 610; s. c. 83 N. W. Rep. 598; 7 Det. Leg. N. 351.

⁷⁷ *Harvey v. Southern Pac. R. Co.*, — Or. —; s. c. 80 Pac. Rep. 1061 (station limits include space between station and water tank). What are necessary station grounds, within the rule permitting railroads to leave station grounds unfenced, is, where stock is not killed immediately adjacent to the station, a question of fact for the jury, and not of law for the court, unless but one conclusion can be drawn from the evidence: *Acord v. St. Louis &c. R. Co.*, 113 Mo. App. 84; s. c. 87 S. W. Rep. 537.

⁷⁸ *Smith v. St. Louis &c. R. Co.*, 111 Mo. App. 410; s. c. 85 S. W. Rep. 972.

⁷⁹ *Marengo v. Great Northern R. Co.*, 84 Minn. 397; s. c. 87 N. W. Rep. 1117.

⁸⁰ *Colyer v. Missouri Pac. R. Co.*, 93 Mo. App. 147.

⁸¹ *Lake Shore &c. R. Co. v. Liidtko*, 69 Ohio St. 384; s. c. 69 N. E. Rep. 653.

⁸² *Taylor v. Spokane Falls &c. R. Co.*, 32 Wash. 450; s. c. 73 Pac. Rep. 499.

⁸³ *Chicago &c. R. Co. v. Hand*, 113 Ill. App. 144.

the track being used to confine a lane, the inner fence will be held to be the right-of-way fence within the meaning of the fence law.⁸⁴ It is clear that the object of fencing is defeated where the fence is set beyond a public highway traversing the right of way, since this method would operate to fence in and not fence out stock from the right of way.⁸⁵ And this would be the effect where the right of way is inclosed on both sides and on one end, but leaving the other end open.⁸⁶

§ 2082. **Sufficiency of Cattle-Guards, Cattle-Pits, etc.**—The railroad company must comply with statutes describing and defining the cattle-guards to be constructed, and it is not sufficient that the cattle-guards installed are similar to those used by first-class railroads if they do not satisfy the statutes.⁸⁷ And where the statute is complied with the railroad company will not be liable for injury to cattle that have passed to the track over a sufficient cattle-guard if free from negligence.⁸⁸ On the matter of gates at private crossings it has been held error to instruct that a railroad company was required to construct and maintain a sufficient gate without qualification as to the standard of care required of the railroad company in doing the work.⁸⁹

§ 2085. **Company Bound only to Ordinary Care in the Maintenance of its Fences.**⁹⁰—Thus an instruction requiring a railroad company to erect and maintain on its right of way fences sufficient to prevent stock from getting on the railroad track, has been held erroneous, as exacting from the railroad company a higher degree of care than the statute demands, which requires only a lawful fence.⁹¹ Again, a railroad company may be liable on the ground that it has failed to maintain a statutory fence after it has been erected.⁹² The destruction of an insufficient statutory fence by trespassers so recently as to preclude repair may be urged as a defense to an action for injuries to stock on the track. In this situation the insufficiency of the fence—a

⁸⁴ *Dailey v. Chicago & C. R. Co.*, 121 Iowa 254; s. c. 96 N. W. Rep. 778.

⁸⁵ *Ft. Worth & C. R. Co. v. Roberts*, 29 Tex. Civ. App. 566; s. c. 69 S. W. Rep. 985.

⁸⁶ *Ft. Worth & C. R. Co. v. Swan*, 97 Tex. 338; s. c. 78 S. W. Rep. 920.

⁸⁷ *Choctaw & C. R. Co. v. Goset*, 70 Ark. 427; s. c. 68 S. W. Rep. 879; *Pittsburgh & C. R. Co. v. Newsom*, 35 Ind. App. 299; s. c. 74 N. E. Rep. 21.

⁸⁸ *Johnson v. Detroit & C. R. Co.*, 135 Mich. 353; s. c. 97 N. W. Rep. 760; 10 Det. Leg. N. 801.

⁸⁹ *Wirstlin v. Chicago & C. R. Co.*, 124 Iowa 170; s. c. 99 N. W. Rep. 697.

⁹⁰ *Georgia Southern & C. R. Co. v. Wisenbaker*, 113 Ga. 604; s. c. 38 S. E. Rep. 956; *Missouri & C. R. Co. v. Bradshaw*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 897.

⁹¹ *Dietrich v. Hannibal & C. R. Co.*, 89 Mo. App. 36.

⁹² *Hendrickson v. Philadelphia & C. R. Co.*, 68 N. J. L. 612; s. c. 54 Atl. Rep. 831.

sufficient fence would likewise have been destroyed—is not regarded as the proximate cause of the injury.⁹³

§ 2086. What Lapse of Time Charges a Company with Notice of a Defect.—It is the rule that a railroad company must have notice of the defective condition of its fences a sufficient time in which to make repairs before the happening of an injury to charge it with liability for such an injury.⁹⁴ This means that a company is entitled to a reasonable time to ascertain that its fence is out of repair, and also a reasonable time after such knowledge to make the repairs, and it is the duty of the court so to inform the jury.⁹⁵ The company will be constructively charged with this notice where the defect has existed for such a length of time that the company, by the exercise of reasonable care, could have known and remedied the defect.⁹⁶ Generally the question whether the railroad company had notice of defects and had a reasonable time to effect repairs is a question for the determination of the jury.⁹⁷

§ 2087. Company Bound to Use Ordinary Care to Keep Cattle-Guards, Gates, Bars, etc., in Repair.⁹⁸—Here, as in the case of fences noted in the preceding section, a railroad company may be charged with notice of defects by the lapse of time.⁹⁹

§ 2088. Care Required in Protecting Cattle-Guards from Becoming Filled up with Ice and Snow.—A railroad company will be charged with negligence warranting a recovery for death or injury to cattle on its right of way where it has permitted a cattle-guard to become so filled with snow and ice as to furnish no obstruction to the passage of stock and allowed this condition to exist for a considerable length of time. This plainly violates the statutory requirement that the railroad company must “maintain proper and sufficient cattle-guards.”¹⁰⁰

§ 2089. Whether Competent for the Land-Owner to Release the Obligation of the Railway Company by Contract.¹⁰¹

⁹³ *Perrault v. Minneapolis &c. R. Co.*, 117 Wis. 520; s. c. 94 N. W. Rep. 348.

⁹⁴ *Dietrich v. Hannibal &c. R. Co.*, 89 Mo. App. 36.

⁹⁵ *Colyer v. Missouri Pac. R. Co.*, 93 Mo. App. 147.

⁹⁶ *Bumpas v. Wabash R. Co.*, 103 Mo. App. 202; s. c. 77 S. W. Rep. 115; *Schlotzhauer v. Missouri &c. R. Co.*, 89 Mo. App. 65; *Sappington v. Chicago &c. R. Co.*, 95 Mo. App. 387; s. c. 69 S. W. Rep. 32 (defect had existed for several months).

⁹⁷ *Wirstlin v. Chicago &c. R. Co.*, 124 Iowa 170; s. c. 99 N. W. Rep. 697.

⁹⁸ *Wirstlin v. Chicago &c. R. Co.*, 124 Iowa 170; s. c. 99 N. W. Rep. 697 (gates).

⁹⁹ *Wirstlin v. Chicago &c. R. Co.*, 124 Iowa 170; s. c. 99 N. W. Rep. 697.

¹⁰⁰ *Paul v. Chicago &c. R. Co.*, 120 Iowa 224; s. c. 94 N. W. Rep. 498.

¹⁰¹ Where a railroad company makes an agreement with a land-owner under which it is its duty to

§ 2091. Whether such Contracts are Covenants Running with the Land.¹⁰²

§ 2093. Whether Contract by Adjoining Owner to Build and Maintain the Statutory Fence Relieves the Company from Further Liability.—It is very properly held that an adjoining land-owner is bound by his agreement to keep a gate at a private crossing in repair and shut, and he will not be allowed to recover for the killing of an animal belonging to him which got on the track because of a defect in the gate.¹⁰³

§ 2097. Effect of Voluntary Act of Land-Owner in Building or Repairing Fences.—An adjoining land-owner will not be deprived of his right to recover for injury to his stock on a right of way solely on the ground that the fence through which the stock passed onto the track was erected by him in the absence of an agreement binding him to keep and maintain the fence.¹⁰⁴

§ 2100. Duty to Exercise Ordinary Care to Avoid Injuring Cattle; Extraordinary Care to Avoid Injuring Passengers.¹⁰⁵—An instruction that where stock is on the track ordinary diligence requires the railroad company to slow up or stop its train rather than kill the stock has been condemned as imposing on the railroad company extraordinary rather than reasonable diligence;¹⁰⁶ and the same criticism was passed on an instruction that the trainmen should use all the means at their command to avoid injury to stock after they are discovered on the track.¹⁰⁷

erect and keep in repair a fence along the right of way, and the fence is permitted to remain out of repair, so that a horse of the tenant of the landowner is injured thereby, the company, as well as its lessee, is liable therefor: *Howard v. Maysville & C. R. Co. (Ky.)*, 70 S. W. Rep. 631; s. c. 24 Ky. L. Rep. 1051.

¹⁰² A parol agreement between the grantor of land and a railroad company to put in a smaller gate than required by statute at the grantor's risk is not binding on a grantee of grantor buying the premises without knowledge of this agreement until after he had gone into possession, and on the discovery of the existence of the agreement he immediately informed the railroad company that he would not be bound by it, and insisted on the

construction of a proper fence: *Meadows v. Chicago & C. R. Co.*, 82 Mo. App. 83.

¹⁰³ *Texas & C. R. Co. v. Owens*, 36 Tex. Civ. App. 54; s. c. 81 S. W. Rep. 62.

¹⁰⁴ *Craig v. Wabash R. Co.*, 121 Iowa 471; s. c. 96 N. W. Rep. 965.

¹⁰⁵ That reasonable care in avoiding injury to animals on the track is all that is required, see *Southern Ry. Co. v. Hays*, 78 Miss. 319; s. c. 28 South. Rep. 939; *Yazoo & M. V. R. Co. v. Wright*, 78 Miss. 125; s. c. 28 South. Rep. 806; *Borneman v. Chicago & C. R. Co.*, — S. D. —; s. c. 104 N. W. Rep. 208.

¹⁰⁶ *Georgia Southern & C. R. Co. v. Jones*, 121 Ga. 822; s. c. 49 S. E. Rep. 729.

¹⁰⁷ *Atlanta & C. R. Co. v. Hudson*, 123 Ga. 108; s. c. 51 S. E. Rep. 29.

§ 2101. **Duty as to Speed of Train—High Speed not of Itself Negligence.**¹⁰⁸—The violation of a rule of the railroad company as to speed of trains does not constitute negligence unless this violation was the proximate cause of the injury.¹⁰⁹

§ 2102. **But may Become Evidence of Negligence for the Jury.**—The fact that the train that struck stock on the track was running at a high rate of speed may be considered by the jury on the question of negligence, though there was no law limiting the speed of trains at the place where the accident occurred.¹¹⁰

§ 2103. **Prohibited Rate of Speed is Negligence per se.**—Where an injury to animals occurs by reason of a violation of a statute or ordinance regulating the speed of trains, such a violation of itself is negligence *per se* and will justify a recovery if this violation of the speed law is the proximate cause of the injury.¹¹¹ In a case where the place at which the animal was struck, though sometimes used as a crossing, was not in fact a public crossing, the law limiting the speed of trains at crossings was held inapplicable, and hence a rate in excess thereof did not charge the company with negligence *per se*.¹¹²

§ 2105. **Duty to Ring Bell and Sound Steam Whistle at Railway Crossings.**—Statutes requiring railroad companies to sound the whistle and ring the bell at crossings are intended for the protection of animals as well as persons using the crossing.¹¹³ A *prima facie* case is made under the rules by evidence that the plaintiff's animal was injured at a public crossing and that the statutory signal was not given on approach thereto, and the burden is then upon the defendant to show that the failure to signal was not the cause of the injury, unless this fact is disclosed by the plaintiff's own evidence,¹¹⁴ but not

¹⁰⁸ The mere fact that a train was running at a high rate of speed does not of itself show negligence: *Galveston &c. R. Co. v. Cassinelli & Co.* (Tex. Civ. App.), 78 S. W. Rep. 247; *St. Louis &c. R. Co. v. Carlisle*, 75 Ark. 560; s. c. 88 S. W. Rep. 584.

¹⁰⁹ *San Antonio &c. R. Co. v. Clark*, 26 Tex. Civ. App. 280; s. c. 62 S. W. Rep. 546.

¹¹⁰ *Gulf &c. R. Co. v. Anson* (Tex. Civ. App.), 82 S. W. Rep. 785.

¹¹¹ *Chicago &c. R. Co. v. Crose*, 113 Ill. App. 547; *Chicago &c. R. Co. v. Zerbe*, 110 Ill. App. 171; *O'Leary v. Chicago &c. R. Co.*, — Iowa —; s. c. 103 N. W. Rep. 362; *Borneman v. Chicago &c. R. Co.*, — S. D. —; s. c. 104 N. W. Rep. 208 (violation of

ordinance is evidence of negligence); *Chicago &c. R. Co. v. Erwin* (Tex. Civ. App.), 65 S. W. Rep. 496.

¹¹² *Southern R. Co. v. Cook*, 121 Ga. 416; s. c. 49 S. E. Rep. 287.

¹¹³ *Graybill v. Chicago &c. R. Co.*, 112 Iowa 738; s. c. 84 N. W. Rep. 946; *McGill v. Minneapolis & St. L. R. Co.*, 113 Iowa 358; s. c. 85 N. W. Rep. 620; *Texas &c. R. Co. v. Crutcher* (Tex. Civ. App.), 82 S. W. Rep. 341.

¹¹⁴ *Atterbury v. Wabash R. Co.*, 110 Mo. App. 608; s. c. 85 S. W. Rep. 114; *Roberts v. Wabash R. Co.*, 113 Mo. App. 6; s. c. 87 S. W. Rep. 601 (sufficiency of evidence that signals were not sounded).

so if elsewhere injured,¹¹⁵ and a recovery for injuries to stock at crossings will be sustained where it is shown that they could have been avoided by the timely sounding of the signals.¹¹⁶ Whether the failure to sound these warnings was the proximate cause of injury to animals on a crossing in a particular case is usually a question of fact for the determination of the jury.¹¹⁷

§ 2106. **Duty to Keep a Lookout for Animals on the Track.**—Generally speaking, it is the duty of both engineer,¹¹⁸ and fireman,¹¹⁹ to keep such a constant lookout for live stock on or in proximity to the track as is consistent with their other duties, and the railroad company will be responsible for injuries to stock resulting from a negligent failure to observe this duty.¹²⁰ The duty is fulfilled by

¹¹⁵ *Nicholas v. Chicago &c. R. Co.*, 125 Iowa 236; s. c. 100 N. W. Rep. 1115 (statutes inapplicable to animals injured at private crossings); *Mankey v. Chicago &c. R. Co.*, 14 S. D. 468; s. c. 85 N. W. Rep. 1013; *Houston &c. R. Co. v. Wilson*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 274; *San Antonio &c. R. Co. v. Aycock* (Tex. Civ. App.), 68 S. W. Rep. 1001 (statutes inapplicable to animals injured at private crossings).

¹¹⁶ *Graybill v. Chicago &c. R. Co.*, 112 Iowa 738; s. c. 84 N. W. Rep. 946; *Mobile &c. R. Co. v. Roper*, 58 S. W. Rep. 518; s. c. 22 Ky. L. Rep. 666; *Texas & P. Ry. Co. v. Crutcher* (Tex. Civ. App.), 82 S. W. Rep. 341.

¹¹⁷ *Kuehl v. Chicago &c. R. Co.*, 126 Iowa 638; s. c. 102 N. W. Rep. 512.

¹¹⁸ *Southern Ry. Co. v. Reaves*, 129 Ala. 457; s. c. 29 South. Rep. 594.

¹¹⁹ *Central of Georgia R. Co. v. Dumas*, 131 Ala. 172; s. c. 30 South. Rep. 867; *Kansas City &c. R. Co. v. Wagand*, 134 Ala. 388; s. c. 32 South. Rep. 744; *Central of Georgia R. Co. v. Stark*, 126 Ala. 365; s. c. 28 South. Rep. 411; *Southern R. Co. v. Riddle*, 126 Ala. 244; s. c. 28 South. Rep. 422; *Georgia &c. Banking Co. v. Churchill*, 113 Ga. 12; s. c. 38 S. E. Rep. 336. An instruction was approved which stated "that ordinary care in the management of defendant's trains is required of railroad companies to avoid injury to domestic animals, and this means that the company's servants are to use all reasonable efforts to avoid harming an animal after it is discovered, or might by proper watchfulness be discovered, on or near

the track, and if defendant's servants keep a constant lookout for stock along the track, and after seeing the horse, or after they by proper watchfulness could have seen it, used reasonable care to avoid the killing, defendant was not liable." *St. Louis Southwestern R. Co. v. Bowen*, — Ark. —; s. c. 84 S. W. Rep. 788. A lookout for stock on the track must be kept by the engineer even in counties where stock is not allowed to run at large: *Davis v. Southern Ry. Co.*, 68 S. C. 446; s. c. 47 S. E. Rep. 723. An instruction that plaintiff must show by a preponderance of evidence that defendant's employes saw the animals in a perilous position, and could, with safety to the train, have stopped before reaching them, and that after seeing them they omitted to do some particular thing, which they could have done to avoid injury, the jury, if they do not so find, must find for defendant, was erroneous, as placing on plaintiff the burden of showing that both the engineer and fireman saw the horses and failed to exercise ordinary care: *Best v. Great Northern R. Co.*, 95 Minn. 67; s. c. 103 N. W. Rep. 709.

¹²⁰ *Kansas City &c. R. Co. v. Wagand*, 134 Ala. 388; s. c. 32 South. Rep. 744. In an action to recover for an animal killed on defendant's track, an instruction which requires all the employes of the company to keep a lookout and makes the company liable for the neglect of any of them to do so, is erroneous: *Arkansas &c. R. Co. v. Sanders*, 69 Ark. 619; s. c. 65 S. W. Rep. 428.

the exercise of reasonable care. The rule does not require the engineer to keep his eyes constantly on the track, as this would interfere with the performance of the main duties of his employment.¹²¹ So he may be excused where he fails to maintain a lookout at a place away from a crossing where he has no reason to anticipate the presence of stock.¹²² The presumption of negligence in failing to maintain a lookout is particularly strong where the point at which the animal was struck was in plain view of the operatives of the engine for some distance before reaching it.¹²³

§ 2107. **Duty to Give Alarm and Stop Train or Slacken Speed when Cattle are Discovered on the Track.**—It is plainly the duty of the operatives in charge of a train, after discovering animals on the track, to use all reasonable precautions consistent with the safety of the train to avoid injuring them.¹²⁴ A Tennessee decision is authority that a goose is not “an animal or obstruction” within the meaning of a statute of that State requiring railroad companies to use every possible means to stop the train to prevent an accident when “an animal or obstruction” appears on the track.¹²⁵

§ 2108. **Duty on Discovering them Approaching the Track.**—It is the duty of the railroad company to keep a lookout for animals approaching or dangerously near a crossing and the railroad company will be liable for killing or injuring animals at a public crossing, where the operatives saw, or by the use of due care might have seen, the animals approaching the crossing in time to have taken measures to avoid injuring them.¹²⁶ A railroad company will not be charged

¹²¹ Cincinnati &c. R. Co. v. Burgess, — Ky. —; s. c. 84 S. W. Rep. 760; 27 Ky. L. Rep. 252. Thus in an action for damages for killing a dog at a point on the track about three-fourths of a mile from a station, where the engineer testified that after leaving the station he had to go up a grade and was engaged in looking after his lubricators and other machinery and did not see the dog on the track, and that during this time the fireman was attending to the fire, it was held that reasonable care by the operatives had been exercised, and the railroad company was absolved from liability: Mobile &c. R. Co. v. Holiday, 79 Miss. 294; s. c. 30 South. Rep. 820.

¹²² Buckman v. Missouri &c. R. Co., 83 Mo. App. 129.

¹²³ Southern R. Co. v. Posten, 131 Ala. 671; s. c. 31 South. Rep. 21; Kansas City &c. R. Co. v. Henson,

132 Ala. 528; s. c. 31 South. Rep. 590; St. Louis &c. R. Co. v. Carlisle, 75 Ark. 560; s. c. 88 S. W. Rep. 584; St. Louis S. W. R. Co. v. Costello, 68 Ark. 32; s. c. 56 S. W. Rep. 270.

¹²⁴ Louisville &c. R. Co. v. Kice (Ky.), 60 S. W. Rep. 705; s. c. 22 Ky. L. Rep. 1462; Spencer v. Missouri &c. R. Co., 90 Mo. App. 91; Best v. Great Northern R. Co., 95 Minn. 67; s. c. 103 N. W. Rep. 709.

¹²⁵ Nashville &c. R. Co. v. Davis (Tenn.), 78 S. W. Rep. 1050.

¹²⁶ Atterbury v. Wabash R. Co., 110 Mo. App. 608; s. c. 85 S. W. Rep. 114; Southern R. Co. v. Shirley, 128 Ala. 595; s. c. 29 South. Rep. 687; Beall v. Chicago &c. R. Co., 97 Mo. App. 111; s. c. 71 S. W. Rep. 101 (evidence held sufficient to show that approach of animals could have been seen by engineer); Central of Georgia R. Co. v. Dumas, 131 Ala. 172; s. c. 30 South. Rep. 867; O'Leary v. Chicago &c. R. Co., —

with the duty to stop or slacken speed where there is nothing to indicate that the animals, though in the vicinity of the track, evince no intention to enter thereon.¹²⁷

§ 2109. When Company not Liable for Injuring Animals after Discovering them on the Track.¹²⁸

§ 2112. No such Duty to Stop or Slacken Speed where it will Endanger the Public.¹²⁹

Iowa —; s. c. 103 N. W. Rep. 362. In an action for negligently killing plaintiff's cow, an instruction that railroad employes are not required to attempt the impossible, and, if the cow came on the track so close to the train that the use of preventive effort could not have avoided the injury, to find for defendant, whether the engineer reversed his engine or not, was properly refused, since it ignores the duty of defendant's agents to keep a proper lookout for obstructions on the track, and when cattle are seen in dangerous proximity to the engine: Southern R. Co. v. Riddle, 126 Ala. 244; s. c. 28 South. Rep. 422. An instruction, in an action for cattle injured by a train at a crossing, that if the cattle were moving toward the track the failure of the engineer to give the statutory signals or stop the train would constitute negligence, is not erroneous, when qualified by the statement that they must be doing so in such a way as to lead an ordinarily prudent person to believe that they would go on the track and be struck by the train: Graybill v. Chicago & C. R. Co., 112 Iowa 738; s. c. 84 N. W. Rep. 946. The mere fact that a train running thirty miles an hour approaches a public road crossing on a down grade, and from around a curve about one hundred yards distant, the statutory crossing signals having been given, is not sufficient to impose on the trainmen the duty to slacken the speed in making the crossing if the engineer is on the lookout, and all customary means to stop the train are used as soon as animals are seen coming on to the track: Missouri & C. R. Co. v. Morris (Tex. Civ. App.), 63 S. W. Rep. 888.

¹²⁷ Yazoo & C. R. Co. v. Wright, 78 Miss. 125; s. c. 28 South. Rep. 806.

¹²⁸ That a railroad company will

not be liable for injuring animals on its track if, after discovering them, it is impossible by the use of due diligence to avoid the collision, see: Southern R. Co. v. Hoge, 141 Ala. 351; s. c. 37 South. Rep. 439; Arkansas & C. R. Co. v. Sanders, 69 Ark. 619; s. c. 65 S. W. Rep. 428; Georgia & C. R. Co. v. Sanders, 111 Ga. 128; s. c. 36 S. E. Rep. 458. Defendant in an action against a railroad company for the killing of a cow by a train is entitled to a peremptory instruction, on undisputed testimony of the engineer and fireman that they were on the lookout; that by reason of a curve the cow was first seen when one hundred fifty yards away, she then being ten to twenty feet from the track, feeding; that she attempted to cross, when the train, going twenty-five or thirty miles an hour, was sixty or seventy yards away, when all efforts to stop were made, but without success, though the train was properly equipped, four hundred twenty yards being necessary to stop a train going that fast: Alabama & C. R. Co. v. Stacy (Miss.), 35 South. Rep. 137. It was held a question for the jury whether the engineer was negligent in killing a horse on the track where the animal was struck on a clear, starlight night at a place where the track was straight for more than a mile, and the engineer testified that he saw the buggy on the track when he was within a hundred yards of it, and that he sounded no alarm and made no effort to stop the train, because he did not know there was a horse attached to the buggy, and he also knew it would be impossible to stop the train in time to avoid the collision: Mitchell v. New Orleans & C. R. Co. (Miss.), 36 South. Rep. 1.

¹²⁹ Where the evidence for plaintiff simply showed that the cattle

§ 2120. Facts which have been Held not Evidence of Negligence.¹³⁰

§ 2124. This Liability under Statutes.—Under a statutory provision that words and phrases shall be taken in their plain and usual sense, it has been held that a statute allowing a recovery for stock frightened by any locomotive or train and injured will not include a “speeder”—a contrivance similar to a hand-car, except that it is operated by a gasoline engine—as such a vehicle is not a “locomotive.”^{130a}

§ 2127. Liability Independent of Statute for Injuries Resulting from Frightening Animals.^{130b}

§ 2134. Must Aver Negligence in the Defendant.—Good pleading requires that the plaintiff should specify wherein the defendant was negligent.¹³¹ A complaint alleging that the defendant operated certain locomotives, etc., through a named county in the State, and on a stated date the defendant negligently ran its locomotive over or against certain animals belonging to the plaintiff, thereby killing or disabling them to the plaintiff's damages, was held not vulnerable to a demurrer for failure to aver in what the defendant's negligence consisted, where the cars were operated, and whether the animals were killed or disabled.¹³² Another complaint which alleged in general

were found dead on the track, and that for the defendant showed that the engineer was keeping a close watch on a dark night while the train was running at forty miles an hour, and that the cattle were discovered on the track two hundred feet away, that under such circumstances it was dangerous to attempt to stop the train, that the natural result would be to throw it from the track, it was error not to direct a judgment for defendant: *Chicago & c. R. Co. v. Huggins*, 4 Ind. T. 194; s. c. 69 S. W. Rep. 845.

¹³⁰ In a case where the evidence was uncontradicted that a curve in the track prevented the engineer from seeing the cattle until he was about two hundred feet from them; that the train was running a little over forty miles an hour and was equipped with air brakes which were in first-class condition; that on seeing the cattle he made “an emergency application of the brakes,” and gave a stop alarm; that he did all he could to prevent striking the animals; that he

stopped the train within six hundred feet; that to stop within one thousand feet would have been a good stop, it was held that a verdict for defendant should have been directed: *Carman v. Montana Cent. R. Co.*, 32 Mont. 137; s. c. 79 Pac. Rep. 690.

^{130a} *Henson v. Williamsville & c. R. Co.*, 110 Mo. App. 595; s. c. 85 S. W. Rep. 597.

^{130b} Where the plaintiff's horse was frightened by escaping steam from an engine starting a heavy train of cars from a station, and ran along a road parallel to the railroad track, when it suddenly swerved, dashed into the train and was killed, a recovery was refused on the ground that nothing that the engineer had done or failed to do contributed to the injury, the proximate cause of which was the fright of the horse: *Southern R. Co. v. Duckett*, 121 Ga. 511; s. c. 49 S. E. Rep. 589.

¹³¹ *South Georgia R. Co. v. Ryals*, 123 Ga. 330; s. c. 51 S. E. Rep. 428.

¹³² *Southern R. Co. v. Hoge*, 141 Ala. 351; s. c. 37 South. Rep. 439.

terms that certain animals were killed by a train of the defendant in a careless and negligent manner by running over said animals in the field of complainant, and on the tracks of the railroad company, was held open to the objection that it did not set out any specific acts of negligence.¹³³ An averment that a train running over stock was running at or about sixty miles an hour does not, without more, charge actionable negligence.¹³⁴

§ 2134a. **Ownership of Stock.**—The declaration or complaint will be fatally defective unless it alleges the plaintiff's ownership of the injured animals.¹³⁵ An averment that the stock killed by the train is "the property of petitioners," avers a joint ownership in the absence of allegations of a several ownership.¹³⁶

§ 2136. **What Complaints have been Held Sufficient.**¹³⁷

§ 2140. **Averring Failure to Ring Bell, Sound Whistle, Slacken Speed.**—Negligence in this regard has been held sufficiently alleged by an averment that the engineer did not keep a proper lookout, and did not blow the whistle, or ring the bell, or try to stop the train when the animals were discovered on the track.¹³⁸

§ 2141. **Particularity in Pleading Contributory Negligence.**¹³⁹

§ 2143. **Plaintiff has the Burden of Proving Negligence.**—The plaintiff will have satisfied the rule under this head where he produces

¹³³ *Macon &c. R. Co. v. Stewart*, 120 Ga. 890; s. c. 48 S. E. Rep. 354.

¹³⁴ *Chicago &c. R. Co. v. Wheeler*, 70 Kan. 755; s. c. 79 Pac. Rep. 673.

¹³⁵ *South Georgia R. Co. v. Ryals*, 123 Ga. 330; s. c. 51 S. E. Rep. 428.

¹³⁶ *Central of Georgia R. Co. v. Bagley*, 121 Ga. 781; s. c. 49 S. E. Rep. 780.

¹³⁷ A petition was held good against a general demurrer which alleged that the defendant was negligent in running the train which struck his animal, that the engine was without a headlight on a night so dark that one was necessary, and set out the particular train by which it was alleged the animal was struck, and described the injuries, and by a subsequent amendment alleged that the track was nearly straight for four hundred yards, and if the engineer had carried a lighted headlight the animal could have been seen, and the injury avoided: *Central of Georgia*

R. Co. v. Weathers, 120 Ga. 475; s. c. 47 S. E. Rep. 956. A declaration which alleges with sufficient specification negligence on the part of defendant and its employes, and in what such negligence consisted, and where it occurred, need not set out the names of the particular employes alleged to have been negligent: *South Georgia R. Co. v. Ryals*, 123 Ga. 330; s. c. 51 S. E. Rep. 428.

¹³⁸ *Central of Georgia R. Co. v. Bagley*, 121 Ga. 781; s. c. 49 S. E. Rep. 780.

¹³⁹ A plea of contributory negligence in that the portion of the track where the alleged injury occurred was in a stock-law district, in which mules were prohibited from running at large, and that at the time of the injury they were being allowed to run at large in such territory, was demurrable: *Southern R. Co. v. Hoge*, 141 Ala. 351; s. c. 37 South. Rep. 439.

evidence which reasonably satisfies the jury of the defendant's negligence.¹⁴⁰

§ 2144. Whether the Fact of Injury is Evidence Tending to Show Negligence.¹⁴¹

§ 2148. Effect of Statutes Making the Fact of Killing or Injuring Prima Facie Evidence of Negligence.¹⁴²—The plaintiff has the burden of proving that the animals were killed by the defendant's trains under statutes raising a presumption of negligence from the killing of stock by railroad trains. The mere fact that stock are found dead in the vicinity of a railroad track does not tend to prove that the animals were killed by the train and were negligently killed.¹⁴³ Again, this presumption only extends to the negligence alleged in the complaint or petition.¹⁴⁴ The presumption may be rebutted and overcome by testimony of the defendant,¹⁴⁵ which shows that he exercised all reasonable care and diligence,¹⁴⁶ and that the injury could not have been prevented though precautionary methods had been taken.¹⁴⁷

§ 2149. Presumption That the Trainmen Did Their Duty.—The presumption that the trainmen performed their duty of ringing the bell and sounding the whistle at a crossing does not obtain where there is evidence that the duty was not performed.¹⁴⁸ So the testimony of the engineer in charge of the train that he did all he could to stop the train before the injury to a team was held not conclusive on the jury where there was evidence that the train might have been stopped after the discovery of the peril and before the injury.¹⁴⁹

¹⁴⁰ *Southern R. Co. v. Riddle*, 126 Ala. 244; s. c. 28 South. Rep. 422.

¹⁴¹ It is the rule in Georgia that a presumption of negligence against a railroad company is raised by proof of the killing of stock by one of the company's trains: *Western &c. R. Co. v. Robinson*, 114 Ga. 159; s. c. 39 S. E. Rep. 950; *Atlantic &c. R. Co. v. J. B. Smith & Son*, 123 Ga. 423; s. c. 51 S. E. Rep. 344.

¹⁴² That the killing of stock on a railroad track raises a presumption of negligence, see *Central of Georgia R. Co. v. McWhorter*, 121 Ga. 465; s. c. 49 S. E. Rep. 264; *Cincinnati &c. R. v. Burgess*, 84 S. W. Rep. 760; s. c. 27 Ky. L. Rep. 252.

¹⁴³ *Southern R. Co. v. Forsythe* (Ky.), 64 S. W. Rep. 506; s. c. 23 Ky. L. Rep. 942.

¹⁴⁴ *Central of Georgia R. Co. v. Weathers*, 120 Ga. 475; s. c. 47 S. E. Rep. 956.

¹⁴⁵ *Macon &c. R. Co. v. Revis*, 119 Ga. 332; s. c. 46 S. E. Rep. 418; *Southern R. Co. v. Cook*, 121 Ga. 416; s. c. 49 S. E. Rep. 287; *Taylor v. Atlantic &c. R. Co.*, 119 Ga. 610; s. c. 46 S. E. Rep. 834.

¹⁴⁶ *Central of Georgia R. Co. v. Bagley*, 121 Ga. 781; s. c. 49 S. E. Rep. 780.

¹⁴⁷ *Western &c. R. Co. v. Robinson*, 114 Ga. 159; s. c. 39 S. E. Rep. 950; *Felton v. Anderson* (Ky.), 66 S. W. Rep. 182; s. c. 23 Ky. L. Rep. 1809 (where presence of animal on the track could not have been discovered in time to have prevented collision); *Illinois Cent. R. Co. v. Gholson* (Ky.), 66 S. W. Rep. 1018; s. c. 23 Ky. L. Rep. 2209.

¹⁴⁸ *Roberts v. Wabash R. Co.*, 113 Mo. App. 6; s. c. 87 S. W. Rep. 601.

¹⁴⁹ *O'Leary v. Chicago &c. R. Co.*, — Iowa —; s. c. 103 N. W. Rep. 362.

§ 2154. Evidence as to the Character and Skill of Defendant's Employés.—Evidence that some of the defendant's trains ran "pretty fast" in the vicinity of the place of the accident has been held admissible to show a habit or custom of the company of running trains at a high rate of speed at that point to support an allegation of high speed in the complaint.¹⁵⁰ This evidence must be confined to the place in question. Evidence of high speed at other points is clearly inadmissible to prove an excess of speed at the point in question.¹⁵¹

§ 2158. Relevancy of other Circumstances.¹⁵²

§ 2161. Venue of Statutory Actions.—Under the Arkansas practice an objection that the stock was not shown to have been killed in the county where the suit was brought is good, though first advanced on appeal.¹⁵³ In Indiana it is held that while a complaint against a railroad company for damages on account of stock killed must show in what county such stock was killed, it need not be done by a positive and direct allegation.¹⁵⁴

§ 2168. Necessity of Stating the Facts on which the Statute Predicates Liability.¹⁵⁵

¹⁵⁰ *Gulf &c. R. Co. v. Anson* (Tex. Civ. App.), 82 S. W. Rep. 785.

¹⁵¹ *Gulf &c. R. Co. v. Anson* (Tex. Civ. App.), 82 S. W. Rep. 785.

¹⁵² In an action for killing an animal at night on the railroad track evidence of the equipment and condition of the locomotive is admissible as having some bearing on the question of negligence: *Central of Georgia R. Co. v. Hardin*, 114 Ga. 548; s. c. 40 S. E. Rep. 738. Where plaintiff testified that the defendant's railroad ran through his land, and defendant gave no intimation of purpose to resist the action on the ground that it did not own or operate the road, further proof of its ownership of the road was unnecessary: *Payne v. Quincy &c. R. Co.*, 113 Mo. App. 609; s. c. 88 S. W. Rep. 164; *Oyler v. Quincy &c. R. Co.*, 113 Mo. App. 375; s. c. 88 S. W. Rep. 162.

¹⁵³ *St. Louis &c. R. Co. v. Gray*, 72 Ark. 376; s. c. 80 S. W. Rep. 748.

¹⁵⁴ *Pittsburgh &c. R. Co. v. Newsum*, 35 Ind. App. 299; s. c. 74 N. E. Rep. 21.

¹⁵⁵ In Missouri, where the view obtains that the duty to fence is for the sole benefit of adjoining owners, a complaint which alleged that the

stock afterward injured were in a field of one other than the plaintiff adjoining the road, and that the gate in the fence along the right of way had been open for a long time, and the cattle passed from there to the track, but did not state that the field was not fenced with a lawful fence, or that the cattle were there with permission of the owner, was held demurrable: *Farmers' Bank v. Chicago &c. R. Co.*, 109 Mo. App. 165; s. c. 83 S. W. Rep. 76. In Montana it is necessary that the complaint allege the plaintiff's ownership or possession of the land along or through which the railroad runs, and that the stock were killed at such place: *Beaudin v. Oregon Short Line R. Co.*, 31 Mont. 238; s. c. 78 Pac. Rep. 303. A complaint under a Missouri statute was held sufficient which alleged that a horse belonging to plaintiff strayed on defendant's tracks at the place where the railroad passed through inclosed and cultivated fields of plaintiff, and where defendant had failed to maintain a lawful fence, and that the animal was killed by defendant's cars: *Meadows v. Chicago &c. R. Co.*, 82 Mo. App. 83. Under the Louisiana statute reliev-

§ 2172. **General Allegations of Failure to Fence Sufficient.**—Under the Missouri statute allowing a recovery for injuries to animals straying upon the track at a place where a lawful fence should have been maintained, it is not necessary that the complaint in such an action should state that the track might have been fenced if it sufficiently alleges facts showing that to be the case.¹⁵⁶

§ 2173. **When Necessary to State the Character of the Land at the Place where the Road was not Fenced.**¹⁵⁷

§ 2174. **Particularity in Stating How Damage Occurred.**¹⁵⁸

§ 2178. **Declarations must be Complete either at Common Law or under the Statute.**¹⁵⁹

ing the owner of stock injured on a railroad track from proving negligence, it has been held that a cause of action was sufficiently set forth by averments that the animal was killed, when and where killed, and its value: *State, ex rel. Sorrel, v. Foster*, 106 La. 425; s. c. 31 South. Rep. 57. Under the Indiana statute, which provides that railroad companies operating roads or that may subsequently operate them shall, within twelve months from the completion of any part of the road maintain suitable cattle guards at all highway crossings, a complaint need not allege that the railroad was in existence when the statute became effective, or that the road had been completed twelve months before the killing: *Pittsburgh & C. R. Co. v. Newsom*, 35 Ind. App. 299; s. c. 74 N. E. Rep. 21.

¹⁵⁶ *Meadows v. Chicago & C. R. Co.*, 82 Mo. App. 83. In another case the matter was held sufficiently covered by allegations that the animal strayed on the tracks of the defendant at a point where the road passed through inclosed fields and at a point where the defendant was required to maintain a lawful fence, not at a public crossing, nor within an incorporated city, town or village, and that the animal strayed on the tracks by reason of the defendant's failure to erect a lawful fence: *Seidel v. Quincy & C. R. Co.*, 109 Mo. App. 160; s. c. 83 S. W. Rep. 77.

¹⁵⁷ The plaintiff should allege his ownership or possession of the land along or through which the railroad ran at the point where the

cattle strayed on the track: *Metlin v. Oregon Short Line R. Co.*, — Mont. —; s. c. 81 Pac. Rep. 737.

¹⁵⁸ No allegation of negligence in the operation of the train is necessary where animals are killed on an unfenced right of way: *Beaudin v. Oregon Short Line R. Co.*, 31 Mont. 238; s. c. 78 Pac. Rep. 303. A complaint alleging that the defendant had a defective cattle guard at a crossing and that the plaintiff was the owner of certain mules which, by reason of the failure of the defendant to maintain a proper guard at the crossing, "strayed upon the line of said railroad at said crossing and were run against" was not open to the objection that it did not show that the animals entered upon the railroad by crossing over the alleged defective guard and showed them struck on the crossing: *Pittsburgh & C. R. Co. v. Newsom*, 35 Ind. App. 299; s. c. 74 N. E. Rep. 21.

¹⁵⁹ Where a petition is vaguely and inartificially drawn, but alleges that defendant, at the limits of a railroad station and running one thousand yards to a cattle guard, constructed a danger trap, to which plaintiff's cattle were exposed, and that five of them were killed by an incoming train, it charges a cause of action for common-law negligence on the part of defendant in constructing its fences so as to expose wandering cattle to danger of being caught by trains in this partial inclosure of defendant's line of railway: *Riley v. St. Louis & C. R. Co.*, 84 Mo. App. 495.

§ 2181. **Separate Injuries Create Separate Causes of Action.**¹⁶⁰

§ 2183. **What Allegations Sufficient in a Complaint before a Justice of the Peace.**—Under the Missouri practice the plaintiff in an action for the killing of stock alleged to have gone on the track because of a defect in a right-of-way fence need not allege that he was the owner of the field from which the cattle escaped, or that the cattle were lawfully in the field.¹⁶¹ In another case a complaint in a justice court was upheld after verdict which charged that it was the railroad company's duty to erect lawful fences on the sides of the road, and that it was its duty to fence the railroad at such place with "a good, lawful fence of rails or posts or planks," and that it failed to construct such "lawful fence," though open to the construction that it limited the jury to a lawful fence made of rails, posts and planks.¹⁶²

§ 2185. **Variance between Pleading and Proof.**—The right of recovery in these as in other cases is limited to the negligence alleged. Thus, where the complaint alleged negligence only in running the train, evidence was inadmissible to show negligence in fencing, or in failing to sound the statutory signals on approaching the crossing.¹⁶³ So where the complaint alleged that the track was not inclosed by a fence as required, it was held improper to receive evidence that the stock went on the track through an open gate in the fence;¹⁶⁴ and so where it was averred that the animal entered on the track over the line where the fence should have been, it was held that the plaintiff could not recover on proof that the animal entered the right of way over cattle-guards.¹⁶⁵ A variance between a complaint alleging that the railroad at the place in question ran through "uninclosed" lands

¹⁶⁰ A statement setting out a cause of action in three counts—the first charging common-law negligence in operating the train, the second the failure to ring the bell or sound the whistle, as required by statute, and the third the failure to fence the place where the cattle went upon the track—was held to state but one cause of action, and that the plaintiff should not have been compelled to elect at the opening of the trial on which count he would proceed: *Atterberry v. Wabash R. Co.*, 110 Mo. App. 608; s. c. 85 S. W. Rep. 114.

¹⁶¹ *Wages v. Quincy & C. R. Co.*, 110 Mo. App. 230; s. c. 85 S. W. Rep. 104.

¹⁶² *Jackson v. Wabash R. Co.*, 85 Mo. App. 443.

¹⁶³ *Haner v. Northern Pac. R. Co.*, 7 Idaho 305; s. c. 62 Pac. Rep. 1028.

¹⁶⁴ *Stonebraker v. Chicago & C. R. Co.*, 110 Mo. App. 497; s. c. 85 S. W. Rep. 631.

¹⁶⁵ *Clement v. Pere Marquette R. Co.*, 139 Mich. 57; s. c. 100 N. W. Rep. 999; 11 Det. Leg. N. 465. But see *Chicago & C. R. Co. v. Brown*, 33 Ind. App. 603; s. c. 71 N. E. Rep. 908, where it was held that a complaint in an action against a railroad company for the killing of a horse, brought under a statute which makes the company liable for stock killed on its right of way "where the same was not securely fenced in," was sustained by proof that the horse entered upon the right of way over a cattle guard which was not sufficient to turn stock.

and evidence that the animal came from grounds not adjoining the right of way, and reached the right of way by travelling along a public road, and thence into a lane and thence on to the right of way, without encountering any intervening fence, was held not so material as to warrant a reversal of the judgment.¹⁶⁶

§ 2186. **Effect of Failure to Deny Allegation of Answer.**—The failure of the plaintiff to deny an allegation of the answer that the place where the killing occurred was a place which the railroad company was not required to fence, has been held not equivalent to an admission of that fact.¹⁶⁷

§ 2188. **Burden of Proof on the Plaintiff.**¹⁶⁸

§ 2191. **Necessity of Proving that the Animals Came upon the Track where the Fence was Defective.**—It will be presumed, in the absence of evidence to the contrary, that the stock came upon the road at the place where it was killed.¹⁶⁹ But this presumption may be rebutted. Thus, for example, at the point where the animals were killed there was a sufficient fence to turn the stock, but a few hundred feet from this place there was an open gate blocked by snow. Tracks

¹⁶⁶ Reed v. Chicago &c. R. Co., 112 Mo. App. 575; s. c. 87 S. W. Rep. 65.

¹⁶⁷ Beaudin v. Oregon Short Line R. Co., 31 Mont. 238; s. c. 78 Pac. Rep. 303.

¹⁶⁸ That plaintiff must prove negligence where animal is killed at place where law does not require right of way to be fenced, see Redmond v. Missouri &c. R. Co., 104 Mo. App. 651; s. c. 77 S. W. Rep. 768; Galveston &c. R. Co. v. Cassinelli & Co. (Tex. Civ. App.), 78 S. W. Rep. 247; Houston &c. R. Co. v. McMillan, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 296; Missouri &c. R. Co. v. Kennedy, 33 Tex. Civ. App. 445; s. c. 76 S. W. Rep. 943; St. Louis &c. R. Co. v. Adams, 24 Tex. Civ. App. 231; s. c. 58 S. W. 1035. An instruction that plaintiff could only recover upon proof of a want of repair known to the defendant, or which existed such a length of time that knowledge could be imputed, held sufficiently favorable to the defendant: Klay v. Chicago &c. R. Co., 126 Iowa 671; s. c. 102 N. W. Rep. 526. On trial of an action against a railway company for killing live stock, it is not error to charge that, the killing being ad-

mitted, defendant, to escape liability, must show by a preponderance of the evidence that at the time of the killing it was in the exercise of ordinary care: Georgia Southern &c. R. Co. v. Young Inv. Co., 119 Ga. 513; s. c. 46 S. E. Rep. 644. The New Mexico statute requiring railroad companies to fence their tracks, and providing a procedure to recover damages for animals killed where such fences were not constructed, did not make a failure to construct such fences negligence *per se*, but only placed the burden of proof upon a railroad company to show that such killing was not the result of negligence on the part of the company or its employes: Pecos Valley &c. R. Co. v. Cazier, — N. M. —; s. c. 79 Pac. Rep. 714. It follows from the doctrine of the main section that where the evidence is of a character that the jury cannot tell what caused the injury the finding should be for the defendant: Schlotzhauer v. Missouri &c. R. Co., 89 Mo. App. 65.

¹⁶⁹ Acord v. St. Louis &c. R. Co., 113 Mo. App. 84; s. c. 87 S. W. Rep. 537; Ellis v. Mississippi River &c. R., 89 Mo. App. 241.

were found approaching the gate and inside the right of way, while through the gateway the snow was blocked and frozen so that tracks were not naturally found there. The gate was the only place through which the cattle could have entered the right of way. It was held that the presumption was successfully rebutted.¹⁷⁰

§ 2192. **What Evidence Sufficient to Sustain Actions under these Statutes.**¹⁷¹—Direct evidence as to the county in which the injuries were inflicted is not absolutely required. The jury may infer from the evidence giving the locality where the animal was killed that the killing was within the county alleged in the complaint, although there is no direct evidence on this point.¹⁷²

§ 2193. **What Evidence Tends to Show that the Fence was Defective.**—Evidence as to the condition of the guards and fences at the place where the animals got upon the right of way before the accident, followed by proof of their continuous bad condition from that time to the time of the occurrence of the accident, is competent evidence in a case of this character.¹⁷³

§ 2194. **Circumstantial Evidence that the Animals were Struck by the Train.**¹⁷⁴

¹⁷⁰ *Bumpas v. Wabash R. Co.*, 103 Mo. App. 202; s. c. 77 S. W. Rep. 115.

¹⁷¹ The law was held correctly stated in an instruction which told the jury that they should inquire whether or not the circumstances in evidence "fairly and naturally led to the conclusion" that plaintiff's stock opened the gate, and thus entered on defendant's right of way, and it was not necessary that the evidence must exclude every other reasonable hypothesis: *Kling v. Chicago & C. R. Co.*, 115 Iowa 133; s. c. 88 N. W. Rep. 355. Under the Missouri statute making a railroad liable for stock going upon the right of way at a place where the railroad is not fenced, and becoming frightened by a passing train, and injured by running against the fence or other object along the road, the mere fact that an animal was found injured outside the right of way, near the fence, with the additional fact that it had been seen on the right of way the morning of the day it was found injured, and that hair was found on the fence wire, does not authorize a recovery against the

railroad, in the absence of evidence that a train had passed, and the animal had been frightened, and had consequently run into the fence: *Shaw v. St. Louis & C. R. Co.*, 110 Mo. App. 561; s. c. 85 S. W. Rep. 611.

¹⁷² *Chicago & C. R. Co. v. Brown*, 33 Ind. App. 603; s. c. 71 N. E. Rep. 908.

¹⁷³ *Chicago & C. R. Co. v. Chipman*, 87 Ill. App. 292.

¹⁷⁴ The fact that the track had been worked between the time of the accident and the time of the inspection thereof by plaintiff may be shown in connection with the question whether any of the evidence as to the position of the animal when struck had been obliterated, and, if so, whether such obliteration was done purposely or not: *Klay v. Chicago & C. R. Co.*, 126 Iowa 671; s. c. 102 N. W. Rep. 526. The mere fact that a colt was found fatally crippled near the base of a steep, rocky fill of a railroad, and that there were tracks on top of the fill indicating that the colt had been there, was not sufficient to show that the colt had been struck by a train, as it was just as reasonable

§ 2197. **Duty to Fence, a Question of Law.**—Contrary to the general rule it is held in Illinois a question for the jury and not one of law for the court, whether the existence of a switch at a particular point used for loading and unloading merchandise will excuse the railroad company from the obligation to fence at such place.¹⁷⁵

§ 2198. **Sufficiency of Fence a Question of Fact.**¹⁷⁶

§ 2202. **Certainty Required in the Statutory Notice.**—Under the rule of liberal construction noted in the main section there seems great propriety in a holding that a notice is not vitiated by using the word "railroad" instead of "railway" in designating a company charged with injuring stock.¹⁷⁷ In one case where a mare was killed the owner served a notice and affidavit on the defendant, saying that on a certain date and at a certain point the defendant's train killed one bay horse four years old of a certain value. He afterwards filled out a stock report at the defendant's request and stated that a bay mare five years old was killed and on a different date. In his complaint he asked to recover for one bay horse killed on or about the time set out in his first affidavit and of the same value. On the trial he testified that only one animal had been killed and that it was a bay mare four years old. The court held that the railroad company was sufficiently advised in the premises to put it on inquiry, which, if pursued, would have led to the discovery of the facts concerning this claim, notwithstanding the variances noted.¹⁷⁸ In still another case the court refused to heed a contention of variance between a notice charging the loss to the company on the ground that it had failed in

to infer that the colt had been crippled by falling in attempting to run down the embankment, and therefore a verdict for the owner is palpably against the weight of the evidence: *Southern R. Co. v. Forsythe* (Ky.), 64 S. W. Rep. 506; s. c. 23 Ky. L. Rep. 942. To recover for stock killed on a public crossing, evidence that the track was fenced and that it had cattle guards at the crossing mentioned, that the fence had the appearance of having been mashed and partially wrecked, that the stock were lying near the cattle guards and inside the fence, and that three of the herd were seen coming from the crossing while the train was passing, is sufficient to support a finding that the stock were killed on the crossing: *Lockett v. Missouri & C. R. Co.*, 89 Mo. App. 100. Evidence that the animals were found near the track, one dead

and the other injured so that it had to be killed, and no showing was made as to the character of the injuries except that one had its legs broken, such evidence was held insufficient to show that the animals were killed by an engine or cars of the defendant: *Beaudin v. Oregon Short Line R. Co.*, 31 Mont. 238; s. c. 78 Pac. Rep. 303.

¹⁷⁵ *Wabash R. Co. v. Warren*, 113 Ill. App. 172.

¹⁷⁶ *Meador v. Missouri Pac. Co.*, 62 Kan. 865; s. c. 61 Pac. Rep. 442 (sufficiency of wire cattle guard); *Saine v. Missouri & C. R. Co.*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 487 (sufficiency of cattle guard at places where railroad passes through field or inclosure).

¹⁷⁷ *Black v. Minneapolis & C. R. Co.*, 122 Iowa 32; s. c. 96 N. W. Rep. 984.

¹⁷⁸ *Brammer v. Wabash R. Co.*, 112 Iowa 375; s. c. 83 N. W. Rep. 1048.

its duty to fence its track, and an allegation in the complaint that the animal entered by passing over a defective and insufficient cattle-guard.¹⁷⁹

§ 2212. **Value of the Animal, how Proved.**¹⁸⁰—The fact that a mare killed on a railroad track was with foal at the time may be considered in estimating the damages.¹⁸¹ Under a statute providing that allegations of value or of amount of damages shall not be considered as true by the failure to controvert them, it was held that the failure of the defendant to controvert the value of the animal for whose injuries the suit was brought, will not relieve the plaintiff of the burden of proving its value, nor deprive him of the right to open and close the argument.¹⁸²

§ 2223. **Construction of Statutes Giving Double Damages.**—The Missouri statute authorizing the recovery of double damages will permit their recovery only in cases of injury from actual contact with the locomotive or train;¹⁸³ and is strictly limited to injuries to the animal, not including accessories such as harness, etc.¹⁸⁴ These damages are recoverable though the injured stock belongs to one not an adjoining proprietor and reaches the railroad over the lands of an adjoining owner if its right of way is not enclosed, as required by statute, and the stock enters upon the track on that account.¹⁸⁵ The statute regards a tenant as the proprietor of land required to be fenced and as such entitled to recover double damages for stock killed on a track not fenced as required by law.¹⁸⁶

§ 2224. **Procedure under Statutes Giving Double Damages.**—The complaint should allege whether the negligence complained of was a defective or improper gate or fence, or permitting an improperly constructed gate to remain open an unreasonable length of time.¹⁸⁷ A

¹⁷⁹ *Boyer v. Chicago & C. R. Co.*, 123 Iowa 248; s. c. 98 N. W. Rep. 764.

¹⁸⁰ Where plaintiff's witnesses testified that the cattle killed were Durhams, valued at from \$30 to \$50 each, the exclusion of evidence of a witness for defendant, that he was familiar with and knew the herd of cattle killed, that they were a mixed lot of very common stock, the market value of which would not exceed from \$7 to \$12.50 per head, was prejudicial error, the verdict in favor of plaintiff having exceeded the values fixed by such witness: *Missouri & C. R. Co. v. Lane* (Tex. Civ. App.), 80 S. W. Rep. 534.

¹⁸¹ *Boyer v. Chicago & C. R. Co.*, 123 Iowa 248; s. c. 98 N. W. Rep. 764.

¹⁸² *Prescott & C. R. Co. v. Brown*, 74 Ark. 606; s. c. 86 S. W. Rep. 809.

¹⁸³ *Reed v. Chicago & C. R. Co.*, 112 Mo. App. 575; s. c. 87 S. W. Rep. 65; *Logan v. St. Louis & C. R. Co.*, 111 Mo. App. 674; s. c. 86 S. W. Rep. 565.

¹⁸⁴ *Huss v. Wabash R. Co.*, 84 Mo. App. 111.

¹⁸⁵ *Oyler v. Quincy & C. R. Co.*, 113 Mo. App. 375; 88 S. W. Rep. 162.

¹⁸⁶ *Huss v. Wabash R. Co.*, 84 Mo. App. 111.

¹⁸⁷ *Litton v. Chicago & C. R. Co.*, 111 Mo. App. 140; s. c. 85 S. W. Rep. 978.

general denial only puts in issue the facts necessary to sustain the plaintiff's case, and will not permit proof by way of defense of matters outside such facts.¹⁸⁸ The fact that the stock was killed by a train need not be proved by direct evidence.¹⁸⁹ The defendant's tender to the plaintiff of a certain sum, which the plaintiff claimed to be the value of the stock, is sufficient evidence of the value of the stock to form a basis for the recovery of the double damages.¹⁹⁰ The right to these damages is a statutory right and is not lost by a concession of the plaintiff's attorney that his client was not entitled to double damages, so as to estop the plaintiff from claiming these damages after a withdrawal of the concession.¹⁹¹ Under the Missouri practice the motion for damages in double the amount of the verdict need not be in writing.¹⁹²

¹⁸⁸ Kirby v. Wabash R. Co., 85 Mo. App. 345.

¹⁸⁹ Oyler v. Quincy &c. R. Co., 113 Mo. App. 375; s. c. 88 S. W. Rep. 162; Payne v. Quincy &c. R. Co., 113 Mo. App. 609; s. c. 88 S. W. Rep. 164.

¹⁹⁰ Black v. Minneapolis &c. R. Co., 122 Iowa 32; s. c. 96 N. W. Rep. 984.

¹⁹¹ Black v. Minneapolis &c. R. Co., 122 Iowa 32; s. c. 96 N. W. Rep. 984.

¹⁹² Wages v. Quincy &c. R. Co., 110 Mo. App. 230; s. c. 85 S. W. Rep. 104.

TITLE FIFTEEN.

RAILWAY FIRES.

[§§ 2232-2388.]

§ 2232. **Liabie only for the Want of Reasonable or Ordinary Care in its Use.**¹—Where a railroad company equips its locomotives with the best known appliances to prevent the escape of sparks, keeps its locomotives in good repair and its right of way clear of combustible materials, it is, as a general rule, not liable for fires caused by escaping sparks.²

§ 2233. **Which is a Care Proportioned to the Danger to Others.**—And this is the case where the running of trains is attended with unusual danger from sparks such as results from a drought and wind. Here the law demands the exercise of a degree of care commensurate with the risk or hazard of such conditions.³

§ 2237. **Railway Companies may Contract against Liability for Fires Communicated by their Locomotives.**—Contracts of this character are valid where fairly entered into,⁴ and are not prohibited by laws forbidding carriers to limit their common-law liability since they do not cover property for the injury or destruction of which a railroad company is liable as a common carrier.⁵ Such contracts, when valid and binding upon the principals thereto, are equally binding upon privies, such as assigns and lessees,⁶ but not upon others, as for

¹Creighton v. Chicago &c. R. Co., — Neb. —; s. c. 94 N. W. Rep. 527. An instruction that railway companies are required to exercise such care as reasonably careful and prudent railway companies generally exercise under circumstances entirely similar to those surrounding the right of way adjacent to a building destroyed by fire was not rendered erroneous by failure to state the degree of care to be that which ordinarily prudent persons generally exercise under similar circumstances: Abrams v. Seattle &c. R. Co., 27 Wash. 507; s. c. 68 Pac. Rep. 78.

²Brady v. Jay, 111 La. 1071; s. c. 36 South. Rep. 132; Simpson v. En-

field Lumber Co., 133 N. C. 95; s. c. 45 S. E. Rep. 469; rev'g s. c. 131 N. C. 518; 42 S. E. Rep. 939.

³Louisville &c. R. Co. v. Fort, 112 Tenn. 432; s. c. 80 S. W. Rep. 429.

⁴Blitch v. Central of Georgia R. Co., 122 Ga. 711; s. c. 50 S. E. Rep. 945.

⁵J. C. Wooldridge & Son v. Ft. Worth &c. R. Co., — Tex. Civ. App. —; s. c. 86 S. W. Rep. 942; Missouri &c. R. Co. v. Carter, 95 Tex. 461; s. c. 68 S. W. Rep. 159.

⁶Northern Pac. R. Co. v. McClure, 9 N. D. 73; s. c. 81 N. W. Rep. 52; 47 L. R. A. 149; Woodward v. Ft. Worth &c. R. Co., 35 Tex. Civ. App. 14; s. c. 79 S. W. Rep. 896.

example, the sub-tenant of an assignee of a lease⁷ or a person storing goods in a warehouse owned by one a party to such an agreement and he makes the deposit without knowledge of its existence.⁸ The agreement will cover only the property or area described, and will not exempt the railroad company from liability for other property destroyed, though adjacent to that covered by the contract.⁹ Where the property destroyed is on a side track it is not necessary to the exemption that the fire should be communicated from a locomotive traversing the side track. The company will be exempt though the fire is thrown from a locomotive on other tracks.¹⁰

§ 2239. **Who Liable—Lessor, Lessee, Mortgage Trustees in Possession.**—Under the principle noted in the main section that a railroad company cannot devolve its franchises upon other persons or corporations by lease or otherwise, without the consent of the State, so as to relieve it from liability for negligence, a railroad company will be liable for damages from a fire set out by a locomotive traversing its tracks, which belonged to a private logging company allowed by it the use of its tracks.¹¹ Under another principle noted therein that the person or corporation who sets out a fire will be liable for the resulting damages, a railroad company has been absolved from liability for damages from fire communicated from land owned by the company, but which it had permitted a city to use as a public dumping ground, and the railroad company had retained no substantial control over the land and had set out no fires thereon,—and this was the conclusion though the company had made some suggestions as to the manner of filling the ground and had on one or two occasions assisted in subduing fires which had broken out on the dump.¹² The action may, with the permission of the court, be maintained against

⁷ *J. C. Wooldridge & Son v. Ft. Worth &c. R. Co.*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 942.

⁸ *Texas &c. R. Co. v. Watson*, 190 U. S. 287; s. c. 23 Sup. Ct. Rep. 681; 47 L. Ed. 1057; aff'g s. c. 112 Fed. Rep. 402; 50 C. C. A. 230. A railroad company will not be relieved from liability for the burning of goods in a warehouse because the owners of the goods are stockholders in the warehouse company—it being a corporation—though in its lease from the railroad company it waived all claim for damages from the destruction of the warehouse by fire set out by the railroad company: *Orient Ins. Co. v. Northern Pac. R. Co.*,

31 Mont. 502; s. c. 78 Pac. Rep. 1036.

⁹ *Kansas City &c. R. Co. v. B. F. Blaker & Co.*, 68 Kan. 244; s. c. 75 Pac. Rep. 71; 64 L. R. A. 81.

¹⁰ *Mann v. Pere Marquette R. Co.*, 135 Mich. 210; s. c. 97 N. W. Rep. 721; s. c. 10 Det. Leg. N. 764; *Richmond v. New York &c. R. Co.*, 26 R. I. 225; 58 Atl. Rep. 767.

¹¹ *McFarland v. Missouri &c. R. Co.*, 94 Mo. App. 336; s. c. 68 S. W. Rep. 105; *Jefferson v. Chicago &c. R. Co.*, 117 Wis. 549; s. c. 94 N. W. Rep. 289.

¹² *Denver v. Porter*, 126 Fed. Rep. 288; s. c. 61 C. C. A. 168.

the receivers of a railroad company though it accrued before they were appointed.¹³

§ 2240. **To Whom Liable—to Landlord or Tenant—Owner—Naked Possessor.**¹⁴—The fact that the plaintiff has an equitable title only to the goods will not prevent a recovery by him for the damages suffered—as for example, where the property destroyed in a warehouse was deposited by the owner's agent who took the receipt in his own name.¹⁵

§ 2242. **Duty of the Company to Extinguish the Fire.**¹⁶

§ 2247. **Liability for Permitting Fire to Escape from its Right of Way.**¹⁷—A railroad company may be imputed with negligence in lighting a fire on its right of way at a time when the weather is very dry and a high wind is blowing.¹⁸ Fires should be guarded as long as they exist. In one case it was very properly held that an inspection at six o'clock in the evening, at which it was determined by the employes of the company that there was no danger from the fire, was insufficient where the fire within four hours spread to and destroyed adjacent buildings.¹⁹

§ 2252. **Duty in the Construction of Locomotives so as to Prevent the Escape of Fire Therefrom.**²⁰—Generally speaking, a railroad com-

¹³ *Grant v. Omaha & C. R. Co.*, 94 Mo. App. 312; s. c. 68 S. W. Rep. 91.

¹⁴ A section of a railroad company's charter providing that the company should be liable to "property owners" for all damages by fire communicated by its engines will include not only those whose lands are traversed by the roadbed, but also those whose lands are sufficiently near thereto to be damaged by fire communicated from the company's negligence, although another section in the preamble to the charter declares that one of the purposes of the act is to secure the rights of the citizens of the State "through whose lands its railroad was intended to pass." *MacDonald v. New York & C. R. Co.*, 23 R. I. 558; s. c. 51 Atl. Rep. 578.

¹⁵ *Alabama Great Southern R. Co. v. Clark*, 136 Ala. 450; s. c. 34 South. Rep. 917.

¹⁶ Where grass was set on fire by sparks from a locomotive, it was not negligence for the train crew to fail to leave the train to extinguish the fire: *Galveston & C. R. Co. v. Chittim*, 31 Tex. Civ. App. 40; s. c. 71 S. W. Rep. 294.

¹⁷ *Brown v. Carolina Midland R. Co.*, 67 S. C. 481; s. c. 46 S. E. Rep. 283 (complaint sufficient in action for destruction of property by fire communicated from burning depot).

¹⁸ *Grant v. Omaha & C. R. Co.*, 94 App. 312; s. c. 68 S. W. Rep. 91.

¹⁹ *B. E. Brister & Co. v. Illinois Cent. R. Co.*, 84 Miss. 33; s. c. 36 South. Rep. 142.

²⁰ A railroad company is not liable for fires caused by sparks escaping from a locomotive, unless it has negligently used an engine not fitted with appliances capable of preventing the escape of sparks of an unusual size or in unnecessary quantity: *White v. New York Cent. & C. R. Co.*, 90 App. Div. (N. Y.) 356; s. c. 85 N. Y. Supp. 497; s. c. aff'd, 181 N. Y. 577; 74 N. E. Rep. 1126. A railway company is not liable for damage resulting from a fire caused by sparks from an engine running on their line, in the absence of negligence in the construction or use of such engine: *Canadian Pac. R. v. Roy*, [1902] App. Cas. 220; s. c. 71 L. J. P. C. 51; 86 L. T. 127; 50 Wkly. Rep. 415.

pany will be liable in damages for property destroyed by fire set out by its locomotives whether due to the operation of a defective engine or the negligent operation of an engine in approved condition.²¹

§ 2253. Bound to Adopt the Best Practicable Improvements in General Use.—The recent decisions support the rule that a railroad company in the operation of its locomotives is only required to use ordinary care to provide the same with appliances to prevent the escape of fire. It is not an insurer of the completeness or perfection of the devices adopted.²² It is not demanded that the company should equip its engines with the “best approved” spark-arresters, but merely with such approved appliances as are in general use.²³ In one case the conclusion was reached that a railroad company had satisfied all the requirements of the rule, where it showed that the locomotive was returned two weeks before the fire from the leading locomotive works of this country where it had been sent for repairs, and the builders testified that the engine left their hands in good order and equipped with the most approved appliances for preventing the escape of sparks, and it further appeared that on the day of the fire the engine had been inspected and found in good order, which evidence was corroborated by photographs of the spark-arrester taken soon thereafter.²⁴

§ 2254. Sufficient that it has Adopted the Best Improved Spark-Arrester and Exercised Due Care in its Use.²⁵

²¹ Norfolk &c. R. Co. v. Perrow, 101 Va. 345; s. c. 43 S. E. Rep. 614.

²² Lesser Cotton Co. v. St. Louis &c. R. Co., 114 Fed. Rep. 133; s. c. 52 C. C. A. 95; Anderson v. Oregon R. Co., 45 Ore. 211; s. c. 77 Pac. Rep. 119; Missouri &c. R. Co. v. Carter, 95 Tex. 461; s. c. 68 S. W. Rep. 159; Houston &c. R. Co. v. Laforge, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 1072; Missouri &c. R. Co. v. Hopkins (Tex. Civ. App.), 80 S. W. Rep. 414; Missouri &c. R. Co. v. Jordan (Tex. Civ. App.), 82 S. W. Rep. 791; St. Louis &c. R. Co. v. Crabb (Tex. Civ. App.), 80 S. W. Rep. 408; St. Louis &c. R. Co. v. Gentry (Tex. Civ. App.), 74 S. W. Rep. 607.

²³ St. Louis &c. R. Co. v. Coombs, — Ark. —; s. c. 88 S. W. Rep. 595; Louisville &c. R. Co. v. Samuels (Ky.), 57 S. W. Rep. 235; s. c. 22 Ky. L. Rep. 303; Mills v. Louisville &c. R. Co., 76 S. W. Rep. 29; s. c. 25 Ky. L. Rep. 488; Bottoms v. Seaboard Air Line R., 136 N. C. 472; s. c. 49 S. E. Rep. 348; Farrington v. Rutland R. Co., 72 Vt.

24; s. c. 47 Atl. Rep. 171. A railroad company is not bound to purchase every new invention, or test every new device to prevent the escape of fire from its engines, nor to adopt appliances which are mere experiments; but if the proofs show a device which it had not adopted upon the engine which set the fire was generally recognized, at the date of the fire, as the best and most approved device to prevent the escape of fire, a verdict that said engine was not equipped with the best and most approved appliances to prevent the escape of fire, will not be set aside for lack of proof, although said device had not been adopted many years, and railroads differed as to some of its details: Chicago &c. R. Co. v. American Strawboard Co., 91 Ill. App. 635; s. c. aff'd, 190 Ill. 268; 60 N. E. Rep. 518.

²⁴ White v. New York &c. R. Co., 99 Va. 357; s. c. 38 S. E. Rep. 180; 3 Va. Sup. Ct. Rep. 250.

²⁵ Scott v. Texas &c. R. Co., 93 Tex. 625; s. c. 57 S. W. Rep. 801;

§ 2259. **Duty to Keep Spark-Arresters in Repair.**—The law does not impose on the railroad company the absolute duty of keeping the spark-arrester in good repair. Only ordinary care in this respect is required.²⁶

§ 2260. **Evidence to Show that the Spark-Arrester was Out of Repair.**—It is not enough that the defendant's locomotive was without a spark-arrester equipment. This, though negligence, does not make the railroad company liable for the consequences of a fire unless it is proved that the locomotive communicated the fire.²⁷ Evidence that sparks escaped from the locomotive in large showers, or that they were of unusual size, and carried to a great height, is admissible to show that the engine was improperly equipped.²⁸

§ 2264. **Obligation to Use Greater Care where there is Combustible Material near the Track.**²⁹

§ 2270. **Duty of Railway Company to Prevent the Accumulation of Combustible Materials upon its Right of Way.**—"If a railroad company negligently permits dry grass, weeds, leaves or other combustible material to accumulate and remain on its right of way, which are set on fire by one of its passing engines, and such fire thus started destroys property of another, without fault on the part of the owner, the company is liable for such damage."³⁰ A railroad company cannot

rev'g s. c. 56 S. W. Rep. 97 (instruction erroneous as excluding the right of plaintiff to recover because of negligence in handling the engine).

²⁶ *Missouri &c. R. Co. v. Jordan* (Tex. Civ. App.), 82 S. W. Rep. 791; *St. Louis &c. R. Co. v. Gentry* (Tex. Civ. App.), 74 S. W. Rep. 607; *St. Louis &c. R. Co. v. Goodnight*, 32 Tex. Civ. App. 256; s. c. 74 S. W. Rep. 583. A railroad company is not liable for injuries resulting from sparks escaping from a locomotive furnished with the best and most approved screen and spark arrester in practical use, provided these appliances were in perfect order: *Louisville &c. R. Co. v. Samuels* (Ky.), 57 S. W. Rep. 235; s. c. 22 Ky. L. Rep. 303.

²⁷ *Cheek v. Oak Grove Lumber Co.*, 134 N. C. 225; s. c. 46 S. E. Rep. 488; 47 S. E. Rep. 400.

²⁸ *Anderson v. Oregon R. Co.*, 45 Ore. 211; s. c. 77 Pac. Rep. 119. See also *Louisville &c. R. Co. v. Samuels* (Ky.), 57 S. W. Rep. 235; s. c. 22 Ky. L. Rep. 303.

²⁹ Actionable negligence under this head may be predicated on the fact of running a train at a high rate of speed in a dry season at a time when the wind was strong and in the direction of the combustible property: *Norfolk &c. R. Co. v. Fritts*, 103 Va. 687; s. c. 49 S. E. Rep. 971. In passing a point where combustible property is exposed, toward which a high wind is blowing, it would be the engineer's duty to shut off steam and slacken speed to minimize the possibility of communicating fire: *Lake Erie &c. R. Co. v. McFall*, 165 Ind. 574; s. c. 72 N. E. Rep. 552.

³⁰ *Greene, J.*, in *St. Louis &c. R. Co. v. Ludlum*, 63 Kan. 719; s. c. 66 Pac. Rep. 1045. See also *Shields v. Norfolk &c. R. Co.*, 129 N. C. 1; s. c. 39 S. E. Rep. 582; *Elder Tp. School Dist. v. Pennsylvania R. Co.*, 26 Pa. Super. Ct. 112; *Atlantic Coast R. Co. v. Watkins*, 104 Va. 154; s. c. 51 S. E. Rep. 172. The presence of dry grass and other combustibles on the right of way of a railroad company is negligence

free itself from liability for fire communicated from combustibles on its right of way by leasing a portion thereof to a private person; it will be responsible for the condition of all of its right of way though in part occupied by a lessee.³¹ The rules under this head are equally applicable to logging railroads.³²

§ 2272. Company not an Insurer, but Liable for Want of Reasonable Care.³³

§ 2279. Circumstances under which the Company may not be Liable.³⁴

§ 2280. Questions of Evidence Connected with this Subject.—An Indiana case is authority for the admission of evidence of the presence of dry grass and weeds on the right of way at other places than that at which the fire complained of occurred, and that other fires occurred at other times and places.³⁵

§ 2281. Instructions in Actions of this Kind.³⁶

per se: Baltimore & C. R. Co. v. Perryman, 95 Ill. App. 199. A railroad is liable for the destruction of a building by fire communicated by sparks from a passing engine to bales of cotton, which the company had permitted to stand on its platform until the bagging came off, and lint bulged out so as to be easily ignited, and from such cotton to the building: Hamburg-Bremen Fire Ins. Co. v. Atlantic & C. R. Co., 132 N. C. 75; s. c. 43 S. E. Rep. 548.

³¹ Sprague v. Atchison & C. R. Co., 70 Kan. 359; s. c. 78 Pac. Rep. 828.

³² Atlantic Coast Line R. Co. v. Watkins, 104 Va. 154; s. c. 51 S. E. Rep. 172; Cratt v. Albemarle Timber Co., 132 N. C. 151; s. c. 43 S. E. Rep. 597.

³³ The test of care is what an ordinarily prudent person under like circumstances would have anticipated and not what the defendant ought to have anticipated: Knickel v. Chicago & C. R. Co., 123 Wis. 327; s. c. 101 N. W. Rep. 690.

³⁴ A person allowed by a railroad company to store ties on the right of way is a mere licensee as to whom the railroad company owes no duty to remove dry grass and combustible rubbish which had been allowed to accumulate around the ties: Connelly v. Erie R. Co., 68

App. Div. (N. Y.) 542; s. c. 74 N. Y. Supp. 277.

³⁵ Wabash R. Co. v. Miller, 158 Ind. 174; s. c. 61 N. E. Rep. 1005.

³⁶ An instruction that defendant railway company must keep its tracks and right of way free from combustible material liable to communicate fire to the premises of others, and, if defendant failed to discharge his duty, and permitted fire to escape to plaintiff's land, whereby his stacks were destroyed, defendant was liable, was erroneous, as requiring too high a degree of care: Ft. Worth & C. R. Co. v. Dial, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 22. An instruction that it was defendant's duty, in an unusually dry season, where inflammable material is liable to be set on fire, to exercise greater precaution in operating its engines than in damp seasons, and that, if the wind is blowing directly from the engine toward inflammable property, greater precautions are required, so that if, when plaintiff's stacks were destroyed, it was an unusually dry time, and defendant did not use great precaution in the operation of its engines, and, through its negligence, plaintiff's stacks were destroyed, he was entitled to recover, was erroneous, as requiring a greater degree of care than a per-

§ 2284. As to the Burden of Proof in these Cases.³⁷

§ 2285. Presumption of Negligence from the Fact of the Fire being Communicated from a Locomotive.³⁸—The doctrine of this section requires the plaintiff to make out a *prima facie* case that the fire was communicated from the defendant's locomotive. It is not sufficient to show a mere possibility or conjecture that it so occurred.³⁹ If the evidence is doubtful as to whether or not the fire which destroyed the plaintiff's property was ignited by sparks from the defendant's engine, the court is justified in refusing to submit the question whether the locomotive was carefully handled to prevent the escape of fire.⁴⁰

son of ordinary prudence would have exercised under the same or similar circumstances: *Ft. Worth &c. R. Co. v. Dial*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 22.

³⁷ The plaintiff has the burden of proof to show that the fire was caused by sparks which escaped owing to the absence of a proper spark arrester see: *White v. New York &c. R. Co.*, 90 App. Div. (N. Y.) 356; s. c. 85 N. Y. Supp. 497; s. c. aff'd, 181 N. Y. 577; 74 N. E. Rep. 1126. A statute making a railroad company liable for damages from fires set out or caused by the "operating of any railway" and casting the burden on defendant to show freedom from negligence has been held not to cover the case of a fire set out by section men in burning grass along a right of way, the setting out of the fire not being regarded as an act of operating, and hence plaintiff has burden of proof of negligence: *Connors v. Chicago &c. R. Co.*, 111 Iowa 384; s. c. 82 N. W. Rep. 953.

³⁸ Recent cases affirming the doctrine of the main section that there is a presumption of negligence from the fact that the fire was communicated from a locomotive, and placing the burden of rebutting this presumption on the railroad company by proof that it availed itself of proper appliances, are: *Great Northern R. Co. v. Coats*, 115 Fed. Rep. 452; *Alabama &c. R. Co. v. Johnston*, 128 Ala. 283; s. c. 29 South. Rep. 771; *Southern Ry. Co. v. Johnson*, 141 Ala. 575; s. c. 37 South. Rep. 919; *Alabama &c. R. Co. v. Taylor*, 129 Ala. 238; s. c. 29 South. Rep. 673; *Louisville &c.*

R. Co. v. Marbury Lumber Co., 132 Ala. 520; s. c. 32 South. Rep. 745; *St. Louis &c. R. Co. v. Coombs*, — Ark. —; s. c. 88 S. W. Rep. 595; *Chicago &c. R. Co. v. American Strawboard Co.*, 91 Ill. App. 635; s. c. aff'd, 190 Ill. 268; s. c. 60 N. E. Rep. 518; *Toledo &c. R. Co. v. Valodin*, 109 Ill. App. 132; *St. Louis &c. R. Co. v. Lawrence*, 4 Ind. T. 611; s. c. 76 S. W. Rep. 254; *Atchison &c. R. Co. v. Geiser*, 68 Kan. 281; s. c. 75 Pac. Rep. 68; *Dyer v. Maine Cent. R. Co.*, 99 Me. 195; s. c. 58 Atl. Rep. 994; 67 L. R. A. 416; *Alabama &c. R. Co. v. Barrett*, 78 Miss. 432; s. c. 28 South. Rep. 820; *Drake v. Yazoo &c. R. Co.*, 79 Miss. 84; s. c. 29 South. Rep. 788; *Anderson v. Oregon R. Co.*, 45 Ore. 211; s. c. 77 Pac. Rep. 119; *Tyler &c. R. Co. v. Hitchins*, 26 Tex. Civ. App. 400; s. c. 63 S. W. Rep. 1069; *White v. New York &c. R. Co.*, 99 Va. 357; s. c. 38 S. E. Rep. 180; 3 Va. Sup. Ct. Rep. 250; *Norfolk &c. R. Co. v. Fritts*, 103 Va. 687; s. c. 49 S. E. Rep. 971. Though plaintiff makes out a *prima facie* case by proving that the fire by which her property was destroyed was set by sparks emitted by defendant's engine, requiring defendant to rebut the same, the burden of proof on the whole case does not shift: *St. Louis Southwestern R. Co. v. Moss*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 281.

³⁹ *Minneapolis Sash &c. Co. v. Great Northern R. Co.*, 83 Minn. 370; s. c. 86 N. W. Rep. 451.

⁴⁰ *Scott v. Texas &c. R. Co.*, 93 Tex. 625; s. c. 57 S. W. Rep. 801; *rev'g s. c. 56 S. W. Rep. 97.*

§ 2286. Cases Denying this Presumption.⁴¹

§ 2288. When this Presumption Deemed Rebutted.—While proof of the fact that the fire was communicated from the defendant's engine makes a *prima facie* case entitling the plaintiff to recover unless rebutted, the defendant need only meet this evidence, he is not required to show his freedom from negligence by a preponderance of the evidence.⁴² A *prima facie* case of negligence will be regarded as rebutted by evidence that the locomotive was equipped with a proper spark-arrester, and that this spark-arrester was in good order, and that the locomotive was carefully managed at the time by skillful employes.⁴³ The statutory presumption of negligence, from proof that the fire was caused by the defendant's locomotive, is not rebutted by testimony merely that the defendant had adopted the latest improvements in spark-arresters; it must also appear that the engine was thus equipped at the time the fire was set out.⁴⁴

§ 2291. Negligence in Communicating the Fire Provable Wholly by Circumstantial Evidence.⁴⁵

§ 2293. Emission of Sparks or Coals of Extraordinary Size or in Extraordinary Quantities Deemed Evidence of Negligence.⁴⁶

⁴¹ See generally: Toledo &c. R. Co. v. Fenstermaker, 163 Ind. 534; s. c. 72 N. E. Rep. 561; Peck v. New York &c. R. Co., 165 N. Y. 347; s. c. 59 N. E. Rep. 206; rev'g s. c. 55 N. Y. Supp. 1121; White v. New York &c. R. Co., 90 App. Div. (N. Y.) 356; s. c. 85 N. Y. Supp. 497; Stephenson v. Pennsylvania R. Co., 20 Pa. Super. Ct. 157. The mere fact that a fire started from a spark from a locomotive does not alone justify an inference that the fire originated on the railroad right of way: Atlantic Coast Line R. Co. v. Watkins, 104 Va. 154; s. c. 51 S. E. Rep. 172.

⁴² Gulf &c. R. Co. v. Johnson, 28 Tex. Civ. App. 395; s. c. 67 S. W. Rep. 182.

⁴³ Southern Ry. Co. v. Pace, 114 Ga. 712; s. c. 40 S. E. Rep. 723; Toledo &c. R. Co. v. Valodin, 109 Ill. App. 132; Toledo &c. R. Co. v. Parks, 163 Ind. 592; s. c. 72 N. E. Rep. 636; Olmstead v. Oregon Short Line R. Co., 27 Utah 515; s. c. 76 Pac. Rep. 557.

⁴⁴ Southern R. Co. v. Puckett, 121 Ga. 322; s. c. 48 S. E. Rep. 968.

⁴⁵ See generally in support of rule: E. Swindell & Co. v. Alabama

R. Co., 123 Ga. 311; s. c. 51 S. E. Rep. 386; Alabama &c. Ry. Co. v. Barrett, 78 Miss. 432; s. c. 28 South. Rep. 820; Peck v. New York &c. R. Co., 165 N. Y. 347; s. c. 59 N. E. Rep. 206; rev'g s. c. 55 N. Y. Supp. 1121. Evidence that engines had previously emitted sparks setting fires at the upgrade, where the house was burned, tends to show the possibility, and, in the absence of any other apparent cause, the probability that some engine caused the fire: McGinn v. Platt, 177 Mass. 125; s. c. 58 N. E. Rep. 175. The negligence of the defendant in suffering the escape of fire from its right of way may be established by proof of the setting fire by sparks from its locomotive to dry grass and rubbish which had accumulated through negligence on its right of way, so that by the natural progress of the fire it spread itself beyond the right of way, without any proof of negligence of defendant in failing to prevent the escape of the fire from the right of way: Pittsburgh &c. R. Co. v. Iddings, 28 Ind. App. 504; s. c. 62 N. E. Rep. 112.

⁴⁶ The emission of sparks unusual in quantity, such as would not be

§ 2294. **Other Evidence of Negligence.**—A presumption of negligence does not necessarily follow from the fact that the railroad employes aided in putting out the fire in question.⁴⁷ Where the fire is negligently caused by sparks from a locomotive, and property not adjoining the right of way is damaged, the length of time the fire has been burning, and the distance to the property from the right of way, while not determinative, may be considered on the question whether the negligence of the railroad company was the proximate cause of the injury.⁴⁸ Evidence that the sparks emitted at the time the fire was set by the engine were unusual in quantity and size, and that the witness had never seen it throw out fire that way before, has been held admissible.⁴⁹ Evidence that the defendant railroad ran along the side of the plaintiff's farm has been held sufficient, in the absence of evidence to the contrary, to show the ownership and operation of the railroad by the defendant.⁵⁰

§ 2299. **Damages Proximate Notwithstanding the Intervention of Intermediate Buildings, Fields, etc., which Facilitate the Progress of the Flames.**⁵¹—The principle here indicated does not obtain in New York. Here the railroad company is not liable to the owners of land not abutting on its right of way for damages caused by fire communicated through abutting and intervening lands over which the railroad had no control.⁵²

emitted from a well-constructed locomotive, will justify the jury in finding negligence in setting out a fire: *Peck v. New York & C. R. Co.*, 165 N. Y. 347; s. c. 59 N. E. Rep. 206; rev'g s. c. 55 N. Y. Supp. 1121. A verdict against a railroad company for fire set by sparks from its locomotive is warranted, on the ground that the spark arrester was not of the most approved kind, or was not in good order and repair, or that the locomotive was not carefully and skillfully handled, by the fact that the fire caught seventy feet from the track: *Texas & C. R. Co. v. Rice* (Tex. Civ. App.), 59 S. W. Rep. 833. A finding that a fire was caused by the company's negligence was sustained by evidence that the fire broke out immediately after an engine had passed; that the engineer, soon after, examined the engine, and found that the door in the spark arrester had fallen down, permitting sparks to escape freely; and that on previous occasions the engine had thrown sparks: *Jamieson v. New York & C.*

R. Co., 11 App. Div. (N. Y.) 50; s. c. 42 N. Y. Supp. 915; s. c. aff'd, 162 N. Y. 630; 57 N. E. Rep. 1113.

⁴⁷*Clarke v. New York & C. R. Co.*, 26 R. I. 59; s. c. 58 Atl. Rep. 245.

⁴⁸*Alabama & C. R. Co. v. Barrett*, 78 Miss. 432; s. c. 28 South. Rep. 820.

⁴⁹*Birmingham R. & C. Co. v. Hinton*, 141 Ala. 606; s. c. 37 South. Rep. 635.

⁵⁰*Kerr v. Quincy & C. R. Co.*, 113 Mo. App. 1; s. c. 87 S. W. Rep. 596.

⁵¹That the negligence of the railroad company in starting a fire on its right of way is the proximate cause of damages to land not adjoining the right of way to which the fire is carried after it has burned its way over intervening property, see: *Illinois Cent. R. Co. v. Almon*, 100 Ill. App. 530; *Alabama & C. Ry. Co. v. Barrett*, 78 Miss. 432; s. c. 28 South. Rep. 820; *Phillips v. Durham & C. R. Co.*, 138 N. C. 12; s. c. 50 S. E. Rep. 462; *St. Louis & C. R. Co. v. Gentry* (Tex. Civ. App.), 80 S. W. Rep. 844.

⁵²*Van Inwegen v. Port Jervis & C.*

§ 2303. **When Recovery not Excluded by the Presence of Intervening Agencies.**—Where a fire negligently set out is temporarily stayed, its fresh start will not be regarded as caused by a new and independent agency so as to relieve the company from liability for property thereafter consumed.⁵³ A wind carrying a fire beyond the right of way is not generally regarded as an intervening cause such as will break the chain of causation.⁵⁴

§ 2305. **Intervening Negligence of Third Persons.**—A railroad company cannot defend on the ground that the fire causing the damage was communicated from a stove in a car which was under the control of a shipper. In this situation, as a matter of law, both the railroad company and the shipper are jointly liable for the latter's negligence.⁵⁵

§ 2307. **Liability for Ulterior, Collateral or Consequential Damages Occasioned by the Burning.**—In a case where crops were fired by sparks thrown from the defendant's engine and the plaintiff, while endeavoring to save some of the property, became surrounded by the flames, and in attempting to escape stumbled and was severely burned, it was held that the defendant's negligence in setting out the fire was not the proximate cause of the plaintiff's injuries.⁵⁶

§ 2313. **Reasonable Care only is Required of the Land-Owner.**—The owner of premises adjoining a railroad is required to take such care of his property to protect it from fire communicated from the locomotives as a man of ordinary prudence would employ under the particular circumstances, but if through his own negligence his property is consumed, or, if such negligence concurs with the negligence of the railroad company and proximately contributes to cause the loss, he cannot recover from the railroad company for such loss.⁵⁷ The rule does not demand that owners of property along the line of a railroad shall keep their premises in such order that danger from fire cannot arise.⁵⁸

§ 2314. **Not Negligence to Use his Property in the Ordinary Way, as though the Railway were not there.**—While the owner of property

R. Co., 165 N. Y. 625; s. c. 58 N. E. Rep. 878; rev'g s. c. 53 N. Y. Supp. 1025; Hoffman v. King, 160 N. Y. 618.

⁵³ St. Louis &c. R. Co. v. League, — Kan. —; s. c. 80 Pac. Rep. 46.

⁵⁴ Chicago &c. R. Co. v. Lesh, 158 Ind. 423; s. c. 63 N. E. Rep. 794; Alabama &c. R. Co. v. Johnston, 128 Ala. 283; s. c. 29 South. Rep. 771.

⁵⁵ Boston &c. R. Co. v. Sargent, 72 N. H. 455; s. c. 57 App. Rep. 688.

⁵⁶ Logan v. Wabash R. Co., 96 Mo. App. 461; s. c. 70 S. W. Rep. 734.

⁵⁷ St. Louis &c. R. Co. v. Crabb (Tex. Civ. App.), 80 S. W. Rep. 408.

⁵⁸ Phillips v. Durham &c. R. Co., 138 N. C. 12; s. c. 50 S. E. Rep. 462.

adjacent to a railroad track must use ordinary care in the management thereof to protect it from fire, he is not required to discontinue the ordinary beneficial use of his property, although such use might increase to some extent the hazard from fire. The property owner has a right to presume that a railroad company will not be guilty of negligence, and he will not be imputed with negligence in using his property in any manner he would have used it had the railroad not passed near his property.⁵⁹

§ 2315. Not Negligence to Allow Combustible Material to Accumulate near the Right of Way of a Railroad Company.—An adjacent land-owner will not be charged with contributory negligence, as a matter of law, because he allows combustible material to accumulate on his premises adjoining a railroad. He is not bound to anticipate the negligence of the railroad and guard against it.⁶⁰ Accordingly the owners of cotton were not imputed with negligence in storing it on lots adjoining the right of way within fifty⁶¹ and eighty feet of the track.⁶² For stronger reasons the owner of property of a combustible nature should not be imputed with negligence because he stored it on the right of way at a station pending shipment.⁶³

§ 2320. Stacking Hay near a Railroad Track.—But an adjoining land-owner may be imputed with contributory negligence where he stacks his hay in an unprotected condition in close proximity to tracks and the conditions are such as would indicate to a man of ordinary prudence the danger of fire from passing trains.⁶⁴

§ 2322. Not Contributory Negligence to Erect and Maintain Buildings near Railway Tracks.—Generally speaking, the owner of adjoining premises is not negligent in erecting a building on these premises and storing his property therein, though the building will

⁵⁹ *Cleveland &c. R. Co. v. Tate*, 104 Ill. App. 615; *Chicago &c. R. Co. v. American Strawboard Co.*, 91 Ill. App. 635; s. c. aff'd, 190 Ill. 268; 60 N. E. Rep. 518; *St. Louis &c. R. Co. v. Crabb* (Tex. Civ. App.), 80 S. W. Rep. 408.

⁶⁰ *Illinois Cent. R. Co. v. Almon*, 100 Ill. App. 530.

⁶¹ *Louisville &c. R. Co. v. Short*, 110 Tenn. 713; s. c. 77 S. W. Rep. 936; *Louisville &c. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237; s. c. 28 South. Rep. 438.

⁶² *Alabama &c. R. Co. v. Ætna Ins. Co.*, 82 Miss. 770; s. c. 35 South. Rep. 304.

⁶³ *Southern R. Co. v. Wilson*, 138

Ala. 510; s. c. 35 South. Rep. 561 (cotton); *San Antonio &c. R. Co. v. Home Ins. Co.* (Tex. Civ. App.), 70 S. W. Rep. 999 (timber).

⁶⁴ *Ft. Worth &c. R. Co. v. Dial*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 22. A charge that if plaintiff stored hay in his barn, which was fifty feet from defendant's track, with knowledge that combustible material had been allowed to accumulate on the right of way, plaintiff could not recover for a destruction of the hay by a fire originating from a spark from an engine, was erroneous: *Rutherford v. Texas &c. R. Co.* (Tex. Civ. App.), 61 S. W. Rep. 422.

be close to the railroad track.⁶⁵ So the erection of a structure on a right of way with the consent of the railroad company will not constitute contributory negligence on the part of the owner of the structure nor deprive him of a right to recover for the burning of property belonging to him not on the right of way to which the fire has been communicated through his property on the right of way.⁶⁶

§ 2324. Care of Buildings erected near Railway Tracks so as to Prevent their Taking Fire.—While the owner of property in danger of loss by fire set out by a railroad company is charged with the duty of saving it from destruction if he can do so by the exercise of reasonable care,⁶⁷ he is not bound to use unusual care in anticipation that it may be negligently destroyed.⁶⁸ The owner of a barn on premises adjoining a railroad right of way will not be imputed with contributory negligence, by reason of his storing hay in the barn, though with knowledge of the existence of combustibles on the right of way.⁶⁹ In one case it was held a question for the jury whether the owner of such a barn was negligent in leaving a window open in the direction of the track.⁷⁰

§ 2327. Contributory Negligence in Failing to Put Out the Fire.—The owner of premises is only required to use reasonable efforts to prevent the destruction of his property by fire communicated thereto by the negligence of a railroad company,⁷¹ and whether he has done so in a given case is a question of fact for the jury.⁷² It is not required that the owner engrossed in other employment requiring his immediate and constant attention—as for example, driving a herd of

⁶⁵ *St. Louis & C. R. Co. v. Miller*, 27 Tex. Civ. App. 344; s. c. 66 S. W. Rep. 139.

⁶⁶ *Kansas City & C. R. Co. v. B. F. Blaker & Co.*, 68 Kan. 244; s. c. 75 Pac. Rep. 71; 64 L. R. A. 81.

⁶⁷ *Louisville & C. R. Co. v. Samuels* (Ky.), 57 S. W. Rep. 235; 22 Ky. L. Rep. 303. Plaintiff and another obtained a license to place a storehouse on defendant's land beside a switch. An express train ran into the switch, causing a fire, which burned the storehouse. Defendant had never employed a watchman to watch that switch, and the station agent, who was joint owner with plaintiff of the storehouse, testified that he never thought it necessary. It was held that plaintiff and his associate, in placing the storehouse there under the license, assumed the ordinary risks, and defendant

was not negligent so far as they were concerned in maintaining things in the same condition after the license was granted as before: *Crofoot v. Syracuse & C. R. Co.*, 75 App. Div. (N. Y.) 157; s. c. 77 N. Y. Supp. 389.

⁶⁸ *Indiana Clay Co. v. Baltimore & C. R. Co.*, 31 Ind. App. 258; s. c. 67 N. E. Rep. 704 (not required to erect a water-works system).

⁶⁹ *Texas & C. R. Co. v. Rutherford*, 28 Tex. Civ. App. 590; s. c. 68 S. W. Rep. 825.

⁷⁰ *St. Louis & C. R. Co. v. Crabb* (Tex. Civ. App.), 80 S. W. Rep. 408.

⁷¹ *Lake Erie & C. R. Co. v. Kiser*, 25 Ind. App. 417; s. c. 58 N. E. Rep. 505; *Indiana Clay Co. v. Baltimore & C. R. Co.*, 31 Ind. App. 258; s. c. 67 N. E. Rep. 704.

⁷² *St. Louis & C. R. Co. v. League*, — Kan. —; s. c. 80 Pac. Rep. 46.

fractious cattle—should leave this employment to engage in fighting the fire.⁷³ Again, a land-owner will not be imputed with the negligence of other persons in failing to combat the fire, though such persons are in his employ, if he is personally ignorant of its existence.⁷⁴

§ 2330. Miscellaneous Cases Illustrating the Doctrines of this Chapter.⁷⁵

§ 2331. Whether the Contributory Negligence of the Property Owner was the Proximate Cause of his Loss.⁷⁶

§ 2341. Constitutionality of Statutes Making Railway Companies Liable for Fires.⁷⁷

§ 2346. What Property Embraced within these Statutes.—The words “right of way,” as used in the South Carolina statute which makes a railroad company liable for fire communicated by its locomotives, or originating on its “right of way,” do not refer to the estate or title of the railroad company in the land designated, but the words are used to designate the locality from which the fire must originate to render the railroad company liable.⁷⁸ This statute renders a railroad company liable for damages to land by destruction of timber, growing trees and turpentine boxes by fire from its locomotives.⁷⁹ The Missouri statute is held not to cover the case of baggage destroyed by fire in a depot, since in this latter case the liability is as strongly fixed under the rules making a common carrier an insurer as it could be under the statute in question.⁸⁰

§ 2349. Contributory Negligence as a Defense against this Statutory Liability.—It has been held under a statute imposing liability on the railroad company approximating that of an insurer, that the question of due care on the part of the plaintiff does not enter into the

⁷³ *Franey v. Illinois Cent. R. Co.*, 104 Ill. App. 499.

⁷⁴ *San Antonio & C. R. Co. v. Adams* (Tex. Civ. App.), 66 S. W. Rep. 578.

⁷⁵ Owner of ties storing same on right of way will be charged with contributory negligence in allowing litter to accumulate around the ties, preventing a recovery for their destruction by fire from passing locomotives: *Connelly v. Erie R. Co.*, 68 App. Div. (N. Y.) 542; s. c. 74 N. Y. Supp. 277.

⁷⁶ *Louisville & C. R. Co. v. Sullivan Timber Co.*, 138 Ala. 379 s. c. 35 South. Rep. 327 (failure to comply with ordinance requiring sidewalks

to be swept not alone proximate cause of destruction of building by fire from passing locomotive).

⁷⁷ Rev. St. Mo. 1899, § 1111, imposing absolute liability for fires set out by locomotives, is constitutional: *McFarland v. Missouri & C. R. Co.*, 94 Mo. App. 336; s. c. 68 S. W. Rep. 105.

⁷⁸ *Brown v. Carolina Midland R. Co.*, 67 S. C. 481; s. c. 46 S. E. Rep. 283.

⁷⁹ *Dent v. South-Bound R. Co.*, 61 S. C. 329; s. c. 39 S. E. Rep. 527.

⁸⁰ *Blackmore v. Missouri Pac. R. Co.*, 162 Mo. 455; s. c. 62 S. W. Rep. 993.

case. The plaintiff's negligence, to prevent a recovery, must be gross, or such as to amount to fraud; and it is proper for a court to refuse to instruct that the plaintiff must show his freedom from contributory negligence before he can recover.⁸¹

§ 2353. **What Particularity of Averment in the Complaint has been Held Sufficient.**—Negligence of the defendant has been held sufficiently averred by these allegations:—that the defendant while operating a locomotive over its road negligently permitted fire to be communicated from the locomotive to cotton of the plaintiff lying on the defendant's station platform by which the cotton was burned;⁸² that the defendant negligently selected and maintained an engine that was in an improper and defective condition, and negligently and improperly managed such engine, whereby sparks of fire were communicated therefrom and thrown onto and ignited the house in which the plaintiff lived;⁸³ that the defendant negligently and carelessly failed to exercise a degree of care proportionate to the increased danger in operating its locomotive, but negligently so operated it at such a high rate of speed as to cause it to throw out dangerous sparks;⁸⁴ that the engine which caused the fire was unskillfully and improperly constructed, and improperly and negligently managed by the defendant and its servants, and by reason of its improper and negligent management, large quantities of sparks were emitted;⁸⁵ that the defendant was operating a railroad through a village in which there was a large number of wooden buildings in close proximity to the track, and on a day when a strong wind was blowing, and it had negligently and wrongfully failed to use sufficient spark-arresters or other proper appliances to prevent the emission of sparks from its locomotives, and negligently ran the trains at such a high speed that the engines threw out unusually large and dangerous sparks, which set fire to the plaintiff's barn.⁸⁶ An allegation that a certain engine run on the defendant's road near the plaintiff's premises, by reason of its improper construction and careless management, communicated fire to the plaintiff's property destroying it, has been held a sufficient allegation of the defendant's ownership of the railroad and engine and the plaintiff's ownership of the property destroyed.⁸⁷ An allegation that the fire

⁸¹ Bowen v. Boston &c. R. Co., 179 Mass. 524; s. c. 61 N. E. Rep. 141.

⁸² Southern R. Co. v. Wilson, 138 Ala. 510; s. c. 35 South. Rep. 561.

⁸³ Birmingham R. &c. Co. v. Hinton, 141 Ala. 606; s. c. 37 South. Rep. 635.

⁸⁴ Lake Erie &c. R. Co. v. McFall, 165 Ind. 574; s. c. 72 N. E. Rep. 552.

⁸⁵ Norwich Ins. Co. v. Oregon R. Co., — Or. —; s. c. 78 Pac. Rep. 1025.

⁸⁶ Lake Erie &c. R. Co. v. McFall, 165 Ind. 574; s. c. 72 N. E. Rep. 552.

⁸⁷ Sims v. Chicago &c. R. Co., 83 Mo. App. 246.

which injured the plaintiff's property originated in consequence of an act of the defendant railroad company has been held equivalent to an allegation that the fire "originated in consequence of the act of any of the defendant's authorized agents or employes," as prescribed by the laws of South Carolina.⁸⁸ An averment that the defendant railroad company negligently permitted fire to escape from its right of way has been held not open to the objection that it pleaded negligence in general terms.⁸⁹

§ 2356. How Aver Negligence in Allowing Fire to Escape.⁹⁰

§ 2358. Examples of Complaints Stating a Good Cause of Action.⁹¹

⁸⁸ *Brown v. Carolina Midland R. Co.*, 67 S. C. 481; s. c. 46 S. E. Rep. 283.

⁸⁹ *Pittsburg &c. R. Co. v. Wise*, 36 Ind. App. 59; s. c. 74 N. E. Rep. 1107.

⁹⁰ A cause of action is sufficiently stated by a complaint alleging that a railroad company so negligently conducted its engine that it fired thick grass on the right of way adjacent to the plaintiff's property, and negligently let the same spread to such property, causing damage without fault of the plaintiff: *Lake Erie &c. R. Co. v. Miller*, 24 Ind. App. 662; s. c. 37 N. E. Rep. 596. In an action against a railroad company for damages resulting from fire, the first paragraph of complaint set forth that the defendant negligently permitted combustible material to accumulate on the right of way, into which combustible material it negligently permitted its engine to cast sparks of fire, which fire was negligently permitted to escape to the plaintiff's land. The second paragraph was like the first, except that there was no averment of negligence in permitting the engine to cast sparks. A third paragraph was like the second, except that there was no averment of negligence in permitting combustible material to accumulate on the right of way. It was held that each paragraph sufficiently alleged that the injuries complained of resulted from the negligence of the company in permitting the escape of the fire, and that demurrers thereto were properly overruled: *Wabash &c. R. Co. v. Schultz*, 30 Ind. App. 495; s. c. 64 N. E. Rep. 421. An allegation that defendant carelessly permitted fire

from the engine to be thrown out, whereby litter which defendant had permitted to accumulate on its right of way ignited, and the fire spread therefrom and burned the plaintiff's property, was held not to amount to an averment that the railway company negligently permitted the combustible matter to accumulate: *Southern R. Co. v. Horine*, 115 Ga. 664; s. c. 42 S. E. Rep. 52.

⁹¹ A cause of action under the common law without regard to the statute is sufficiently set out by a complaint alleging that defendant, a railroad company, willfully, carelessly and negligently set fire to grass and weeds on its premises, which premises were adjacent to the land of plaintiff, and carelessly and negligently suffered the fire to escape beyond defendant's premises: *Clark v. San Francisco &c. R. Co.*, 142 Cal. 614; s. c. 76 Pac. Rep. 507. A complaint, which, after alleging that defendant operated a railroad near defendant's house, then alleged that plaintiff's house was destroyed by fire, which "was communicated to plaintiff's said building from an engine or locomotive operated by defendant. . . . and said fire was caused by the negligence or carelessness of defendant in operating or running said locomotive," has been sustained against a demurrer upon the ground of uncertainty and indefiniteness in its allegations of negligence: *Alabama &c. R. Co. v. Taylor*, 129 Ala. 238; s. c. 29 South. Rep. 673. See also *Alabama &c. R. Co. v. Johnston*, 128 Ala. 283; s. c. 29 South. Rep. 771. A complaint for the burning of property on a railroad platform is not defective

§ 2360. **Necessity of Definite Statement as to Time of the Accident.**—Under the Georgia practice where there are circumstances under which the defendant is entitled to know the exact date of the fire in order to make his defense, he must call for particularity of dates by demurrer.⁹²

§ 2361. **What Allegations will not Authorize Particular Evidence: Variance between Allegations and Proof.**—Under an allegation that a fire was communicated to the plaintiff's property from a depot, he may prove that the stove in the depot was defective.⁹³

§ 2362. **Allegations to Show that the Fire was the Proximate Cause of the Injury.**⁹⁴

for failure to allege that the property was on the platform with the defendant's consent: *Southern R. Co. v. Wilson*, 138 Ala. 510; s. c. 35 South. Rep. 561. The complaint alleging that there was a large accumulation of combustible matter on defendant's right of way where the fire was set, and that, for a long time prior to the fire, defendant had negligently suffered such matter so to remain during the hot season, until it was ignited by sparks from a passing locomotive, which fire, through defendant's negligence, escaped and communicated to plaintiff's property, was held sufficiently certain and definite, both as to the extent of the accumulation of combustible matter, etc., and also as to the time during which it had been permitted to remain on the right of way: *Pittsburg & C. R. Co. v. Wise*, 36 Ind. App. 59; s. c. 74 N. E. Rep. 1107. A complaint alleging the plaintiff's ownership of the property destroyed, that it was started in a building along the side of the track of the railroad company, that the building was set on fire and the goods destroyed by sparks thrown from a locomotive belonging to and operated by the defendant, and that the fire was set by the negligence of the defendant, in having a defectively constructed and equipped engine, was held sufficient without further alleging what duty the law imposed on the defendant as to the protection of others against fire set by defectively constructed engines or that the building was not on defendant's land or that the plaintiff was not a gratuitous

licensee of the building from the defendant: *Adriance Platt & Co. v. Lehigh Valley R. Co.*, 105 App. Div. (N. Y.) 33; s. c. 93 N. Y. Supp. 473. An allegation that the meshes of the arrester were too large and were insufficient to prevent the escaping of sparks and live coals therefrom, and that when the fire was set out the locomotive was so negligently equipped, by such meshes being too large, and by reason of the old, worn, broken, and burned condition of the arrester and meshes, and that the engine was then so negligently managed by defendant, in that too much fuel was supplied, and too much steam put on, etc., it threw out coals of fire of unusual size, character, and quantity, was held to charge negligence on the part of defendant in the construction, equipment, and management of the locomotive with sufficient certainty and definiteness: *Pittsburg & C. R. Co. v. Wise*, 36 Ind. App. 59; s. c. 74 N. E. Rep. 1107.

⁹² *Southern R. Co. v. Puckett*, 121 Ga. 322; s. c. 48 S. E. Rep. 968.

⁹³ *Brown v. Carolina Midland R. Co.*, 67 S. C. 481; s. c. 46 S. E. Rep. 283.

⁹⁴ That the defendant's negligence was the proximate cause of the plaintiff's injury was held sufficiently alleged by an averment that the defendant negligently set fire to and burned the house in which the plaintiff resided; that he was in the house when it was ignited and was burned while escaping from it during the fire: *Birmingham R. & C. Co. v. Hinton*, 141 Ala. 606; s. c. 37 South. Rep. 635. A complaint for

§ 2365. When Proper to Permit an Amendment of Complaint.—

It has been held proper to allow the amendment of an allegation that a railroad company "by the use and running of their engines, locomotives or other machinery, or otherwise by the negligence of their agents, employes, or servants, set fire to and destroyed," by the addition of a paragraph alleging that the fire in question was caused by the negligence of a section foreman in the employment of the company, and by setting forth the particulars as to the origin of the fire.⁹⁵ In another case where a petition in an action against a railroad company for damages resulting from fire alleged that the fire was negligently communicated from one of the defendant's engines to the grass growing along the track, it was held not error to permit an amendment, more than seven years after the filing of the original petition, by adding that the company was negligent in permitting dry vegetation to accumulate and remain on the right of way where the fire was set out, as the amendment did not set out a separate and distinct cause of action.⁹⁶

§ 2368. Evidence to Show that the Fire was Communicated from Defendant's Locomotive.⁹⁷—It has been held that testimony of the plaintiff that the engines which went by immediately before the fire started were attached to regular trains of the defendant railroad company is sufficient to show ownership of the engines in the defendant in the absence of rebutting testimony on that issue.⁹⁸

injuries to a highway caused by fire escaping from a railroad right of way, which alleges that defendant negligently permitted dry grass, etc., to accumulate and remain on the right of way; that the peaty soil of the right of way, the adjoining lands and the highway was dry and combustible through drought; that defendant by means of fire from its passing engine set fire to and ignited the combustibles on the right of way, and that the fire thus set out, through defendant's negligence, spread and communicated to the peaty surface soil, and through the defendant's negligence escaped from the right of way to the peaty lands adjoining, and through the defendant's negligence escaped to and communicated with and ignited the roadway, etc., sufficiently shows defendant's negligence was the proximate cause of the injury: *Pittsburgh & C. R. Co. v. Iddings*, 23 Ind. App. 504; s. c. 62 N. E. Rep. 112.

⁹⁵ *Southern R. Co. v. Ward*, 110 Ga. 793; s. c. 36 S. E. Rep. 78.

⁹⁶ *St. Louis & C. R. Co. v. Ludlum*, 63 Kan. 719; s. c. 66 Pac. Rep. 1045.

⁹⁷ That the fire which destroyed the property originated from sparks from a passing locomotive may be shown by circumstantial evidence, see: *Kansas City & C. R. Co. v. B. F. Blaker & Co.*, 68 Kan. 244; s. c. 75 Pac. Rep. 71; 64 L. R. A. 81. That evidence that the fire sprang up immediately or very soon after the passage of a train, and that there was no fire in the vicinity before, and no apparent cause for the fire, will support a finding that the fire was set out by the engine, see: *Southern R. Co. v. Williams*, 113 Ga. 335; s. c. 38 S. E. Rep. 744; *Central of Georgia R. Co. v. Trammell*, 114 Ga. 312; s. c. 40 S. E. Rep. 259; *Toledo & C. R. Co. v. Fenstermaker*, 163 Ind. 534; s. c. 72 N. E. Rep. 561; *Black v. Minneapolis & C. R. Co.*, 122 Iowa 32; s. c. 96 N. W. Rep. 984; *Toledo & C. R. Co. v. Parks*, 163 Ind. 592; s. c. 72 N. E. Rep. 636.

⁹⁸ *Spink v. New York & C. R. Co.*, 26 R. I. 115; s. c. 58 Atl. Rep. 499.

§ 2370. **Evidence that the Engine Set Other Fires.**⁹⁹—But the plaintiff is not entitled to show that a year later, and at another place, the engine in question set out other fires.¹⁰⁰

§ 2371. **Evidence of Other and Distinct Fires Set by Other Engines.**¹⁰¹—In connection with other evidence to show that the plaintiff's property was set on fire by an unknown passing engine, it may be shown that a short time before this a passing engine had thrown sparks as far from the track as the location of the plaintiff's property.¹⁰²

§ 2377. **Other Evidence Admissible for the Plaintiff in Such Actions.**—In rebuttal of the testimony of the defendant that an engine was so equipped as to make the throwing of sparks impossible, evi-

⁹⁹ That such evidence is admissible, see: *Hendricks v. Southern R. Co.*, 123 Ga. 342; s. c. 51 S. E. Rep. 415; *Jacobs v. New York & C. R. Co.*, 107 App. Div. (N. Y.) 134; s. c. 94 N. Y. Supp. 954. Where a fire occurred near a railroad right of way immediately after the passing of a train, and there was a strong wind blowing from the track towards the place where the fire started, and a fire had started near the same place a few days before, immediately after the passing of a train, a finding that the fire was started by sparks from the engine was supported by the evidence: *San Antonio & C. R. Co. v. Adams* (Tex. Civ. App.), 66 S. W. Rep. 578. Evidence that, shortly before the day on which a particular fire occurred, a locomotive of the company had thrown out sparks from which straw had become ignited, was properly rejected where there was no evidence that such locomotive was run on the day in question: *Akins v. Georgia R. & C. Co.*, 111 Ga. 815; s. c. 35 S. E. Rep. 671.

¹⁰⁰ *Cheek v. Oak Grove Lumber Co.*, 134 N. C. 225; s. c. 46 S. E. Rep. 488; 47 S. E. Rep. 400.

¹⁰¹ That evidence of other and distinct fires set out by other engines is admissible where the engine actually setting out the fire cannot be identified, see: *Alabama & C. R. Co. v. Johnston*, 128 Ala. 283; s. c. 29 South. Rep. 771; *Pittsburgh & C. R. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322; s. c. 56 N. E. Rep. 766; *St. Louis & C. R. Co. v. Lawrence*, 4 Ind. Ter. 611; s. c. 76 S. W. Rep.

254; *Black v. Minneapolis & C. R. Co.*, 122 Iowa 32; s. c. 96 N. W. Rep. 984; *Alabama & C. R. Co. v. Aetna Ins. Co.*, 82 Miss. 770; s. c. 35 South. Rep. 304; *Manchester Assur. Co. v. Oregon R. & C. Co.*, — Ore. —; s. c. 79 Pac. Rep. 60; *Shelly v. Philadelphia & C. R. Co.*, 211 Pa. 160; s. c. 60 Atl. Rep. 581; *Louisville & C. R. Co. v. Short*, 110 Tenn. 713; s. c. 77 S. W. Rep. 936. That evidence of fires set out by other locomotives is inadmissible where the locomotive setting out the fire is identified, see: *Sprague v. Atchison & C. R. Co.*, 70 Kan. 359; s. c. 78 Pac. Rep. 828; *Hygienic Plate-Ice Mfg. Co. v. Raleigh & C. R. Co.*, 126 N. C. 797; s. c. 36 S. E. Rep. 279; *Shelly v. Philadelphia & C. R. Co.*, 211 Pa. 160, 165; s. c. 60 Atl. Rep. 581, 582; *Norfolk & C. R. Co. v. Briggs*, 103 Va. 105; s. c. 48 S. E. Rep. 521. Where defendant's evidence tended to prove that the only locomotive which could have caused the fire was in good repair and fitted with the most approved spark arrester, evidence that some one of defendant's locomotives had caused a fire a few days before that sued for was inadmissible, there being nothing to show that the two fires were caused by the same locomotive: *McFarland v. Gulf & C. R. Co.*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 450.

¹⁰² *Mills v. Louisville & C. R. Co.*, 116 Ky. 309; s. c. 76 S. W. Rep. 29; 25 Ky. L. Rep. 488; *Jacobs v. New York & C. R. Co.*, 107 App. Div. (N. Y.) 134; s. c. 94 N. Y. Supp. 954; *Louisville & C. R. Co. v. Fort*, 112 Tenn. 432; s. c. 80 S. W. Rep. 429.

dence is admissible for the plaintiff that no appliances had yet been devised that would prevent locomotives under all circumstances from throwing sparks.¹⁰³ Where the evidence is circumstantial, and one of the questions to be determined by the jury is whether a locomotive could throw sparks to the distance claimed by the plaintiff, expert witnesses may testify as to the distance sparks would be thrown by an engine laboring up a grade as heavy as that opposite the plaintiff's property.¹⁰⁴ In an action of this character a witness, though not an expert, may testify as to how the quantity of sparks thrown by the engine at the time compared with that thrown by other engines along the road.¹⁰⁵ It has been held competent to prove that, shortly before the fire, cinders were found on the roof of the burned building as showing that coals could be thrown to that distance.¹⁰⁶ The jury need not accept as conclusive the statements of witnesses that the engine was in order and carefully operated, though this evidence is not contradicted, but they may consider all the evidence bearing on the condition of the engine and the mode of its operation and the circumstances surrounding the fire.¹⁰⁷

§ 2379. **Admissibility of Evidence under Particular Allegations.**¹⁰⁸

§ 2380. **Evidence for the Defendant.**—As tending to show that the fire could have been started by an incendiary, evidence is admissible on the behalf of the defendant that immediately before the fire was discovered a person having an interest in the contents of the building was seen running from the premises.¹⁰⁹ Evidence that the engineer was cautious and very careful about allowing sparks to escape is irrelevant.¹¹⁰

§ 2381. **Evidence on the Question of Damages.**—In a case where the plaintiff claimed that his meadow was permanently damaged by the fire set out by the defendant, which consumed the grass standing thereon, evidence of a witness who owned land some miles distant,

¹⁰³ German Ins. Co. v. Chicago &c. R. Co., 128 Iowa 386; s. c. 104 N. W. Rep. 361; Bowen v. Boston &c. R. Co., 179 Mass. 524; s. c. 61 N. E. Rep. 141.

¹⁰⁴ Gibbs v. St. Louis &c. R. Co., 104 Mo. App. 276; s. c. 78 S. W. Rep. 835.

¹⁰⁵ Orient Ins. Co. v. Northern Pac. R. Co., 31 Mont. 502; s. c. 78 Pac. Rep. 1036.

¹⁰⁶ Gorham Mfg. Co. v. New York &c. R. Co., 27 R. I. 35; s. c. 60 Atl. Rep. 638.

¹⁰⁷ St. Louis &c. R. Co. v. Coombs, — Ark. —; s. c. 88 S. W. Rep. 595.

¹⁰⁸ A railroad company having ad-

mitted that the fire was caused by sparks which escaped from its engine, and pleaded that the engine was furnished with a proper spark arrester, which was properly adjusted and in perfect condition, its plea was, in effect, a plea of confession and avoidance, and it therefore properly assumed the burden of proof: Illinois Cent. R. Co. v. Barret (Ky.), 66 S. W. Rep. 9; s. c. 23 Ky. L. Rep. 1755.

¹⁰⁹ Missouri &c. R. Co. v. Jordan (Tex. Civ. App.), 82 S. W. Rep. 791.

¹¹⁰ McFarland v. Gulf &c. R. Co., — Tex. Civ. App. —; s. c. 88 S. W. Rep. 450.

which had been burned at about the same time of the year and under similar circumstances, that it was not injured by such burning, was held admissible, although his lot was not shown to be similarly situated.¹¹¹ Evidence of the cost of personal property alleged to have been destroyed by fire negligently set out by the defendant's locomotive is admissible on the question of value at the time of its destruction, but is insufficient, standing alone, to sustain a recovery.¹¹² Whether the property injured or destroyed was insured has no bearing on the issue of negligence and evidence directed thereto is irrelevant where offered for that purpose.¹¹³

§ 2384. **Rule of Damage where the Property is Insured.**—In Kansas it is the rule that the owner of insured property destroyed by fire set out by a railroad company may recover from the railroad company the excess in the value of his property over the amount paid him by the insurance company.¹¹⁴ The clause in a Maine statute making a railroad company liable for losses by fire set out by its engines and giving the railroad company the benefit of any insurance on the property, is held by the courts of that State to apply only to cases where the liability is imposed by the statute and not to those cases where it is liable because of its own negligence.¹¹⁵

§ 2386. **Questions of Fact for the Jury.**¹¹⁶—The construction of contracts exempting railroad companies from liability for damages caused by a fire conform to the general rule in other branches of the law and is a question solely for the determination of the court.¹¹⁷ In a

¹¹¹ *Castner v. Chicago & C. R. Co.*, 126 Iowa 581; s. c. 102 N. W. Rep. 499.

¹¹² *St. Louis & C. R. Co. v. Moss*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 281.

¹¹³ *Missouri & C. R. Co. v. Jordan* (Tex. Civ. App.), 82 S. W. Rep. 791. In an action against a railroad company for loss of a stock of goods by fire communicated by the defendant's engine, the rejection of evidence that plaintiff had transferred his cause of action to insurers under subrogation clauses of the policies for the amounts paid to the plaintiff by the insurers on account of the loss was not cause for reversal; the insurers being parties to the suit, and the pleadings showing that plaintiff had an interest in the recovery over the interest claimed by the insurers: *Missouri & C. R. Co. v. Keahey*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 1102.

¹¹⁴ *Kansas City & C. R. Co. v. B. F. Blaker & Co.*, 68 Kan. 244; s. c. 75 Pac. Rep. 71; 64 L. R. A. 81.

¹¹⁵ *Dyer v. Maine Cent. R. Co.*, 99 Me. 195; s. c. 58 Atl. Rep. 994; 67 L. R. A. 416.

¹¹⁶ That the question whether the defendant has overcome a *prima facie* case made by the plaintiff is for the jury, see: *Norris v. Baltimore & C. R. Co.*, 109 Fed. Rep. 591; s. c. 48 C. C. A. 561; *Central of Georgia R. Co. v. Trammell*, 114 Ga. 312; s. c. 40 S. E. Rep. 259; *Atchison & C. R. Co. v. Geiser*, 68 Kan. 281; s. c. 75 Pac. Rep. 68; *Atchison & C. R. Co. v. Ireton*, 63 Kan. 888; s. c. 66 Pac. Rep. 987; *Illinois Cent. R. Co. v. Barret* (Ky.), 66 S. W. Rep. 9; s. c. 23 Ky. L. Rep. 1755; *Baker v. Roanoke & C. R. Co.*, 133 N. C. 31; s. c. 45 S. E. Rep. 347; *Matthews v. Pittsburg & C. R. Co.*, 18 Pa. Super. Ct. 10.

¹¹⁷ *Mann v. Pere Marquette R. Co.*,

case where the plaintiff's *prima facie* case was met by evidence of the defendant that the engine was equipped with the latest practical devices to prevent the emission of sparks and was properly handled by competent workmen, and the plaintiff failed to show any actionable negligence on the part of the defendant, it was held that the question of the defendant's negligence was solely for the court and it was error to submit it to the jury.¹¹⁸

§ 2387. **Instructions which were not Erroneous.**—An instruction that the word "originate" means that the fire must have originated in the grass or combustible matter on the defendant's right of way, and must have been originated therein by sparks from the defendant's engine, has been held not open to the objection that it imposed on the plaintiff the duty of proving by more than a preponderance of evidence that the fire originated in combustible matter on the railroad right of way from sparks emitted from its engine, and was communicated to his land.¹¹⁹ An instruction that the measure of damages was the difference between the market value of the land immediately before and immediately after the fire, making no mention of possible depreciation from any other cause, was held not erroneous, where there was no contention that any other factor had intervened to effect the value.¹²⁰ An instruction that if the jury believed the sparks escaped from one of the defendant's engines and set the fire and the plaintiff did not contribute thereto, they should find for the plaintiff, was not erroneous as being on the weight of evidence, in assuming that the setting of the fire by sparks established negligence.¹²¹ An instruction that, if the fire was caused by sparks from the engine, such fact would *prima facie* establish negligence of the defendant, was held not erroneous as being on the weight of the evidence.¹²² An instruction that, if the fire was started by sparks emitted from one of the defendant's engines, the defendant would be liable unless at the time it had used on such engine the best appliances for preventing the setting out of fire, and such engine was properly handled, was held not objectionable as eliminating the defendant's duty to keep the engine in repair.¹²³ An instruction was upheld which told the jury that if the

135 Mich. 210; s. c. 97 N. W. Rep. 721; 10 Det. Leg. N. 764.

¹¹⁸ Louisville & C. R. Co. v. Marbury Lumber Co., 125 Ala. 237; s. c. 28 South. Rep. 438; Alabama & C. R. Co. v. Taylor, 129 Ala. 238; s. c. 29 South. Rep. 673.

¹¹⁹ Jackson v. Missouri & C. R. Co. (Tex. Civ. App.), 78 S. W. Rep. 724.

¹²⁰ Chicago & C. R. Co. v. Brown, 157 Ind. 544; s. c. 60 N. E. Rep. 346.

¹²¹ Texas & C. R. Co. v. Woldridge (Tex. Civ. App.), 63 S. W. Rep. 905.

¹²² Gulf & C. R. Co. v. Jordan, 25 Tex. Civ. App. 82; s. c. 60 S. W. Rep. 784.

¹²³ German Ins. Co. v. Chicago & C. R. Co., 128 Iowa 386; s. c. 104 N. W. Rep. 361.

defendant permitted inflammable material to exist on its right of way, which became ignited by sparks from the engine, and the fire spread across the lands of several persons to the property of the plaintiff, the burden was on the defendant to show that its engine was properly equipped to prevent the escape of sparks, and, if its failure so to equip was the proximate cause of the plaintiff's property being destroyed, the defendant was liable.¹²⁴

§ 2388. **Instruction, the Giving of which was Erroneous.**—An instruction was held argumentative which told the jury that they had no right to speculate as to how the fire arose, and that before they could find for the plaintiff, the evidence must satisfy them that the fire arose from a spark from the defendant's engine, and was communicated to the plaintiff's property in one of the methods alleged in the complaint, and that, if the evidence failed on both or either of these points, the verdict should be for the defendant.¹²⁵ Another instruction was held open to the objection that it charged on the weight of the evidence wherein it informed the jury that for the railroad company to permit the accumulation of dry and inflammable matter on its right of way, and for it to remain there, was such negligence on the defendant's part as to make it liable for any damage occasioned thereby.¹²⁶ An instruction defining the reasonable care required of a railroad company to be "the actual adoption of the most approved and best known spark-arresters and appliances" was held incorrect in the use of the word "adoption" instead of the word "procuring."¹²⁷ A charge to find for the defendant if it had exercised "all reasonable care and caution" to keep its spark-arrester in repair was held to impose too high a degree of care on the railroad company.¹²⁸

¹²⁴ Phillips v. Durham &c. R. Co., Tex. Civ. App. 82; s. c. 60 S. W. 138 N. C. 12; s. c. 50 S. E. Rep. 462. Rep. 784.

¹²⁵ Louisville &c. R. Co. v. Sullivan ¹²⁷ Anderson v. Oregon R. Co., 45 Timber Co., 138 Ala. 379; s. c. 35 Or. 211; s. c. 77 Pac. Rep. 119.

South. Rep. 327.

¹²⁸ Gulf &c. R. Co. v. Jordan, 25 ¹²⁸ St. Louis &c. R. Co. v. Crabb (Tex. Civ. App.), 80 S. W. Rep. 408.

TITLE SIXTEEN.

NEGLIGENCE OF TELEGRAPH COMPANIES.

[§§ 2392-2527.]

§ 2392. **General Nature of the Liability of Such Companies.**—A telegraph company may require prepayment as a condition of the acceptance of a telegram, but if it accepts the message without this requirement, it will be held to the same degree of care and diligence that it would if prepayment of the charges had been made.¹ So the action by an addressee for damages cannot be defeated on the ground that the message was sent without charge by the sender, who was an employé of the company.² There is authority that a telegraph operator is a servant of the telegraph company and not its agent, and hence the rule that the principal is charged with the knowledge of his agent is without application.³ Where the Federal Revenue laws require the affixing of stamps to telegrams as a condition to their transmission, a telegraph company will not be liable for damages resulting from its failure to transmit a message tendered without compliance with this provision.⁴

§ 2393. **Not Insurers, but Liable for Negligence, Fraud, etc.**—A telegraph company will be liable for damages caused by the transmission and delivery of a false message put on the wires by one of its operators, where this act was within the apparent scope of his employment. The fact that it was unauthorized is not conclusive of the question. The test is whether if the message had been genuine its transmission would have been within the actual authority of the operator.⁵

¹ *Cogdell v. Western Union Tel. Co.*, 135 N. C. 431; s. c. 47 S. E. Rep. 490.

² *Western Union Tel. Co. v. Snodgrass*, 94 Tex. 284; s. c. 60 S. W. Rep. 308.

³ *Western Union Tel. Co. v. Wofford*, 32 Tex. Civ. App. 427; s. c. 74 S. W. Rep. 943.

⁴ *Western Union Tel. Co. v. Waters*, 139 Ala. 652; s. c. 36 South. Rep. 773.

⁵ *Pacific &c. Cable Co. v. Bank of Palo Alto*, 109 Fed. Rep. 369; s. c. 48 C. C. A. 413. In an action against

a telegraph company for negligence in sending a fraudulent telegram to a bank purporting to come from another bank advising the acceptance of a check, an instruction based on the theory that it was permissible for the jury to say and to find that the telegraph company was fairly charged by the language of the telegram with notice that some one other than the addressee was intending to act on the information therein given, and would be affected by it, so as to take the telegram out of the well-recognized rule that a

So a telegraph company may be liable for damages resulting from the delivery of messages sent over the wires by wire tappers where the telegraph company has taken no precautions to guard against the perpetration of fraud of this character.⁶

§ 2394. **Failure to Transmit and Deliver Correctly Constitutes Prima Facie Evidence of Negligence.**—The failure promptly to deliver a telegram of itself raises a presumption of negligence.⁷ In one case it was held that a *prima facie* case of negligence was established by proof that the name of the addressee of a telegram was changed from "Norris" to "Nortys" in the course of transmission.⁸

§ 2397. **Exceptional Rule under the Stipulation in Regard to Repeating the Message.**⁹

§ 2398. **Analogous Doctrines with Regard to the Loss of Goods by Carriers.**¹⁰

§ 2399. **Obligation of Company to Notify Sender of its Inability to Transmit.**¹¹—Where the wires are down at the time a message is

telegraph company cannot be liable to a stranger to the company and to the telegram, was held erroneous: *Western Union Tel. Co. v. Shriver*, 129 Fed. Rep. 344.

⁶ *Western Union Tel. Co. v. Uvalde Nat. Bank*, 97 Tex. 219; s. c. 77 S. W. Rep. 603; aff'g s. c. 72 S. W. Rep. 232.

⁷ *Harrison v. Western Union Tel. Co.*, 136 N. C. 381; s. c. 48 S. E. Rep. 772; *Green v. Western Union Tel. Co.*, 136 N. C. 489; s. c. 49 S. E. Rep. 165; 67 L. R. A. 985; *Hellams v. Western Union Tel. Co.*, 70 S. C. 83; s. c. 49 S. E. Rep. 12; *Poulnot v. Western Union Tel. Co.*, 69 S. C. 545; s. c. 48 S. E. Rep. 622.

⁸ *Western Union Tel. Co. v. Norris*, 25 Tex. Civ. App. 43; s. c. 60 S. W. Rep. 982.

⁹ A telegraph company is liable for any direct damages resulting from its failure on a tender of charges to repeat or trace a telegram which had not been properly transmitted: *Newsome v. Western Union Tel. Co.*, 137 N. C. 513; s. c. 50 S. E. Rep. 279.

¹⁰ The rule that a common carrier cannot be relieved from the results of its negligence because the condition of the person affected thereby is unusual is applicable also to the business of transmitting telegraph messages, and a telegraph company

cannot urge that it could not be charged with notice that the subject of a delayed death message was so large that successful embalment was impossible: *Western Union Tel. Co. v. Hamilton*, 36 Tex. Civ. App. 300; s. c. 81 S. W. Rep. 1052.

¹¹ In one case the plaintiff delivered a telegram to defendant for transmission from Detroit to New York without repeating, but requested that the message be delivered by a certain hour. The operator at Detroit, by reason of storms in New York, was unable to communicate with New York City direct, so he sent the message to Buffalo to be there repeated to destination. The message, which directed plaintiff's broker to reduce an order for the purchase of lemons, was delayed between Buffalo and New York, so that its purpose failed. It was reasoned that, in the absence of instructions to repeat the message, the operator at Detroit, who was without knowledge of the delay, was not guilty of negligence in failing to advise plaintiff that he was unable to send the message through to destination, so as to entitle plaintiff to recover for delay: *Jacob v. Western Union Tel. Co.*, 135 Mich. 600; s. c. 98 N. W. Rep. 402.

tendered for transmission the telegraph company may legally decline to receive the message, but if, with knowledge of the defect, the message is received without informing the sender of this fact the company will be liable for resulting damages if it fails promptly to transmit the message.¹² But it will not be liable, as a matter of law, for a failure to forward by some other method if the message was accepted without knowledge that it could not be transmitted.¹³ Where the message is received to be forwarded and delivered to a connecting company, the receiving company should notify the sender of conditions on the connecting line preventing its prompt transmission.¹⁴ If, for any reason, the delivery cannot be made promptly after transmission, it is the duty of the telegraph company to inform the sender of this fact, and state the reasons therefor so that he may have an opportunity to aid in the delivery by supplying a better address, etc.¹⁵

§ 2400. Negligence of Connecting Lines.¹⁶—In a case where a message can be forwarded from a point on the telegraph company's line to the addressee over a connecting telephone line, the telegraph company may be imputed with actionable negligence in failing to route the message as directed by the sender if delay and damage result from the deviation.¹⁷

§ 2401. Contributory Negligence as a Defense in these Cases.—It is not required that the negligence of the plaintiff should have been

¹² *Swan v. Western Union Tel. Co.*, 129 Fed. Rep. 318; s. c. 63 C. C. A. 550; *Faubion v. Western Union Tel. Co.*, 36 Tex. Civ. App. 98; s. c. 81 S. W. Rep. 56. In such a case evidence as to the extent of a storm which had prostrated the lines, or of the congestion of business, or that the company had posted notices in its office that its wires were down and that all messages would be delayed in transmission, was inadmissible, in the absence of evidence that plaintiff had actual notice of such facts or of such notices: *Western Union Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526; s. c. 69 S. W. Rep. 181.

¹³ *Faubion v. Western Union Tel. Co.*, 36 Tex. Civ. App. 98; s. c. 81 S. W. Rep. 56.

¹⁴ *Western Union Tel. Co. v. Sorsby*, 29 Tex. Civ. App. 345; s. c. 69 S. W. Rep. 122.

¹⁵ *Cogdell v. Western Union Tel. Co.*, 135 N. C. 431; s. c. 47 S. E. Rep. 490. Where a telegraph company failed to notify its agent at the

sending station of its failure to deliver a message, it cannot show that such act was not required in the exercise of due care, by showing that the sender lived beyond the free-delivery limits, where he had telephone connections with the telegraph office: *Hendricks v. Western Union Tel. Co.*, 126 N. C. 304; s. c. 35 S. E. Rep. 543.

¹⁶ A death message was received, and was transmitted over a route requiring its repetition at three relay stations, though the company could have sent it over a route only requiring one repetition. The message was directed to one "Rone," and a relay operator read and transmitted the name as "Bone," and the message was not delivered, as a result thereof. The facts were held sufficient to raise the issue of the negligence of the company: *Western Union Tel. Co. v. Ragland* (Tex. Civ. App.), 61 S. W. Rep. 421.

¹⁷ *Western Union Tel. Co. v. Sims*, 30 Tex. Civ. App. 32; s. c. 69 S. W. Rep. 464.

the direct or proximate cause of the damages occasioned by failure to deliver a telegram. It is sufficient if it proximately contributed with the negligence of the company in causing the damages.¹⁸ The sender may be imputed with contributory negligence in furnishing an incorrect or insufficient address,¹⁹ but not necessarily where he has furnished the fullest address he could obtain by the exercise of reasonable care.²⁰ It has been held that the fact that the plaintiff's agent knew that certain of the defendant's lines were down, but did not know that the company did not have other lines over which the message could be sent, did not exempt the company from liability for the damages resulting from delay.²¹ It has been held that a person, tendering a message which was wrongfully refused, was not charged with contributory negligence in sending the message by a messenger on horseback instead of using the telephone if he was without knowledge of the existence of telephone connections.²² A message to a father announcing the dangerous illness of a son by the name of "Ira" was changed to "Car" in transmission. The recipient of the message had a nephew by the name of Carl and he took the message to announce the serious sickness of the nephew and delayed his return home until after the death of his child. It was held that he was not guilty of contributory negligence in delaying his return so as to prevent a recovery of damages occasioned by the mistake.²³ In one case it was held that a person sending a second message by telegraph some time after the first, in order to revoke it, who explained the situation to the telegraph company was not, by his failure to make these messages show on their face which was the later one, guilty of such negligence as to bar recovery for damages sustained by the defendant's negligence in delivering the first message last.²⁴

§ 2403. **Statutory Penalties against these Companies.**²⁵—The penalty provided by the Missouri statute for failure "promptly and with

¹⁸ *Western Union Tel. Co. v. Rawls* (Tex. Civ. App.), 62 S. W. Rep. 136.

¹⁹ *Hargrave v. Western Union Tel. Co.* (Tex. Civ. App.), 60 S. W. Rep. 687.

²⁰ *Western Union Tel. Co. v. Bowen*, 97 Tex. 621; s. c. 81 S. W. Rep. 27; rev'g s. c. 76 S. W. Rep. 613.

²¹ *Western Union Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526; s. c. 69 S. W. Rep. 181.

²² *Western Union Tel. Co. v. Downs*, 25 Tex. Civ. App. 597; s. c. 62 S. W. Rep. 1078.

²³ *Efrd v. Western Union Tel. Co.*, 132 N. C. 267; s. c. 43 S. E. Rep. 825.

²⁴ *Hocker v. Western Union Tel. Co.*, 45 Fla. 363; s. c. 34 South. Rep. 901.

²⁵ The Indiana statute imposing a penalty on telegraph companies for failure to receive and transmit messages impartially is constitutional, and the "aggrieved party" entitled to the penalty is held to be the person whose message the telegraph company has refused to receive or failed to transmit on the terms or in the manner prescribed by the

impartiality and good faith" to transmit a message is not recoverable where the delay is caused by the wires being disabled by a wind and sleet storm, and the operator acts in good faith and with diligence and without partiality.²⁶

§ 2404. These Statutes Penal and Strictly Construed.—The Mississippi provision authorizing a recovery against a telegraph company for transmitting a message incorrectly is strictly limited to incorrect transmission and does not authorize a recovery for delay or failure to transmit.²⁷ The Arkansas statute imposing a penalty for discrimination applies only to the willful or intentional refusal to transmit a message, and not to a refusal resulting from negligence on the part of the agent in ascertaining whether or not the company has an office at the place to which the message was directed.²⁸

§ 2406. Application of these Statutes to Interstate Messages.²⁹

§ 2408. Other Holdings with Reference to such Statutes.³⁰

§ 2411. Extent to which Such Companies can Limit their Liability by Rules, Regulations, and Stipulations in Message Blanks, etc.—A condition in a contract that the company will not be liable for delays in transmission arising from unavoidable interruptions in the working of the wires will not exempt the company from liability for delays from causes known to exist by the agent of the company at the time the message is received, and of which the sender is ignorant.³¹

statute: *Western Union Tel. Co. v. Ferguson*, 157 Ind. 37; s. c. 60 N. E. Rep. 679.

²⁶ *Taylor v. Western Union Tel. Co.*, 107 Mo. App. 212; s. c. 80 S. W. Rep. 697.

²⁷ *Hilley v. Western Union Tel. Co.*, 85 Miss. 67; s. c. 37 South. Rep. 556; *Marshall v. Western Union Tel. Co.*, 79 Miss. 154; s. c. 27 South. Rep. 614; *Western Union Tel. Co. v. Hall*, 79 Miss. 623; s. c. 31 South. Rep. 202.

²⁸ *State v. Western Union Telegraph Co.*, — Ark. —; s. c. 88 S. W. Rep. 834.

²⁹ That these penalty statutes are without application to inter-state messages, see: *Western Union Tel. Co. v. Carter*, 156 Ind. 531; s. c. 60 N. E. Rep. 305; *Hearn v. Western Union Tel. Co.*, 36 Misc. (N. Y.) 557; s. c. 73 N. Y. Supp. 1077.

³⁰ Where, in an action of this character the plaintiff specifically charges that the defendant carelessly and negligently failed to

transmit and send a message from its office in the place it was sent to its destination, other allegations in the pleading respecting the actual delivery of the message will be disregarded as superfluous: *Hill v. Western Union Tel. Co.*, 105 Mo. App. 572; s. c. 80 S. W. Rep. 3. A telegram was written on a day blank, and was received by a telegraph company's agent in the evening, and paid for as a day message. Such agent marked it as a night message, and transmitted it in that form to the relay office. It was not sent to its destination until the next morning, and it was not delivered until 3 P. M. of that day. It was held that the company was negligent, and liable to the penalty imposed by statute for failure promptly to transmit the message: *Parker v. Western Union Tel. Co.*, 87 Mo. App. 553.

³¹ *Western Union Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526; s. c. 69 S. W. Rep. 181.

§ 2413. What Regulations and Stipulations have been Held Valid.

—In a case where the recipient of a message delivered the answer to the messenger and it did not appear that the messenger was authorized to receive messages, it was held that a stipulation in the company's blank on which the answer was written to the effect that messengers receiving messages were agents of the senders, and that no responsibility should attach to the company until the message was tendered at the office, was binding on the sender of the message.³²

§ 2418. Circumstances under which Assent to such Stipulations not Presumed.³³

§ 2420. Effect of Messages not Written upon the Company's Blanks.

—Where a message tendered for transmission is written on the blank of another company and the message is accepted by the sending company, then the contract and conditions on the back of the message are regarded as adopted by the parties to the contract and both parties are bound by the conditions.³⁴

§ 2420a. What Law Governs.—It is the general rule that the interpretation of the contract between the parties will be determined by the laws of the State in which the message was tendered for transmission.³⁵

§ 2422. Validity and Effect of Stipulations as to Repeating Messages.—In jurisdictions where the telegraph company is declared a common carrier by statute or otherwise, it cannot limit its common-law liability by stipulating against liability for unrepeatd messages.³⁶

§ 2423. Such Stipulations do not Relieve the Company from Responsibility for Negligence, Misconduct or Bad Faith.³⁷

³² *Ayers v. Western Union Tel. Co.*, 65 App. Div. (N. Y.) 149; s. c. 72 N. Y. Supp. 634.

³³ Assent not implied where the message is written and signed by the company's agent, and the sender does not see, sign, or agree to the stipulations: *Western Union Tel. Co. v. Uvalde Nat. Bank* (Tex. Civ. App.), 72 S. W. Rep. 232.

³⁴ *Western Union Tel. Co. v. Waxelbaum*, 113 Ga. 1017; s. c. 39 S. E. Rep. 443; *Jacob v. Western Union Tel. Co.*, 135 Mich. 600; s. c. 98 N. W. Rep. 402; *Young v. Western Union Tel. Co.*, 65 S. C. 93; s. c. 43 S. E. Rep. 448.

³⁵ *Shaw v. Postal Tel. Cable Co.*, 79 Miss. 670; s. c. 31 South. Rep. 222; *Bryan v. Western Union Tel.*

Co., 133 N. C. 603; s. c. 45 S. E. Rep. 938; 43 S. E. Rep. 1003; *Hancock v. Western Union Tel. Co.*, 137 N. C. 497; s. c. 49 S. E. Rep. 952; *Western Union Tel. Co. v. Christensen* (Tex. Civ. App.), 78 S. W. Rep. 744. But see *Howard v. Western Union Tel. Co.*, — Ky. —; s. c. 84 S. W. Rep. 764; 27 Ky. L. Rep. 244; s. c. modified, 86 S. W. Rep. 982, where it is held that the matter will be determined by the laws of the State where the negligent act occurs.

³⁶ *Postal Tel. Cable Co. v. Schaefer*, 110 Ky. 907; s. c. 62 S. W. Rep. 1119; 23 Ky. L. Rep. 344; *Postal Tel. & Co. v. Wells*, 82 Miss. 733; s. c. 35 South. Rep. 190.

³⁷ That the telegraph company is

§ 2424. **Exonerate only from Liability Preventable by Repeating.**³³

§ 2427. **Other Holdings in Regard to Stipulations as to Repeating.**—One court has held that a stipulation that the company will not be liable for mistakes unless the message is telegraphed back for comparison will not relieve the company from liability for a mistake occurring through want of reasonable care in repeating the message at a relay station.³⁹

§ 2429. **Stipulations as to the Time and Manner of Presenting Claims for Damages.**⁴⁰—Under a stipulation of this character the claim must be reduced to writing and it must identify the message, set out the negligence complained of and the nature and extent of the damages suffered.⁴¹ Conditions of this character may be waived and the waiver may be shown by acts of the company's agents in accepting verbal statements as to the damage, or by seeking information of the plaintiff as to the merits of his claim, where such acts occur within the time limited by the condition in the blank.⁴²

§ 2430. **Assent of the Sender to such Stipulations.**⁴³

§ 2431. **What Limitations of Time Reasonable and What not: Sixty Days Deemed Reasonable.**⁴⁴

liable only for failure to exercise ordinary care, see: *Western Union Tel. Co. v. Norris*, 25 Tex. Civ. App. 43; s. c. 60 S. W. Rep. 982; *Western Union Tel. Co. v. Brown* (Tex. Civ. App.), 75 S. W. Rep. 359. In one case where a person requested certain information by telegram and it was sent by an unrepeat message under a contract exempting the telegraph company from liability for mistakes in unrepeat messages, it was held that the recipient of the telegram by his request made the sender of the telegram his agent and hence was bound by the contract, and the telegraph company was liable only for a mistake in the message caused by its gross negligence in transmission: *Coit v. Western Union Tel. Co.*, 130 Cal. 657; s. c. 63 Pac. Rep. 83.

³³ See generally: *Western Union Tel. Co. v. Henley*, 157 Ind. 90; s. c. 60 N. E. Rep. 682.

³⁹ *Western Union Tel. Co. v. Ragland* (Tex. Civ. App.), 61 S. W. Rep. 421.

⁴⁰ That stipulations limiting the

time for a presentation of claims for damages are valid where reasonable, see *Western Union Tel. Co. v. Courtney*, 113 Tenn. 482; s. c. 82 S. W. Rep. 484.

⁴¹ *Western Union Tel. Co. v. Courtney*, 113 Tenn. 482; s. c. 82 S. W. Rep. 484.

⁴² *R. M. Hays & Bro. v. Western Union Tel. Co.*, 70 S. C. 16; s. c. 48 S. E. Rep. 608; 67 L. R. A. 481.

⁴³ The sender of the telegram will be regarded as assenting to a condition as to the time of presenting the claim where he writes his message on a blank bearing the stipulation: *Western Union Tel. Co. v. Courtney*, 113 Tenn. 482; s. c. 82 S. W. Rep. 484.

⁴⁴ *Broom v. Western Union Tel. Co.*, 71 S. C. 506; s. c. 51 S. E. Rep. 259 (sixty days); *Whitehill v. Western Union Tel. Co.*, 136 Fed. Rep. 499 (sixty days); *Hartzog v. Western Union Tel. Co.*, 84 Miss. 448; s. c. 36 South. Rep. 539 (sixty days); *Western Union Tel. Co. v. Vanway* (Tex. Civ. App.), 54 S. W. Rep. 414 (ninety days).

§ 2439. Commencement of Action Equivalent to such Notice.⁴⁵—

It is the rule in Tennessee that the institution of a suit and service of process will amount to a presentation of the claim when the service is made within the specified time, and the process contains the identification of the message, a statement of the negligence, and the nature and extent of the damages, or when the declaration giving such information is filed within the specified time; but a summons merely stating that the defendant was called on to answer the plaintiff "in an action to her damages two thousand dollars" has been held not to satisfy the rule.⁴⁶

§ 2443. Evidence of Negligence in Cases of Non-delivery.⁴⁷

§ 2444. Right to Establish Free-Delivery Limits.—The reasonableness of rules establishing free-delivery limits is for the court where the facts are undisputed.⁴⁸ A rule making the territory within two and one-half miles from the receiving station a free-delivery district has been upheld as reasonable.⁴⁹ The distance is measured in a straight line from the office and not by the nearest travelled route.⁵⁰ It is the duty of the telegraph company to acquaint the sender with the fact that it has a free-delivery limit, and where the message is sent to one outside this district the charges for a delivery should be stated and demanded.⁵¹ Where these charges are exacted it is the duty of the

⁴⁵ That service of summon within the time stipulated is equivalent to the presentation of the claim, see: *Bryan v. Western Union Tel. Co.*, 133 N. C. 603; s. c. 45 S. E. Rep. 938; 43 S. E. Rep. 1003. *Contra*, *Western Union Tel. Co. v. Hays* (Tex. Civ. App.), 63 S. W. Rep. 171. ⁴⁶ *Western Union Tel. Co. v. Courtney*, 113 Tenn. 482; s. c. 82 S. W. Rep. 484.

⁴⁷ A telegraph company will not be excused from its negligent failure to deliver a message at the street number of the addressee written on the dispatch because of a mistake in the name of the sendee due to the similarity of sound on the telegraph keys between one of the letters in the sendee's name and one of the letters in the name as incorrectly taken from the wires: *Green v. Western Union Tel. Co.*, 136 N. C. 489; s. c. 49 S. E. Rep. 165; 67 L. R. A. 985.

⁴⁸ *Western Union Tel. Co. v. Scott*, 87 S. W. Rep. 289; s. c. 27 Ky. L. Rep. 975.

⁴⁹ *Western Union Tel. Co. v. Scott*,

87 S. W. Rep. 289; s. c. 27 Ky. L. Rep. 975.

⁵⁰ *Western Union Tel. Co. v. Jennings*, — Tex. —; s. c. 84 S. W. Rep. 1056; aff'g s. c. 81 S. W. Rep. 1278.

⁵¹ *Western Union Tel. Co. v. Mathews*, 107 Ky. 663; s. c. 55 S. W. Rep. 427; *Bright v. Western Union Tel. Co.*, 132 N. C. 317; s. c. 43 S. E. Rep. 841; *Bryan v. Western Union Tel. Co.*, 133 N. C. 603; s. c. 45 S. E. Rep. 938; 43 S. E. Rep. 1003; *Hood v. Western Union Tel. Co.*, 135 N. C. 622; s. c. 47 S. E. Rep. 607; *Western Union Tel. Co. v. Swearingen*, 95 Tex. 420; s. c. 67 S. W. Rep. 767; rev'g s. c. 65 S. W. Rep. 1080. The sender of a telegram guarantied to pay any charges for delivery beyond the free-delivery limits of the city to which the message was sent, and, on the receiving office sending back a request for a guaranty, the agent replied that it was made. It was held that the guaranty did not become operative until the receiving office wired back for it and received it: *Hargrave v. Western Union Tel. Co.* (Tex. Civ. App.), 60 S. W. Rep. 687.

company to make the delivery outside the free district, though it may be required to pay out more than the charge to employ a person to make the special delivery.⁵² Damages are recoverable for failure to deliver a telegram, though the addressee lived outside the free-delivery limits, if the telegraph company, with knowledge of that fact, undertakes to transmit and deliver the message without extra charge, and this particularly in a case where the addressee could have been found within the free-delivery limits had the telegraph company exercised reasonable diligence in seeking him.⁵³

§ 2446. **What Efforts the Company must Make to Deliver.**—A telegraph company is required to make a reasonable effort to deliver the message; the duty is not absolute.⁵⁴ This ordinary diligence is the measure of the duty of the company, whether within or without the free-delivery limit, if the conditions calling for the delivery outside these limits are complied with.⁵⁵ It is not enough that the com-

⁵² *Western Union Tel. Co. v. Matthews*, 113 Ky. 188; s. c. 67 S. W. Rep. 849; 24 Ky. L. Rep. 3.

⁵³ *Western Union Tel. Co. v. Davis*, 30 Tex. Civ. App. 590; s. c. 71 S. W. Rep. 313.

⁵⁴ *Reynolds v. Western Union Tel. Co.*, 81 Mo. App. 223; *Western Union Tel. Co. v. Hays* (Tex. Civ. App.), 53 S. W. Rep. 171. In the following cases the telegraph company was absolved from the charge of negligence in the delivery of the telegram under the circumstances indicated: *Western Union Tel. Co. v. Cross*, 116 Ky. 5; s. c. 74 S. W. Rep. 1098; 76 S. W. Rep. 162; 25 Ky. L. Rep. 268 (messenger spent all afternoon searching for information as to addressee without success); *Hinson v. Postal Telegraph Cable Co.*, 132 N. C. 460; s. c. 43 S. E. Rep. 945 (refusal of sendee's employer to receive message imputed to sender and not telegraph company); *Gainey v. Western Union Tel. Co.*, 136 N. C. 261; s. c. 48 S. E. Rep. 653 (message addressed to post office outside limits of receiving office, and message mailed); *Hargrave v. Western Union Tel. Co.* (Tex. Civ. App.), 60 S. W. Rep. 637 (repeated attempts of messenger to locate person indicated as "near" a certain mill); *Western Union Tel. Co. v. Christensen* (Tex. Civ. App.), 78 S. W. Rep. 744 (sendee's address as certain street number in Dallas; not negligence to fail to send mes-

sage to address in West Dallas); *Western Union Tel. Co. v. Cox* (Tex. Civ. App.), 74 S. W. Rep. 922 (sendee described as "travelling picture man"; messenger took telegram to all hotels in town and failed to locate him); *Western Union Tel. Co. v. Sorsby*, 29 Tex. Civ. App. 345; s. c. 69 S. W. Rep. 122 (not required to send message over telephone or by mail on finding connecting carrier's line out of order). In a case where a death message was sent to plaintiff who resided outside the free delivery limits in care of a person who resided within such limits, but it was agreed that the message should not be delivered to this person, but that he should be applied to for the address of the sendee, and the sender neither paid nor tendered the special delivery fee, and there was no contract made for a special delivery to the addressee, it was held that he was not entitled to recover damages for delay: *Western Union Tel. Co. v. Bryant*, 35 Tex. Civ. App. 442; s. c. 80 S. W. Rep. 406.

⁵⁵ *Western Union Tel. Co. v. Swearingen*, 95 Tex. 420; s. c. 67 S. W. Rep. 767; rev'g s. c. 65 S. W. Rep. 1080. In the absence of an understanding or custom that a telegraph company shall deliver a message at a place several miles beyond the town to which it is addressed the extent of the contract of the company is the prompt trans-

pany depended on the address given in the message—which was erroneous—if more definite information as to the address could have been acquired by the exercise of reasonable efforts in that direction.⁵⁶ Where the addressee of a message, known to the company to be important, and for which it has received additional compensation to secure a prompt delivery, is known by the receiving agent to be at another point in which the company maintains an office, the company will be charged with negligence if the agent fails to re-transmit the message to such point.⁵⁷ Where the person to whose care the telegram is addressed refuses to receive it, the telegraph company must use every reasonable effort to find and deliver the message to the sendee himself, and, if unable to do so, to ask of the sender a better address.⁵⁸ A telegraph company is not liable for a failure to transmit a message to the sendee by telephone in the absence of a special contract to that effect, and a contract of this kind is not to be implied from a provision on the back of the blank that the telegraph company is the agent of the sender for the transmission of telegrams over other lines.⁵⁹ The mere fact that the addressee is known to live outside the free delivery district does not excuse the telegraph company from making prompt and diligent inquiry to see if he is not within the district when the message is received.⁶⁰ In a case where the addressee lived without the district it was held a sufficient delivery to turn the message over to a neighbor, well known in the community as an honest person, who promised to deliver it to the sendee without charge.⁶¹ In another case, however, the telegraph company was held liable for negligent delivery where it gave the message to a neighbor of the sendee and he turned it over to another neighbor, who negligently delayed its delivery until too late

mission and a diligent effort to deliver the message in the town to which it is addressed: *Western Union Tel. Co. v. Harvey*, 67 Kan. 729; s. c. 74 Pac. Rep. 250.

⁵⁶ *Hurlburt v. Western Union Tel. Co.*, 123 Iowa 295; s. c. 98 N. W. Rep. 794; *Cogdell v. Western Union Tel. Co.*, 135 N. C. 431; s. c. 47 S. E. Rep. 490; *Western Union Tel. Co. v. Bowen*, 97 Tex. 621; s. c. 81 S. W. Rep. 27; rev'g s. c. 76 S. W. Rep. 613. Thus, though a telegram is addressed "care some hotel," the telegraph company will not discharge its whole duty by inquiring at the various hotels in the town, if, by the exercise of ordinary care, the addressee could be found else-

where: *Western Union Tel. Co. v. Waller*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 695.

⁵⁷ *Western Union Tel. Co. v. Hendricks*, 26 Tex. Civ. App. 366; s. c. 63 S. W. Rep. 341.

⁵⁸ *Hinson v. Postal Telegraph Cable Co.*, 132 N. C. 460; s. c. 43 S. E. Rep. 945.

⁵⁹ *Hellams v. Western Union Tel. Co.*, 70 S. C. 83; s. c. 49 S. E. Rep. 12.

⁶⁰ *Rosser v. Western Union Tel. Co.*, 130 N. C. 251; s. c. 41 S. E. Rep. 378.

⁶¹ *Western Union Tel. Co. v. Swearingen*, 95 Tex. 420; s. c. 67 S. W. Rep. 767; rev'g s. c. 65 S. W. Rep. 1080.

for the sendee to take a train that would have brought him to the bedside of a dying member of his family before death.⁶²

§ 2447. To whom the Telegram may or may not be Delivered.—Generally speaking, any delivery of a telegram which is good in law as between the company and the addressee is good as between the company and the sender of the message.⁶³ The delivery may be made to the person in whose care it is sent if the addressee is absent when it arrives;⁶⁴ and where directed in the care of a corporation it may be delivered to an agent of the corporation.⁶⁵ A delivery of the message to a brother or business partner of the person in whose care it is sent will generally suffice where this person is away when the telegram is received,⁶⁶ unless the message was sent under a special contract that it was to be delivered to the addressee personally, or the person in whose care it was sent.⁶⁷ In Texas it is the rule that the delivery of a message to a clerk of a hotel at which the addressee lives is not a sufficient delivery to the sendee,⁶⁸ unless the sendee has specially authorized the hotel people to receipt for messages addressed to him.⁶⁹

§ 2448. Relevant Evidence on this Subject.⁷⁰

§ 2450. Liability for Negligent Delay in Delivering.—A telegraph company is as responsible for unreasonable delay in the delivery of a cipher message as if the message were intelligible.⁷¹ A delay of twenty-seven hours by a telegraph company in sending a message twenty-two miles is unreasonable in the absence of evidence that the

⁶² *Western Union Tel. Co. v. Bellew*, 32 Tex. Civ. App. 338; s. c. 74 S. W. Rep. 799.

⁶³ *Norman v. Western Union Tel. Co.*, 31 Wash. 577; s. c. 72 Pac. Rep. 474.

⁶⁴ *Sweet v. Western Union Tel. Co.*, 139 Mich. 322; s. c. 102 N. W. Rep. 850; 11 Det. Leg. N. 841.

⁶⁵ *Lefler v. Western Union Tel. Co.*, 131 N. C. 355; s. c. 42 S. E. Rep. 819; 59 L. R. A. 477.

⁶⁶ *Western Union Tel. Co. v. Hendricks*, 29 Tex. Civ. App. 413; s. c. 68 S. W. Rep. 720.

⁶⁷ *Western Union Tel. Co. v. Hendricks*, 29 Tex. 413; s. c. 68 S. W. Rep. 720.

⁶⁸ *Western Union Tel. Co. v. Cobb*, 95 Tex. 333; s. c. 67 S. W. Rep. 87; *Western Union Tel. Co. v. Redinger* (Tex. Civ. App.), 66 S. W. Rep. 485.

⁶⁹ *Western Union Tel. Co. v. Barefoot*, 97 Tex. 159; s. c. 76 S. W. Rep. 914; rev'g s. c. 74 S. W. Rep. 560.

⁷⁰ In a case where the telegraph company claimed inability to locate the sendee, evidence that strangers carrying the news embodied in the telegram learned where plaintiff lived within twenty or thirty minutes after arrival in the town is admissible, as showing plaintiff to have been accessible and that her residence could have been found in a short time, by proper inquiry: *Western Union Tel. Co. v. Davis*, 24 Tex. Civ. App. 427; s. c. 59 S. W. Rep. 46. Evidence that a second telegram was sent later to the operator at plaintiff's town, asking that the first be promptly delivered, is admissible, as accentuating defendant's negligence: *Western Union Tel. Co. v. Frith*, 105 Tenn. 167; s. c. 58 S. W. Rep. 118.

⁷¹ *Dodd Grocery Co. v. Postal Tel. & C. Co.*, 112 Ga. 685; s. c. 37 S. E. Rep. 981.

delay was due to the act of God, the fault of the sender, or other matters beyond the control of the telegraph company.⁷² It has been held that a delay of five hours was not of itself evidence of negligence where the sending office was located in a country district in one State, and the receiving office was located in a country district in another, and the message was sent on Sunday at a time when telegraph offices are closed for a part of the day.⁷³ Delay in delivering a message will not be excused on the ground that the telegraph company has no messengers at its office and its agent is not allowed to leave the office; it is the duty of the telegraph company to employ sufficient help.⁷⁴ Nor is it an excuse that there are two places in the State having the same name as that to which the message is to be sent; in such a case it is the duty of the receiving agent to require the sender to designate the town intended.⁷⁵

§ 2451. **Reasonable Diligence in Delivering Urgent Messages.**—It is the doctrine under this head that the telegraph company is bound to exercise a degree of diligence commensurate with the known importance of the message. This doctrine does not call for the exercise of extraordinary diligence. It means that the telegraph company shall use ordinary diligence and care in view of the importance of the message.⁷⁶ In one case it was held that evidence that the sender of a message on delivering it to a messenger stated that it must be at its destination at a certain hour, and that the messenger repeated this declaration to the operator to whom he delivered the telegram, was insufficient to establish a special contract to deliver the message within the time specified.⁷⁷

⁷² *Western Union Tel. Co. v. Parsons* (Ky.), 72 S. W. Rep. 800; s. c. 24 Ky. L. Rep. 2008.

⁷³ *Ayers v. Western Union Tel. Co.*, 65 App. Div. (N. Y.) 149; s. c. 72 N. Y. Supp. 634.

⁷⁴ *Western Union Tel. Co. v. Parsons* (Ky.), 72 S. W. Rep. 800; s. c. 24 Ky. L. Rep. 2008.

⁷⁵ *Western Union Tel. Co. v. Parsons* (Ky.), 72 S. W. Rep. 800; s. c. 24 Ky. L. Rep. 2008.

⁷⁶ *Western Union Tel. Co. v. Hendricks*, 29 Tex. Civ. App. 413; s. c. 68 S. W. Rep. 720; *Western Union Tel. Co. v. Church*, 3 Neb. (unoff.) 22; s. c. 90 N. W. Rep. 878; 57 L. R. A. 905 (evidence sufficient to charge company with knowledge that telegram addressed to physician was urgent); *Hargrave v. Western Union Tel. Co.* (Tex. Civ. App.), 60 S. W. Rep. 687 (death

message). Where plaintiff sent a telegram to a relative, asking that money be wired for the transportation of the body of her dead son, and, though the addressee of the message resided three and one-half miles in the country from destination of the message, plaintiff did not inform the sending agent of such fact, nor arrange for immediate delivery at the addressee's residence, the telegraph company, on receiving the message after hours, when it had no messengers available to deliver it, was not guilty of negligence in failing to deliver the message until the next day: *McCaul v. Western Union Tel. Co.*, 114 Tenn. 661; s. c. 88 S. W. Rep. 325.

⁷⁷ *Jacob v. Western Union Tel. Co.*, 135 Mich. 600; s. c. 98 N. W. Rep. 402.

2452. Question how Affected by the Hours of Closing Company's Office.—Within the limitations noted in the main section a telegraph company may establish office hours for the receipt and delivery of messages.⁷⁸ A rule not to deliver messages received after seven o'clock in the evening until the next morning will not be regarded as an unreasonable rule in a town where the business of the company is not large enough to justify the employment of a special messenger to deliver such messages.⁷⁹ Where the telegraph company is not obliged to deliver messages after its office hours it will not render itself liable by voluntarily attempting to make a delivery.⁸⁰ Similarly a telegraph company will not become liable for failure to transmit a message received after office hours where it is accepted by an operator not in its employ and using the wires in another line of service.⁸¹ But a telegraph company may contract for the immediate transmission and delivery of a telegram, though it is received after office hours and it will be liable in such a case for damages the result of negligence in its transmission or delivery.⁸² Thus a telegraph company, authorizing railroad operators to receive messages in the night and the charges

⁷⁸ *Western Union Tel. Co. v. Rawls* (Tex. Civ. App.), 62 S. W. Rep. 136; *Western Union Tel. Co. v. Christensen* (Tex. Civ. App.), 78 S. W. Rep. 744. A telegraph company requesting an instruction, in an action for delay in the delivery of a message, that if reasonable office hours were established at the receiving office, and the message was not received until after such hours, defendant was not compelled to deliver the same, cannot object to the submission to the jury of the question whether such office hours were reasonable: *Western Union Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74; s. c. 61 S. W. Rep. 548. A message received at an office after reasonable office hours and delivered within an hour after opening the office is delivered with due diligence: *Bonner v. Western Union Tel. Co.*, 71 S. C. 303; s. c. 51 S. E. Rep. 117.

⁷⁹ *Davis v. Western Union Tel. Co.* (Ky.), 66 S. W. Rep. 17; s. c. 23 Ky. L. Rep. 1758; *Western Union Tel. Co. v. Steinberger*, 107 Ky. 469; s. c. 54 S. W. Rep. 829; 21 Ky. L. Rep. 1289. Where a telegraph company, under its rules, did not deliver messages received after 7 p. m. until the next morning, it owed no duty, where a message was

received exactly at 7 p. m., to deliver it that night, as the rules of the company required that before delivery a letter-press copy of the message should be made, and a record thereof entered in a book kept for that purpose; and this was true though the message may have been received by the day operator, and while the messenger was still in the office, as the messenger's hours of employment had expired: *Davis v. Western Union Tel. Co.* (Ky.), 66 S. W. Rep. 17; s. c. 23 Ky. L. Rep. 1758.

⁸⁰ *Western Union Tel. Co. v. Rawls* (Tex. Civ. App.), 62 S. W. Rep. 136.

⁸¹ *Sweet v. Postal Tel. & C. Co.*, 22 R. I. 344; s. c. 47 Atl. Rep. 881.

⁸² *Western Union Tel. Co. v. Crompton*, 138 Ala. 632; s. c. 36 South. Rep. 517; *Western Union Tel. Co. v. Cavin*, 30 Tex. Civ. App. 152; s. c. 70 S. W. Rep. 229; *Western Union Tel. Co. v. Perry*, 30 Tex. Civ. App. 243; s. c. 70 S. W. Rep. 439. A telegraph company could not be heard to say that it received and delivered messages only between 7 a. m. and 7 p. m., when it appeared that at the time the message in question was received, 8:30 p. m., its office was open, an operator there to receive messages, and a boy to deliver them: *Bright v.*

therefor, has been held liable for mental anguish caused by a failure to deliver a message so received during the night, though it customarily did not deliver such messages until after the arrival of its own servants in the morning.⁸³ The mere fact that a telegraph company on certain occasions had accepted and transmitted telegrams tendered after office hours will not of itself show an abrogation of the rules as to closing hours.⁸⁴ In a case where a telegram was offered at a time when it could be transmitted before the time for closing the telegraph office in the town of its destination, it was held that the consent of the sender that it might be sent the next morning, induced only by the clerk's statement that it was impossible to send it that evening, would not estop him from claiming damages for a failure to send it until the next morning.⁸⁵ So a telegraph company may fix reasonable hours for the reception of messages on Sunday, and such messages will be received subject to those rules irrespective of whether the sender knew of their existence, unless they were waived by the company, or the rules do not apply to the message in question.⁸⁶ In determining whether a telegraph company was negligent in delivering a message received during closed hours on Sunday, the time consumed after the opening of the office in copying, numbering, enveloping, and addressing the message must be considered.⁸⁷

§ 2453. **Other Questions Relating to the Delay in Delivering Messages.**—Where the company was ignorant of the condition of its line when it accepted a message, it will be entitled to plead this condition in defense of an action for negligent failure to deliver the message.⁸⁸ There is a holding that a telegraph company will not be liable for the negligent transmission of the contents of a message over a telephone to the addressee by its messenger acting as the addressee's agent,

Western Union Tel. Co., 132 N. C. 317; s. c. 43 S. E. Rep. 841.

⁸³Dowdy v. Western Union Tel. Co., 124 N. C. 522; s. c. 32 S. E. Rep. 802.

⁸⁴Western Union Tel. Co. v. McConnico, 27 Tex. Civ. App. 610; s. c. 66 S. W. Rep. 592. Where a telegram is received outside of reasonable office hours by one not the operator, and not connected with the company, who chanced to be in the office, and committed it to writing, and left it on the operator's desk and it was delivered immediately after opening the office on the next day, due diligence is shown: Harrison v. Western Union Tel. Co., 71 S. C. 386; s. c. 51 S. E. Rep. 119.

⁸⁵Western Union Tel. Co. v. Seffel, 31 Tex. Civ. App. 134; s. c. 71 S. W. Rep. 616.

⁸⁶Western Union Tel. Co. v. Pierce, 95 Tex. 578; s. c. 68 S. W. Rep. 771; 70 S. W. Rep. 360; rev'g s. c. 67 S. W. Rep. 920; Western Union Tel. Co. v. McConnico, 27 Tex. Civ. App. 610; s. c. 66 S. W. Rep. 592. See also Smith v. Western Union Tel. Co., 72 S. C. 116; s. c. 51 S. E. Rep. 537.

⁸⁷Western Union Tel. Co. v. McConnico, 27 Tex. Civ. App. 610; s. c. 66 S. W. Rep. 592.

⁸⁸Faubion v. Western Union Tel. Co., 36 Tex. Civ. App. 98; s. c. 81 S. W. Rep. 56.

though the telephone used was in the telegraph office.⁸⁹ It is the general rule that a presumption of negligence is raised by a failure to deliver a telegram within a reasonable time.⁹⁰

§ 2455. Rule in *Hadley v. Baxendale*: Damages in Contemplation of the Parties.⁹¹

§ 2457. Only Direct or Proximate Damages Recoverable.⁹²—The rule of the common law limiting damages to those the direct and proximate result of the injury is not abrogated by a statute making

⁸⁹ *Norman v. Western Union Tel. Co.*, 31 Wash. 577; s. c. 72 Pac. Rep. 474.

⁹⁰ *Arial v. Western Union Tel. Co.*, 70 S. C. 418; s. c. 50 S. E. Rep. 6.

⁹¹ The death and decomposition of the body of a wife to such an extent as to prevent her husband from viewing her remains has been held a result fairly and reasonably to have been anticipated by the telegraph company, in negligently failing promptly to deliver a message to a husband telling him to come home at once, and that his wife would have to be operated on for strangulated hernia: *Western Union Tel. Co. v. Hamilton*, 36 Tex. Civ. App. 300; s. c. 81 S. W. Rep. 1052. The cost of a telegram, an extra notice, three extra trips of the undertaker and mental sufferings of the wife, were held to have been in the contemplation of the parties as the result of the delay of a telegram notifying the wife that her husband with the remains of her father would arrive at a certain time at a point where they were to be met by the wife: *Western Union Tel. Co. v. Christensen* (Tex. Civ. App.), 78 S. W. Rep. 744. In another case it was held that the telegraph company might reasonably infer that, as a result of its failure to deliver a message sent by a woman passenger to a person asking him to meet her at a flag station, she would be compelled to walk alone in the night from this station subject to distress of mind: *Western Union Tel. Co. v. Norton* (Tex. Civ. App.), 62 S. W. Rep. 1081. Damages for suffering from cold and hunger in sleeping out of doors and in attempting to reach his home 400 miles away, resulting from failure to deliver a

telegram sent by a traveller asking for funds to continue his journey, were damages reasonably within the contemplation of the parties in making the contract to send the message, and hence not too remote to enable the sender to recover therefor: *Barnes v. Western Union Tel. Co.*, 27 Nev. 438; s. c. 76 Pac. Rep. 931; 65 L. R. A. 666. On the other hand, damages for delay in the delivery of telegrams on the ground that they were not within the contemplation of the parties in these cases:—To a woman prevented from being present to comfort her sister on the occasion of the burial of her child, where the telegram merely announced the fatal illness of the child (*Western Union Tel. Co. v. Wilson*, 97 Tex. 22; s. c. 75 S. W. Rep. 482); for the exposure of a baby to the weather, because a telegram sent by the mother requesting the father to meet her was delayed, and the telegraph company did not know that the child accompanied the mother (*Western Union Tel. Co. v. Murray*, 29 Tex. Civ. App. 207; s. c. 68 S. W. Rep. 549); for mental anguish caused by the fact that a coffin containing the remains of a mother was placed in a wagon yard for three hours because a telegram asking a conveyance to meet the funeral party was delayed (*Western Union Tel. Co. v. Burch*, 36 Tex. Civ. App. 237; s. c. 81 S. W. Rep. 552).

⁹² *Western Union Tel. Co. v. Norton* (Tex. Civ. App.), 62 S. W. Rep. 1081. Addressee of death message not delivered cannot recover his expenses in going to the deceased: *Hunter v. Western Union Tel. Co.*, 135 N. C. 458; s. c. 47 S. E. Rep. 745.

telegraph companies liable for all damages occasioned by the negligence of their operators in receiving, transmitting or delivering messages;⁹³ nor by statutes allowing the recovery of damages for mental anguish, though unaccompanied by bodily injury.⁹⁴ Under the main rule a parent cannot claim damages for the failure to reach the bedside of his son before death where he could not have arrived in time if he had received the telegram promptly.⁹⁵ So a son prevented from promptly responding to his mother's message calling him home was denied a recovery of damages for mental anguish suffered by him on the supposition that his mother was dangerously ill, when, as a matter of fact, the message referred solely to a business matter. Here the addressee's own misapprehension, and not the company's negligence, was the proximate cause of his mental anguish.⁹⁶ So it has been held that a cattle buyer had no cause of action against a telegraph company for failure to deliver a telegram from his commission merchant when, prior to shipping his stock, he received from other sources information regarding the market as full as that contained in the undelivered message.⁹⁷

§ 2458. **What Damages Deemed too Remote, Contingent, or Problematical.**⁹⁸—In a case involving the question of damages for delay in the delivery of a telegram asking a husband to meet his wife at a station strange to her, the evidence should show that the husband would have been at the train with a conveyance had the telegram been promptly delivered, and that the wife could not have procured a conveyance herself to take her to her home, and thus avoided injury from exposure.⁹⁹ Where the plaintiff, on receiving a message from his wife that she was ill, immediately sent her two messages asking if he should come to her, and her answer was not delivered to the plaintiff, where-

⁹³ *Fisher v. Western Union Tel. Co.*, 119 Wis. 146; s. c. 96 N. W. Rep. 545.

⁹⁴ *Arial v. Western Union Tel. Co.*, 70 S. C. 418; s. c. 50 S. E. Rep. 6.

⁹⁵ *Western Union Tel. Co. v. Hendricks*, 26 Tex. Civ. App. 366; s. c. 63 S. W. Rep. 341.

⁹⁶ *Bowers v. Western Union Tel. Co.*, 135 N. C. 504; s. c. 47 S. E. Rep. 597.

⁹⁷ *Reynolds v. Western Union Tel. Co.*, 81 Mo. App. 223.

⁹⁸ *Western Union Tel. Co. v. Lovett*, 24 Tex. Civ. App. 84; s. c. 58 S. W. Rep. 204 (sorrow of wife because of delay of telegram to absent husband asking him to be present at his child's deathbed); *West-*

ern Union Tel. Co. v. Arnold, 96 Tex. 493; s. c. 73 S. W. Rep. 1043 (sorrow at inability to obtain particular clergyman to conduct funeral services). The damages were held too remote and uncertain, where, if a telegram had been received, it only gave the addressee an opportunity to make a contract for work, which he might or might not have made, the profits on which, if made, would have been subject to several contingencies: *Johnson v. Western Union Tel. Co.*, 79 Miss. 58; s. c. 29 South. Rep. 787.

⁹⁹ *Western Union Tel. Co. v. Campbell*, 36 Tex. Civ. App. 276; s. c. 81 S. W. Rep. 580.

upon he made the trip, which he would not otherwise have made, it was held that he was entitled to recover the expenses of going to his wife and returning therefrom,¹⁰⁰ but not an amount which he might have earned as an attorney at law during the time lost while making the trip.¹⁰¹ In a case where a telegraph company failed to deliver a message to an attorney, asking his attendance on the hearing of a proceeding in the probate court, it appeared that the effect of the failure to deliver the message was to cause an adjournment of the proceeding and pending the adjournment the claim was compromised. The attorney's compensation for services on the hearing of the claim depended on the amount of the recovery. It was held that the damages for the loss of this compensation were too remote and uncertain to entitle him to a recovery.¹⁰²

§ 2460. What Damages not too Remote.¹⁰³

§ 2463. Loss of Profits in Other Cases of Delays in Delivering Messages.—The certain profits of a transaction may be recovered for failure to deliver a telegram, but profits dependent upon the fluctuations of the market and the hazard and chances of business are too remote and speculative.¹⁰⁴ Thus the sender of a message containing a bid for the erection of a building, who lost the contract because of delay in the delivery of the message, may show what his profits would have been had he received the contract, as these profits can be shown with a reasonable degree of certainty.¹⁰⁵ The measure of damages in such a case is the difference between the amount of the plaintiff's bid and the amount it would have cost him to have erected

¹⁰⁰ *Kopperl v. Western Union Tel. Co.*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 1018.

¹⁰¹ *Kopperl v. Western Union Tel. Co.*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 1018.

¹⁰² *Sweet v. Western Union Tel. Co.*, 139 Mich. 322; s. c. 102 N. W. Rep. 850; 11 Det. Leg. N. 841.

¹⁰³ *Western Union Tel. Co. v. Sef-fel*, 31 Tex. Civ. App. 134; s. c. 71 S. W. Rep. 616 (mental anguish resulting from the negligent failure to transmit a telegram calling a mother to her daughter's deathbed until after the only train had left on which she could have reached her daughter before her death). Loss of time is an element of damages for a failure to deliver a death message notifying the person to whom the message is addressed to meet the sender and to have a grave prepared, since such injury

may be reasonably contemplated by the parties: *Western Union Tel. Co. v. Ragland* (Tex. Civ. App.), 61 S. W. Rep. 421.

¹⁰⁴ *Reynolds v. Western Union Tel. Co.*, 81 Mo. App. 223. Where one seeking a purchaser for cotton sent a telegram asking the addressee for a bid, and the answer making a bid was negligently delayed in transmission, a contention that there could be no recovery in an action by the sender for damages, for the reason that the delayed telegram was merely a step in the negotiations for a contract, and not the completion of a contract, was of no merit: *Western Union Tel. Co. v. Love-Banks Co.*, 73 Ark. 205; s. c. 83 S. W. Rep. 949.

¹⁰⁵ *Texas & C. Tel. Co. v. Mackenzie*, 36 Tex. Civ. App. 178; s. c. 81 S. W. Rep. 581.

the building according to the plans and specifications on which he based his bid.¹⁰⁶ Where the failure to deliver a message results in the failure of the addressee to sell property to a person who had agreed to purchase it at a certain price, the measure of damages is the difference between the amount which he would have received for the property and the amount which he did receive on afterwards disposing of it after the exercise of due diligence to obtain the highest price which he could under the circumstances.¹⁰⁷

§ 2464. **Damages Arising from Mistakes in Quoting Prices.**—A telegraph company making an error in quoting the price of an article, whereby the sender of the message is compelled to furnish goods at a loss, is liable for the damages resulting from the acceptance of the proposal as contained in the telegram.¹⁰⁸ So the buyer of goods or articles paying more than the intended price because of an error in transmission may recover the difference between the price stated in the message as tendered by the seller and the price actually paid.¹⁰⁹ And so where the cost of an article stated in a telegram from the manufacturer is made the basis of a contract between the receiver of a telegram and a third person, and it subsequently turns out that the cost was greater than that stated in the telegram, and that the error was attributable solely to the telegraph company, the latter will be liable to the addressee for the amount of the loss suffered by reason of the negligence.¹¹⁰ In a case where a mining expert advised his clients to buy certain stock, and the delivery of the telegram was delayed several hours, at which time the price had risen, it was held that the addressee was entitled to recover the difference between what he had to pay for the stock and what the stock would have cost him if the telegram had been promptly delivered.¹¹¹ So where a telegram tendering the plaintiff an option on cotton was not delivered, and he was compelled to go into the open market and buy the cotton to fill a contract, he was held entitled to recover the difference between the option and the price he had to pay for the cotton.¹¹²

¹⁰⁶ *Texas &c. Tel. Co. v. Mackenzie*, 36 Tex. Civ. App. 178; s. c. 81 S. W. Rep. 581.

¹⁰⁷ *Brooks v. Western Union Tel. Co.*, 26 Utah 147; s. c. 72 Pac. Rep. 499.

¹⁰⁸ *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576; s. c. 40 S. E. Rep. 815; *Fisher v. Western Union Tel. Co.*, — Ky. —; s. c. 84 S. W. Rep. 1179; 27 Ky. L. Rep. 340.

¹⁰⁹ *R. M. Hays & Bro. v. Western*

Union Tel. Co., 70 S. C. 16; s. c. 48 S. E. Rep. 608; 67 L. R. A. 481; *Western Union Tel. Co. v. Spivey*, 98 Tex. 308; s. c. 83 S. W. Rep. 364.

¹¹⁰ *Wolf Co. v. Western Union Tel. Co.*, 24 Pa. Super. Ct. 129.

¹¹¹ *Swan v. Western Union Tel. Co.*, 129 Fed. Rep. 318; s. c. 63 C. C. A. 550.

¹¹² *Western Union Tel. Co. v. L. Hirsch*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 394.

§ 2465. **Damages Arising from Delay of Messages Accepting Offers of Sale.**—In a case where a cotton dealer sent telegrams to two persons asking for bids for his cotton and each answered that day, but the message making the higher bid was negligently delayed and not received until the next business day, when the price had fallen below both bids, it was held that the measure of damages was not the difference between the price offered in the delayed message and the market value, but the difference between this message and the other.¹¹³ Where a telegraph company delayed delivery of a message to a real estate broker containing an offer for land held by him for sale, thereby preventing a sale, the company was liable to the broker for the loss of his commission.¹¹⁴

§ 2467. **Other Holdings on the Question of Damages.**—Here, as elsewhere, it is the duty of a person suffering injury by the negligence of a telegraph company to use reasonable diligence to make the injury as small as possible.¹¹⁵ So, in an action for mental anguish suffered by the sender of a message because of the failure to deliver the same, the jury may consider, in mitigation of damages, the neglect of the plaintiff to use other means within his reach to secure the desired information.¹¹⁶ But it has been held that the addressee of a

¹¹³ *Western Union Tel. Co. v. Love-Banks Co.*, 73 Ark. 205; s. c. 83 S. W. Rep. 949. In answer to a telegram to a lumber company asking whether it could furnish some lumber, and at what price, a reply telegram was delivered to the telegraph company, but never sent. It was held, in an action for damages, that the measure of damages was not the difference between the cost of the lumber as delivered and the fixed price, but the difference between such price and the market value when the delivery would have been made, if the contract had been carried out: *Beatty Lumber Co. v. Western Union Tel. Co.*, 52 W. Va. 410; s. c. 44 S. E. Rep. 309.

¹¹⁴ *Harper v. Western Union Tel. Co.*, 111 Mo. App. 269; s. c. 86 S. W. Rep. 904.

¹¹⁵ See generally: *Postal Tel. Cable Co. v. Schaefer*, 110 Ky. 907; s. c. 23 Ky. L. Rep. 344; 62 S. W. Rep. 1119; *Western Union Tel. Co. v. Matthews*, 113 Ky. 188; s. c. 67 S. W. Rep. 849; 24 Ky. L. Rep. 3; *Reynolds v. Western Union Tel. Co.*, 81 Mo. App. 223. Where the plaintiff missed the first train, and was

thereby prevented from attending his brother's funeral, by reason of his return to his ranch to change his clothes and carry back medicines to his sick son and give directions to his employés, it was not error to refuse to charge that defendant was not liable if, by a reasonable expenditure of money, plaintiff could have lessened or prevented the injury, since plaintiff's excuse for delay involved more than an expenditure of money: *Western Union Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74; s. c. 61 S. W. Rep. 548. Where a telegraph company negligently failed to transmit an order for forwarding of messages sent to plaintiff, whereby he failed to receive a message sent to him regarding the condition of his sick child, and he, instead of sending a message of inquiry, made a railroad journey to his home, in order to relieve his anxiety, the expenses of such journey to and fro could not be recovered as damages in an action against the company: *Hilley v. Western Union Tel. Co.*, 85 Miss. 67; s. c. 37 South. Rep. 556.

¹¹⁶ *Willis v. Western Union Tel.*

death message prevented from attending a funeral by delay in its delivery is not required, as a condition to a recovery of damages, to telegraph a request for the postponement of the funeral.¹¹⁷ Where a telegram accepting employment was erroneously transmitted as a declination of the offer, the sender was held entitled to recover the difference between what he would have earned under the contract and what he actually earned at other employment.¹¹⁸ Interest, when allowed on the plaintiff's demand, is not allowed as interest *eo nomine*, but with a view to full compensation. And hence courts generally add interest at the legal rate as the measure of damages suffered from the date of the original damages by reason of the loss of the use of the property destroyed or the use of the sum to which plaintiff was instantly entitled at the date of the loss.¹¹⁹ Where there is proof that loss or injury was sustained by the plaintiff as the result of the defendant's negligence, but the amount of such damages is not shown, a judgment for nominal damages is proper.¹²⁰

§ 2469. Notice to the Telegraph Company of the Nature and Importance of the Message.—Generally speaking, there can be no recovery of damages unless the telegraph company had notice of the importance of the message and the probable consequences that would result from its negligent transmission and delivery, and this notice may be implied from the language of the message itself.¹²¹ In a case where the plaintiff sued for damages for the non-delivery of a telegram, an allegation that before the delivery of the message in question another message was received, announcing a death in the family, was held proper, as showing notice to the defendant of the promptness required in the transmission of the telegram.¹²²

§ 2470. Notice of Nature and Importance Conveyed by the Message Itself.—Death messages,¹²³ telegrams inquiring as to the condition of members of one's family,¹²⁴ and telegrams importing on their face a proposal to buy or sell, are generally regarded as sufficient to

Co., 69 S. C. 531; s. c. 48 S. E. Rep. 538.

¹¹⁷ Postal Telegraph Cable Co. v. Pratt, 85 S. W. Rep. 225; s. c. 27 Ky. L. Rep. 430; Western Union Tel. Co. v. Crawford (Tex. Civ. App.), 75 S. W. Rep. 843.

¹¹⁸ McGregor v. Western Union Tel. Co., 85 Mo. App. 308.

¹¹⁹ Western Union Tel. Co. v. Garner, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 433.

¹²⁰ Richmond Hosiery Mills v. Western Union Tel. Co., 123 Ga. 216; s. c. 51 S. E. Rep. 290.

¹²¹ Capers v. Western Union Tel. Co., 71 S. C. 29; s. c. 50 S. E. Rep. 537; Newsome v. Western Union Tel. Co., 137 N. C. 513; s. c. 50 S. E. Rep. 279.

¹²² Jones v. Western Union Tel. Co., 70 S. C. 539; s. c. 50 S. E. Rep. 198.

¹²³ Harrison v. Western Union Tel. Co., 136 N. C. 381; s. c. 48 S. E. Rep. 772.

¹²⁴ Willis v. Western Union Tel. Co., 69 S. C. 531; s. c. 48 S. E. Rep. 538.

charge the company with the necessity of prompt transmission and delivery;¹²⁵ but a telegram addressed to a doctor asking him to meet an incoming passenger at a station will not have this effect, where there is nothing on its face to indicate that the doctor's services as a physician are required.¹²⁶

§ 2472. Rule in Case of Cipher or Unintelligible Messages.¹²⁷

§ 2476. Damages for Injury to Feelings Alone.¹²⁸—Mental anguish is generally recognized as an element of damages¹²⁹ in cases where the telegraph company has notice of the urgency and importance of the message.¹³⁰

§ 2479. Doctrine that Such Damages are not Recoverable unless Accompanied with Physical Injury.¹³¹

§ 2480. Doctrine that such Damages not Recoverable unless Accompanied with some Other Actual Damage.¹³²—In one case, where

¹²⁵ Beatty Lumber Co. v. Western Union Tel. Co., 52 W. Va. 410; s. c. 44 S. E. Rep. 309; Western Union Tel. Co. v. Turner, 94 Tex. 304; s. c. 60 S. W. Rep. 432; Brooks v. Western Union Tel. Co., 26 Utah 147; s. c. 72 Pac. Rep. 499.

¹²⁶ Williams v. Western Union Tel. Co., 136 N. C. 82; s. c. 48 S. E. Rep. 559.

¹²⁷ Where a telegraph company received a message reading: "All right. Sell bluffing each described amply,"—from a customer who was known to be engaged in dealing in cotton, and all of whose messages were "rush" messages, the company was sufficiently apprised that the message was important, though partly in cipher, and responsible for the actual damages caused by its failure to promptly transmit the message: Western Union Tel. Co. v. Birge-Forbes Co., 29 Tex. Civ. App. 526; s. c. 69 S. W. Rep. 181.

¹²⁸ In support of principle indicated, see generally: Howard v. Western Union Tel. Co., — Ky. —; s. c. 84 S. W. Rep. 764; 27 Ky. L. Rep. 244; 86 S. W. Rep. 982; Graham v. Western Union Tel. Co., 109 La. 1069; s. c. 34 South. Rep. 91; Bryan v. Western Union Tel. Co., 133 N. C. 603; s. c. 45 S. E. Rep. 938.

¹²⁹ Cowan v. Western Union Tel. Co., 122 Iowa 379; s. c. 98 N. W. Rep. 281. The South Carolina statute making telegraph companies liable for mental anguish for negli-

gence in receiving, transmitting and delivering messages, gives damages for anxiety, and for negligence which prolongs anxiety and other kinds of mental suffering: Willis v. Western Union Tel. Co., 69 S. C. 531; s. c. 48 S. E. Rep. 538.

¹³⁰ Postal & Cable Co. v. Pratt, 85 S. W. Rep. 225; s. c. 27 Ky. L. Rep. 430; Darlington v. Western Union Tel. Co., 127 N. C. 448; s. c. 37 S. E. Rep. 479. Where the plaintiff sues for damages for non-delivery of a telegram, and the message on its face in no way connected the wife and baby of the plaintiff with its transmission, the fact that by the delay the wife and baby suffered, and their suffering caused the plaintiff pain and anguish, not being a result naturally to be anticipated from failure to deliver the telegram, the plaintiff cannot recover therefor: Jones v. Western Union Tel. Co., 70 S. C. 539; s. c. 50 S. E. Rep. 198.

¹³¹ In support of the principle indicated, see generally: Alexander v. Western Union Tel. Co., 126 Fed. Rep. 445; Stansell v. Western Union Tel. Co., 107 Fed. Rep. 668; Western Union Tel. Co. v. Waters, 139 Ala. 652; s. c. 36 South. Rep. 773; Western Union Tel. Co. v. Ferguson, 157 Ind. 64; s. c. 60 N. E. Rep. 674, 1080; Western Union Tel. Co. v. Adams, 28 Ind. App. 420; s. c. 63 N. E. Rep. 125.

¹³² See generally: Western Union Tel. Co. v. Sklar, 126 Fed. Rep. 295;

the agent of a telegraph company willfully sent a false and forged dispatch to an unmarried man, purporting to be signed by an unmarried lady, with whom he had a casual acquaintance, requesting him to meet her at a certain town, and afterwards exhibited the telegram, and boasted of having sent it, it was most righteously held that the act of the operator was within the scope of his business, so that the telegraph company was liable for damages to the lady arising from the mental suffering caused by injury to her reputation.¹³³

§ 2480a. **What Relationship Sufficiently near to Authorize these Damages.**—It has been held that damages for mental anguish were recoverable where the relationship between the parties to death or funeral messages was grandmother and grandchild,¹³⁴ a father-in-law and his daughter-in-law,¹³⁵ a wife and her husband's uncle,¹³⁶ second cousins,¹³⁷ and near relatives generally.¹³⁸ In the case of a father and a brother-in-law of his daughter,¹³⁹ an aunt and a nephew,¹⁴⁰ and a wife and her stepson¹⁴¹ the relationship has been held too remote.

§ 2481. **Disclosure of the Relationship of the Parties not Necessary to such Damages.**¹⁴²—But it has been held that delay in the delivery of a message addressed to a married man, disclosing no interest of his wife in the subject-matter, does not render the telegraph company liable for damages for mental anguish of the wife because of her inability to attend the burial of a grandchild whose death the message announced, in the absence of evidence that the message was intended for the wife's benefit.¹⁴³

Western Union Tel. Co. v. Bocker, 138 Ala. 484; s. c. 35 South. Rep. 468; *Western Union Tel. Co. v. Krichbaum*, 132 Ala. 535; s. c. 31 South. Rep. 607; *Blount v. Western Union Tel. Co.*, 126 Ala. 105; s. c. 27 South. Rep. 779.

¹³³ *Magouirk v. Western Union Tel. Co.*, 79 Miss. 632; s. c. 31 South. Rep. 206.

¹³⁴ *Western Union Tel. Co. v. Crocker*, 135 Ala. 492; s. c. 33 South. Rep. 45; *Western Union Tel. Co. v. Porterfield*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 850.

¹³⁵ *Bennett v. Western Union Tel. Co.*, 128 N. C. 103; s. c. 38 S. E. Rep. 294.

¹³⁶ *Bright v. Western Union Tel. Co.*, 132 N. C. 317; s. c. 43 S. E. Rep. 841.

¹³⁷ *Hunter v. Western Union Tel. Co.*, 135 N. C. 458; s. c. 47 S. E. Rep. 745.

¹³⁸ *Meadows v. Western Union Tel. Co.*, 131 N. C. 73; s. c. 43 S. E. Rep. 512.

¹³⁹ *Western Union Tel. Co. v. Ayers*, 131 Ala. 391; s. c. 31 South. Rep. 78.

¹⁴⁰ *Denham v. Western Union Tel. Co.*, 87 S. W. Rep. 788; s. c. 27 Ky. L. Rep. 999.

¹⁴¹ *Harrison v. Western Union Tel. Co.*, 136 N. C. 381; s. c. 48 S. E. Rep. 772.

¹⁴² In support of principle that disclosure of relationship of parties to death message is not necessary to recovery of damages, see: *Bennett v. Western Union Tel. Co.*, 128 N. C. 103; s. c. 38 S. E. Rep. 294; *Bright v. Western Union Tel. Co.*, 132 N. C. 317; s. c. 43 S. E. Rep. 841; *Hunter v. Western Union Tel. Co.*, 135 N. C. 458; s. c. 47 S. E. Rep. 745.

¹⁴³ *Cranford v. Western Union Tel.*

§ 2482. **When Addressee may Recover Damages for Injury to the Feelings.**—In one case where delay in delivering a message announcing the death of a sister did not prevent the addressee from attending the funeral, but caused her to suffer mental anguish only until she procured a postponement of the funeral to enable her to be present, it was held that she was not entitled to recover damages for the negligence of the company.¹⁴⁴ In another case a message was received by a telegraph company in the evening under a contract for prompt delivery to the plaintiff, and was transmitted the following morning, but not delivered until five o'clock in the evening, though proper diligence would have secured prompt delivery. The delay prevented the addressee from reaching her mother's bedside before her death. Here the company's negligence was the proximate cause of the addressee's mental anguish.¹⁴⁵

§ 2483. **Elements of Damage in Cases where the Feelings are Hurt.**—The term "mental anguish," to designate the suffering endured by the plaintiff through the negligence of telegraph companies in the transmission or delivery of messages, will include injuries to the feelings of persons prevented by such negligence from being present at the deathbed or funeral services of near relatives;¹⁴⁶ the distress of mind of unattended females arriving at night in strange towns and not met by friends to whom notice of their coming had been sent by telegram;¹⁴⁷ the mental suffering of a woman without funds in a strange

Co., 138 N. C. 162; s. c. 50 S. E. Rep. 585.

¹⁴⁴ *Western Union Tel. Co. v. Reed*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 296.

¹⁴⁵ *Western Union Tel. Co. v. Shaw*, 33 Tex. Civ. App. 395; s. c. 77 S. W. Rep. 433.

¹⁴⁶ *Western Union Tel. Co. v. Crumpton*, 138 Ala. 632; s. c. 36 South. Rep. 517; *Hurlburt v. Western Union Tel. Co.*, 123 Iowa 295; s. c. 98 N. W. Rep. 794; *Thomas v. Western Union Tel. Co.*, 85 S. W. Rep. 760; 27 Ky. L. Rep. 569; *Marsh v. Western Union Tel. Co.*, 65 S. C. 430; s. c. 43 S. E. Rep. 953. The mental anguish resulting from the inability of a husband to view the remains of his dead wife, because of the decomposition of her body, is not too remote, contingent, or speculative to constitute the basis of a legal recovery in an action against a telegraph company for negligent delay in the delivery of a telegram announcing her serious ill-

ness, which reached him too late to enable him to get home before she died: *Western Union Tel. Co. v. Hamilton*, 36 Tex. Civ. App. 300; s. c. 81 S. W. Rep. 1052.

¹⁴⁷ *Green v. Western Union Tel. Co.*, 136 N. C. 489; s. c. 49 S. E. Rep. 165; 67 L. R. A. 985; *Western Union Tel. Co. v. Siddall*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 343. Where a wife telegraphed to her husband to meet her, but, owing to the telegraph company's negligence, the message was not delivered, and she arrived at the railroad station at night, and went to a hotel, where she failed to secure lodging owing to its crowded condition, and from which, after a delay, she voluntarily went, escorted by a stranger, who treated her with courtesy, in a search for her husband, to a second hotel, where she found him, she was not entitled to damages from the telegraph company for mental suffering accruing from the time she reached the first

town during the time when a telegram asking for money was negligently delayed in its delivery to the person who would have supplied her;¹⁴⁸ the sorrow of a parent witnessing the suffering of a sick child while awaiting the arrival of a physician absent by reason of delay in the delivery of a telegram commanding his immediate presence;¹⁴⁹ the sorrow of the plaintiff because deprived of the consolation of a relative during bereavement;¹⁵⁰ grief suffered by a parent taking the remains of his child to a distant point and not being met at his destination by relatives and friends to whom he had sent a message announcing his coming, and because of this negligence the grave for his child was not prepared.¹⁵¹ It has been held there can be no recovery for mental suffering caused by anger and resentment,¹⁵² or vexation,¹⁵³ nor for mere increase of mental anxiety,¹⁵⁴ nor for the mental anguish of a father beholding the suffering of his child during the period of delay in delivering a message to a physician announcing the nature of the child's trouble, and requesting his immediate presence with surgical instruments,¹⁵⁵ nor for mental anguish arising solely out of the fact of the loss of a relative by death,¹⁵⁶ nor for mere uneasiness and distress self-provoked and arising purely from imaginary causes.¹⁵⁷ Thus where the plaintiff, in response to a telegram announcing his brother's death, undertook to send a message asking what disposition would be made of the body, which message was not sent, it was held that he could not recover for mental

hotel until she found her husband: *Western Union Tel. Co. v. Taylor* (Tex. Civ. App.), 81 S. W. Rep. 69.

¹⁴⁸ *Western Union Tel. Co. v. Burgess* (Tex. Civ. App.), 56 S. W. Rep. 237.

¹⁴⁹ *Western Union Tel. Co. v. Cavin*, 30 Tex. Civ. App. 152; s. c. 70 S. W. Rep. 229. See also *Western Union Tel. Co. v. Church*, 3 Neb. (unoff.) 22; s. c. 90 N. W. Rep. 878; 57 L. R. A. 905 (such damages recoverable by the sick person).

¹⁵⁰ *Bright v. Western Union Tel. Co.*, 132 N. C. 317; s. c. 43 S. E. Rep. 841.

¹⁵¹ *Western Union Tel. Co. v. Giffin*, 27 Tex. Civ. App. 306; s. c. 65 S. W. Rep. 661.

¹⁵² *Western Union Tel. Co. v. Bell* (Tex. Civ. App.), 61 S. W. Rep. 942.

¹⁵³ A statute authorizing recovery of damages for mental anguish in transmitting telegrams does not authorize recovery for vexation caused the sender of the telegram because of the dishonor of his check owing to the failure to deliver the tele-

gram in time: *Capers v. Western Union Tel. Co.*, 71 S. C. 29; s. c. 50 S. E. Rep. 537.

¹⁵⁴ *Western Union Tel. Co. v. Bass*, 28 Tex. Civ. App. 418; s. c. 67 S. W. Rep. 515.

¹⁵⁵ *Western Union Tel. Co. v. Reid*, — Ky. —; s. c. 85 S. W. Rep. 1171; 27 Ky. L. Rep. 659.

¹⁵⁶ *Hancock v. Western Union Tel. Co.*, 137 N. C. 497; s. c. 49 S. E. Rep. 952.

¹⁵⁷ *Morrison v. Western Union Tel. Co.* (Tex. Civ. App.), 59 S. W. Rep. 1127. A party was not entitled to recover for mental anguish on account of his wife's exposure to smallpox, due to a telegraph company's failure to deliver promptly a telegram announcing that her brother had died of such disease and that she had better not come, where her testimony showed that she was not alarmed on her own account, but merely was anxious because she had her baby with her: *Western Union Tel. Co. v. Murray*, 29 Tex. Civ. App. 207; s. c. 68 S. W. Rep. 549.

anguish, since the message did not show that mental anguish would likely result from a failure to transmit, and its intent was merely to seek relief from anguish already existing.¹⁵⁸ So where a message was received by the sendee announcing the death of his grandchild in time for him to take the train to attend the burial, the mere fact that his wife was prevented from taking the train because of her inability to place her children in the care of a neighbor after the receipt of the message by her husband would not render the telegraph company liable for mental anguish resulting from her failure to attend the burial.¹⁵⁹

§ 2484. Quantum of Damages for Injuries to the Feelings.¹⁶⁰

§ 2485. Exemplary Damages against Telegraph Companies.—Exemplary damages are recoverable for a willful breach of the duty to deliver a telegram without delay,¹⁶¹ where actual damages are shown.¹⁶² Such damages were allowed in a case where a telegram was sent announcing the death of the plaintiff's son, followed by another to the operator asking prompt delivery of the first, and the operator forgot to deliver the message for four days, whereby the plaintiff was prevented from attending the funeral services.¹⁶³ They were refused in another case where a night message to a wife requesting instructions as to the disposition of her husband's body, and indicating no special urgency, was sent out for delivery by the receiving office immediately on the opening of the office, and this office, on failure to

¹⁵⁸ *Sparkman v. Western Union Tel. Co.*, 130 N. C. 447; s. c. 41 S. E. Rep. 881.

¹⁵⁹ *Cranford v. Western Union Tel. Co.*, 138 N. C. 162; s. c. 50 S. E. Rep. 585.

¹⁶⁰ In these cases the amount stated was held not excessive:—\$400 (suffering of person in strange town because of failure to deliver message calling for funds), *Barnes v. Western Union Tel. Co.*, 27 Nev. 438; s. c. 76 Pac. Rep. 931; 65 L. R. A. 666; \$500 (delay prevented grandmother from seeing remains of grandchild), *Western Union Tel. Co. v. Porterfield*, — Tex. Civ. App. —; 84 S. W. Rep. 850; \$750 (through failure to deliver, funeral party was not met at station), *Western Union Tel. Co. v. Giffin*, 27 Tex. Civ. App. 306; s. c. 65 S. W. Rep. 661; \$750 (delay prevented presence of mother at daughter's funeral), *Western Union Tel. Co. v. Rice* (Tex. Civ. App.), 61 S. W. Rep. 327; \$1,000 (delay prevented parents from viewing body of son before burial), *Western Union*

Tel. Co. v. Norris, 25 Tex. Civ. App. 43; s. c. 60 S. W. Rep. 982; \$1,000 (several days' delay in delivery of message to parent within easy reach prevented presence at funeral of son), *Western Union Tel. Co. v. Frith*, 105 Tenn. 167; s. c. 58 S. W. Rep. 118; \$1,316 (delay prevented husband from reaching wife before her death), *Western Union Tel. Co. v. Hamilton*, 36 Tex. Civ. App. 300; s. c. 81 S. W. Rep. 1052.

¹⁶¹ *Hellams v. Western Union Tel. Co.*, 70 S. C. 83; s. c. 49 S. E. Rep. 12; *Lewis v. Western Union Tel. Co.*, 57 S. C. 325; s. c. 35 S. E. Rep. 556; *Poulnot v. Western Union Tel. Co.*, 69 S. C. 545; s. c. 48 S. E. Rep. 622; *Kopperl v. Western Union Tel. Co.*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 1018 (gross negligence insufficient).

¹⁶² *Connolly v. Western Union Tel. Co.*, 100 Va. 51; s. c. 40 S. E. Rep. 618; 4 Va. Sup. Ct. Rep. 6.

¹⁶³ *Western Union Tel. Co. v. Frith*, 105 Tenn. 167; s. c. 58 S. W. Rep. 118.

locate the residence of the addressee, sent a service message for a better address and delivered it before one o'clock of that day, and in ample time for the wife to have answered before her husband was buried had she exercised proper diligence.¹⁶⁴ It is held that these damages cannot be recovered for the transmission and delivery of libelous messages by agents of the company where no malice or wrongful intent is shown on the part of either the company or its agents other than might be inferred from the transmission and delivery.¹⁶⁵

§ 2486. What Law Governs.—The right to recover damages for mental anguish becomes a question of some importance where the message is transmitted between a point in one State recognizing this form of injury as an element of damages and a point in another State where they are not recoverable. The question has been much considered recently by the courts of Texas, and there the conclusion is reached that such damages may be recovered only where recoverable in the State where the telegram originates; in other words, the place of entering into the contract controls.¹⁶⁶ Accordingly a telegraph company in Texas is liable for damages for mental suffering resulting from its negligence in failing to deliver promptly a message sent from a point in that State to a non-resident in a jurisdiction which does not allow a recovery in such cases.¹⁶⁷ The cases on the question are by no means harmonious, and authorities are not wanting that sustain the recovery for damages for mental anguish caused by negligent delay in delivering messages in a jurisdiction where the negligent act occurs, if statutes therein authorize their recovery, although the telegram originated in a State where mental anguish was not regarded as an element of damages.¹⁶⁸ In Tennessee, where unreasonable

¹⁶⁴ *Western Union Tel. Co. v. Spratley*, 84 Miss. 86; s. c. 36 South. Rep. 188.

¹⁶⁵ *Western Union Tel. Co. v. Cashman*, 132 Fed. Rep. 805; s. c. 65 C. C. A. 607.

¹⁶⁶ *Thomas v. Western Union Tel. Co.*, 25 Tex. Civ. App. 398; s. c. 61 S. W. Rep. 501; *Western Union Tel. Co. v. Blake*, 29 Tex. Civ. App. 224; s. c. 68 S. W. Rep. 526; *Western Union Tel. Co. v. Christensen* (Tex. Civ. App.), 78 S. W. Rep. 744. Where a message was given to a telegraph company in Arkansas, and transmitted to its destination in Texas, where the agent negligently failed to deliver the same to the addressee, a recovery was governed by the laws of Arkansas, and damages for mental anguish, not being

recoverable there, could not be recovered in a suit in Texas: *Western Union Tel. Co. v. Buchanan*, 35 Tex. Civ. App. 437; s. c. 80 S. W. Rep. 561.

¹⁶⁷ *Western Union Tel. Co. v. Anderson*, 34 Tex. Civ. App. 14; s. c. 78 S. W. Rep. 34; *Western Union Tel. Co. v. Waller*, 96 Tex. 589; s. c. 74 S. W. Rep. 751; rev'g s. c. 72 S. W. Rep. 264.

¹⁶⁸ *Western Union Tel. Co. v. Ford* (Ark.), 92 S. W. Rep. 528; *Howard v. Western Union Tel. Co.*, — Ky. —; s. c. 84 S. W. Rep. 764; 27 Ky. L. Rep. 244; *Postal Tel. & Co. v. Wells*, 82 Miss. 733; s. c. 35 South. Rep. 190; *Harrison v. Western Union Tel. Co.*, 71 S. C. 386; s. c. 51 S. E. Rep. 119; *Gray v. Western Union Tel. Co.*, 108 Tenn. 39; s. c.

ble delay in delivery is made a misdemeanor and penalized, damages may be recovered for mental suffering caused by negligence in the delivery of the telegram, though the telegram was sent from a State where these damages are not recognized, and this though all such damages were suffered in that jurisdiction. The breach is regarded as a breach of statutory duty and not as a breach of a private contract.¹⁶⁹

§ 2487. Parties to Actions against Telegraph Companies.¹⁷⁰

§ 2488. When the Right of Action is in the Addressee.—In Georgia the conclusion is reached after an extensive examination of the authorities that the sendee of a telegram can recover for negligence in transmission or delivery only where the telegraph company knows or is chargeable with notice that the message is for his benefit.¹⁷¹ There the telegraph company is considered the agent of the sender, to whom, and not to the telegraph company, the sendee must look for damages arising out of error in the transmission of the message.¹⁷²

§ 2490. When the Right of Action is in the Sender.—The undisclosed principal of the sender of a message may sue in his own name for damage resulting from the negligence of the telegraph company in the transmission or delivery of the message.¹⁷³

§ 2491. Whether any Right of Action in a Third Person.¹⁷⁴

64 S. W. Rep. 1063; 56 L. R. A. 301; 91 Am. St. Rep. 106; Western Union Tel. Co. v. James, 162 U. S. 650; s. c. 16 Sup. Ct. Rep. 934; 40 L. Ed. 1105.

¹⁶⁹ Gray v. Western Union Tel. Co., 108 Tenn. 39; s. c. 64 S. W. Rep. 1063.

¹⁷⁰ In a case where defendant telegraph company failed to deliver a message sent by a father, in behalf of himself and a daughter, to her husband, telling him to meet them at a train, and because of the failure to deliver both father and daughter were compelled to walk some distance through the rain and pay hotel bills, their causes of action were separate: Western Union Tel. Co. v. Campbell, 36 Tex. Civ. App. 276; s. c. 81 S. W. Rep. 580. In an action against a telegraph company for its own negligent act it is not necessary to join a telephone company transmitting the message to the telegraph company to forward: Western Union Tel. Co. v. Kuykendall (Tex. Civ. App.), 86 S. W. Rep. 61; s. c. rev'd, — Tex. —; 89 S. W. Rep. 965.

¹⁷¹ A telegram addressed to a firm of real estate brokers, as follows: "See S. Take his last offer. Wire me at F."—did not show that it was for the benefit of the addressees, and hence, in the absence of any other notice to the telegraph company that such was the case, the addressees could not sue for failure to deliver it: Frazier v. Western Union Tel. Co., 45 Ore. 414; s. c. 78 Pac. Rep. 330; 67 L. R. A. 319.

¹⁷² Brooke v. Western Union Tel. Co., 119 Ga. 694; s. c. 46 S. E. Rep. 826; Richmond Hosiery Mills v. Western Union Tel. Co., 123 Ga. 216; s. c. 51 S. E. Rep. 290. A telegraph company being the agent of the sender, the addressee cannot be prejudiced by mistakes in transmission, but may rely on the telegram as delivered to him, to prove the contents of the message: Ashford v. Schoop, 81 Mo. App. 539.

¹⁷³ Dodd Grocery Co. v. Postal Tel. Cable Co., 112 Ga. 685; s. c. 37 S. E. Rep. 981.

¹⁷⁴ See also Whitehill v. Western Union Tel. Co., 136 Fed. Rep. 499. Where a telegraph company failed

§ 2495. **Form of Action: Contract or Tort.**¹⁷⁵

§ 2496. **What the Plaintiff must Aver and Prove.**—In a State where the laws prohibit the making of contracts on Sunday, except such as are necessary in order to relieve suffering, avert harm, and prevent serious loss of health and life, a person seeking the recovery of damages caused by the negligence of a telegraph company in the transmission of a message sent on Sunday must plead facts which will show the necessity for sending the message on Sunday, and that the telegraph company had notice of this urgency.¹⁷⁶ This necessity may appear from the contents of the message, or the necessity and notice thereof to the company may be shown by the averment of extrinsic facts.¹⁷⁷ The declaration in an action for failure to deliver a message directing the purchase of goods at a named price, provided they could be shipped by a certain steamer, was held bad in that it failed to allege that the goods could have been purchased at the price if the message had been promptly delivered and could have been shipped by the steamer named.¹⁷⁸ In a State where it is unlawful to contract in futures, the complaint, in an action for damages from negligent delay in delivering a telegram relating to the sale of commodities in the future, must allege ownership of the commodity in the seller and the intention to make an actual delivery.¹⁷⁹ There is a holding that the plaintiff, in an action for failure to deliver a telegram announcing a death and the time of the burial, need not allege that, if the message had been delivered in time, he would have attended the funeral.¹⁸⁰

§ 2498. **Complaints or Petitions in Actions to Recover Statutory Penalties.**—Statutes imposing penalties for the negligence of telegraph companies in the transmission or delivery of messages create a cumulative remedy which is in addition to the action for damages

to deliver a telegram sent by the son of plaintiff to a third person for the benefit of plaintiff, the latter has a right of action: *Butler v. Western Union Tel. Co.*, 62 S. C. 222; s. c. 40 S. E. Rep. 162.

¹⁷⁵ Negligence by the telegraph company in discharging its contractual obligation correctly to transmit and expeditiously deliver the message constitutes a tort, and the action therefor is not made to sound in contract merely because the plaintiff, by way of inducement, pleads the making of the contract: *Cowan v. Western Union Tel. Co.*,

122 Iowa 379; s. e. 98 N. W. Rep. 281.

¹⁷⁶ *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14; s. c. 54 N. E. Rep. 775.

¹⁷⁷ *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14; s. c. 54 N. E. Rep. 775.

¹⁷⁸ *Ferguson v. Anglo-American Tel. Co.*, 151 Pa. St. 211; s. c. 25 Atl. Rep. 40; 31 W. N. C. (Pa.) 165.

¹⁷⁹ *Gist v. Western Union Tel. Co.*, 45 S. C. 344; s. c. 23 S. E. Rep. 143.

¹⁸⁰ *Harrison v. Western Union Tel. Co.*, 71 S. C. 386; s. c. 51 S. E. Rep. 119.

which the plaintiff may have sustained; hence the plaintiff in an action to recover the penalty need not allege or show actual damages.¹⁸¹

§ 2499. What Allegations are Unnecessary.—Under the Iowa code, which places upon the telegraph company the burden of proof that the mistake or delay was not due to its own negligence, it is not necessary for the plaintiff, suing for damages from the erroneous transmission of a telegram, to allege his own freedom from contributory negligence.¹⁸²

§ 2500. Allegations with Regard to Giving Company Notice of Claim.—The failure of the pleader to allege a prior presentation of the plaintiff's claim for damages to the company, as required by the contract, does not require a dismissal of the action, but the complaint may be amended on the taxation of the accrued costs to him.¹⁸³

§ 2501. Examples of Good Declarations or Complaints.¹⁸⁴

§ 2502. Examples of Complaints that have been Assailed on Various Grounds, and Held Sufficient.—A complaint, which set out the

¹⁸¹ *Western Union Tel. Co. v. Ferguson*, 157 Ind. 37; s. c. 60 N. E. Rep. 679.

¹⁸² *Cowan v. Western Union Tel. Co.*, 122 Iowa 379; s. c. 98 N. W. Rep. 281.

¹⁸³ *Western Union Tel. Co. v. Hays* (Tex. Civ. App.), 63 S. W. Rep. 171.

¹⁸⁴ A complaint was held to set forth a cause of action which averred the delivery of a message to the company accepting an offer to sell a number of barrels of sugar at a certain price, the payment of the charges, the failure to transmit and deliver the message, and a loss by reason of the advance in the market price of the sugar: *Dodd Grocery Co. v. Postal Tel. Cable Co.*, 112 Ga. 685; s. c. 37 S. E. Rep. 981. Negligence was held sufficiently averred by an allegation that the defendant telegraph company received a second message to be transmitted to revoke an earlier message, and had carelessly neglected to send the first message at once, and delivered the last message first, whereby the first revoked the last: *Hocker v. Western Union Tel. Co.*, 45 Fla. 363; s. c. 34 South. Rep. 901. A cause of action was held sufficiently stated by a declaration which alleged that a message directed to plaintiff, informing him that his sister was dying, was de-

livered to defendant telegraph company for transmission, and that, had such message been delivered within a reasonable time, plaintiff would have had ample time to have attended his sister's funeral; that plaintiff did not know of his sister's condition until the evening of the second day after the delivery of the telegram for transmission, after his sister had been buried; and that, by defendant's willful negligence, plaintiff was subject to great pain and anguish, in consequence of being deprived of the privilege of attending his sister's funeral, etc.: *Hartzog v. Western Union Tel. Co.* (Miss.), 34 South. Rep. 361. A count alleging that on account of defendant's negligence plaintiff lost a valuable situation which was open to him, and another one alleging that plaintiff lost the situation through defendant's negligence in not delivering the message within a reasonable time, and another count, added by way of amendment, specifying more definitely that the residence of plaintiff was within the radius of free delivery, and stating the time he was kept out of employment, were held sufficient as against demurrer: *Western Union Tel. Co. v. Bowman*, 141 Ala. 175; s. c. 37 South. Rep. 493.

negligent delivery of a message at a certain hour on a certain day and alleged that but for the delay the plaintiff would have reached the bedside of his son twelve hours before his death, which occurred the next day after it was delivered, was held sufficiently specific to apprise the telegraph company of the precise nature of the claim, although it did not state the hour of the son's death.¹⁸⁵

§ 2505. Variance Between Allegations and Proofs.—In one case it was held that there was no material variance between an allegation that a person whose sickness was the subject of a message was "at" a house in a small village, and proof that she was at the house described, but it was two miles distant from such town.¹⁸⁶ In another case in the same State it was held that there was a fatal variance between an alleged failure to transmit a message to the sendee in a certain town, and evidence of an agreement to deliver the message at her home two and a half miles from this town.¹⁸⁷ In South Carolina, where the plaintiff is not required to elect between two or more acts of negligence set forth in his complaint, he is not subject to a nonsuit on the whole of his action because the complaint charged both simple negligence and wantonness and willfulness and there was an entire failure of proof as to the wantonness or willfulness.¹⁸⁸

§ 2506. What must be Pleaded by Way of Special Defense, and How.—A telegraph company intending to rely on the defense that its failure to deliver a message was excusable on account of the misspelling of the name of the sendee should set up that fact as a defense in its answer.¹⁸⁹ Under a statute imposing a penalty for a failure to transmit telegrams impartially and in good faith and in order of time in which they are received, it is not a defense that the telegraph company used reasonable diligence in attempting to deliver the message and that its failure to deliver resulted from the sender's neglect to furnish a correct address; a plea of contributory negligence is not a defense to a charge of partiality and bad faith.¹⁹⁰

§ 2507. Interpretation of Complaints in these Actions.—Where messages are received from a sender under a contract allowing him to pay his telegraph tolls at the end of each month, it is not necessary

¹⁸⁵ *Howard v. Western Union Tel. Co.*, 76 S. W. Rep. 387; s. c. 25 Ky. L. Rep. 828.

¹⁸⁶ *Western Union Tel. Co. v. Roberts*, 34 Tex. Civ. App. 76; s. c. 78 S. W. Rep. 522.

¹⁸⁷ *Western Union Tel. Co. v. Byrd*, 34 Tex. Civ. App. 594; s. c. 79 S. W. Rep. 40.

¹⁸⁸ *Poulnot v. Western Union Tel. Co.*, 69 S. C. 545; s. c. 48 S. E. Rep. 622.

¹⁸⁹ *Cogdell v. Western Union Tel. Co.*, 135 N. C. 431; s. c. 47 S. E. Rep. 490.

¹⁹⁰ *Western Union Tel. Co. v. Ferguson*, 157 Ind. 37; s. c. 60 N. E. Rep. 679.

that the complaint should allege the payment or tender of the fee for transmitting the message.¹⁹¹

§ 2510. **Declarations of the Company's Agent.**—Remarks of the agent at the time of receiving the message, or thereafter, showing a comprehension of the importance of the message, are admissible upon the issue whether diligence commensurate with the importance of the message had been exercised in its delivery.¹⁹²

§ 2511. **Declarations of Other Persons.**¹⁹³

§ 2513. **Evidence on the Question of Damages.**—The plaintiff in an action for damages for delay in the delivery of a message calling sendee to a deathbed or to attend a funeral, must prove not only that he could, but that he would, have reached the place in time to have accomplished the object of the telegram if it had been seasonably delivered.¹⁹⁴

§ 2514. **Evidence of what would have Happened, been Done, been Realized, if, etc.**—The sender of a message ordering goods for a certain purpose cannot recover damages resulting from failure to receive the goods because of an error in transmission unless he shows that the order would have been filled if the message had been properly transmitted.¹⁹⁵ So in an action for damages for delay in the delivery of a telegram accepting an offer for the sale of a commodity, the plaintiff was entitled to introduce in evidence a copy of a telegram received from another person offering to purchase the commodity at an advanced price.¹⁹⁶ And so in an action to recover for delay in delivery of a telegram directing the deposit of money in a bank to pay a check it must be alleged that the money would have been deposited by the person directed and in time to meet the check.¹⁹⁷

¹⁹¹ *Western Union Tel. Co. v. Henley*, 157 Ind. 90; s. c. 60 N. E. Rep. 682.

¹⁹² *Western Union Tel. Co. v. Davis*, 24 Tex. Civ. App. 427; s. c. 59 S. W. Rep. 46.

¹⁹³ Where the damages are sought for failure to deliver a telegram whereby plaintiff lost an employment, evidence as to a conversation between plaintiff's agent and another, in which a contract of employment was made for plaintiff, was competent: *Western Union Tel. Co. v. Bowman*, 141 Ala. 175; s. c. 37 South. Rep. 493.

¹⁹⁴ *Howard v. Western Union Tel. Co.*, — Ky. —; s. c. 84 S. W. Rep. 764; 27 Ky. L. Rep. 244; 86 S. W. Rep. 982; *Hancock v. Western*

Union Tel. Co., 137 N. C. 497; s. c. 49 S. E. Rep. 952; *Cumberland Tel. Co. v. Brown*, 104 Tenn. 56; s. c. 55 S. W. Rep. 155; *Western Union Tel. Co. v. Adams* (Tex. Civ. App.), 80 S. W. Rep. 93; *Western Union Tel. Co. v. Norris*, 25 Tex. Civ. App. 43; s. c. 60 S. W. Rep. 982.

¹⁹⁵ *Newsome v. Western Union Tel. Co.*, 137 N. C. 513; s. c. 50 S. E. Rep. 279. See also *Elam v. Western Union Tel. Co.*, 113 Mo. App. 538; s. c. 88 S. W. Rep. 115.

¹⁹⁶ *Postal Telegraph Cable Co. v. William Rhett & Co.* (Miss.), 35 South. Rep. 829.

¹⁹⁷ *Capers v. Western Union Tel. Co.*, 71 S. C. 29; s. c. 50 S. E. Rep. 537.

§ 2516. **Evidence on the Subject of Mental Anguish, Injury to the Feelings, etc.**—It has been held that the plaintiff in an action for damages of this character can testify as to the particular apprehensions from which he suffered because of a failure to receive the telegram.¹⁹⁸

§ 2518. **Questions as to the Burden of Proof.**—A *prima facie* case of negligent delay in the delivery of a telegram is made by proof or admission that the telegram was received by the defendant for transmission, and that it failed to deliver the same to the sendee within a reasonable time.¹⁹⁹ Where there is no special contract between the sender of the telegram and the company limiting liability unless the message is repeated, a *prima facie* case of negligence is made by proof of an error in the message.²⁰⁰ Where damages are claimed for the delivery of a forged message sent by wire tappers, proof of the delivery of the message, of its forged character and of the loss resulting to the plaintiff from reliance on it, constitutes a *prima facie* case.²⁰¹ In the foregoing cases the burden of proof of freedom from negligence is placed on the telegraph company. Where the action is for a failure to deliver a telegram as sent, directing the purchase of a commodity, and the company defends on the ground that the message relates to an illegal dealing in futures, the burden is placed on the defendant to show that the commodity would not and could not have been delivered.²⁰² Where the negligence of the company has resulted in the plaintiff's loss of employment—the subject of a message—the telegraph company has the burden of proving, in mitigation of damages, that the plaintiff obtained, or could have obtained, other employment by exercising reasonable diligence.²⁰³

§ 2522. **Other Points of Evidence.**—In an action for damages caused by the sending of a false and forged telegram by the company's agent, evidence of the agent's habits as to sobriety and of his demeanor when intoxicated has been held admissible on the question of his fitness for the position he occupied.²⁰⁴ In the case of delay in the delivery of a death message addressed to a person in care of another, parol evidence was held admissible to show that it was the

¹⁹⁸ Willis v. Western Union Tel. Co., 69 S. C. 531; s. c. 48 S. E. Rep. 538. 77 S. W. Rep. 603; aff'g s. c. 72 S. W. Rep. 232.

¹⁹⁹ Cogdell v. Western Union Tel. Co., 135 N. C. 431; s. c. 47 S. E. Rep. 490. ²⁰² Western Union Tel. Co. v. Hill (Tex. Civ. App.), 65 S. W. Rep. 1123.

²⁰⁰ Western Union Tel. Co. v. Hines, 22 Tex. Civ. App. 315; s. c. 54 S. W. Rep. 627. ²⁰³ Western Union Tel. Co. v. Bowman, 141 Ala. 175; s. c. 37 South. Rep. 493.

²⁰¹ Western Union Tel. Co. v. Uvalde Nat. Bank, 97 Tex. 219; s. c. ²⁰⁴ Magouirk v. Western Union Tel. Co., 79 Miss. 632; s. c. 31 South. Rep. 206.

understanding between the parties when the message was sent that it was to be delivered to the addressee only, and that it was intended that the person in whose care the message was sent was to be applied to only for the purpose of securing the sendee's address.²⁰⁵

§ 2526. **Questions of Law and Fact.**²⁰⁶—The question whether the regulations of a telegraph company fixing office hours at a certain place are reasonable is generally a question of law for the determination of the court, and not one of fact for the jury.²⁰⁷

§ 2527. **Instructions to Juries in these Cases.**²⁰⁸

²⁰⁵ *Western Union Tel. Co. v. Bryant*, 35 Tex. Civ. App. 442; s. c. 80 S. W. Rep. 406.

²⁰⁶ *Cogdell v. Western Union Tel. Co.*, 135 N. C. 431; s. c. 47 S. E. Rep. 490 (whether name "Cogdell" and "Cogdell" are so dissimilar as not to suggest identity); *Willis v. Western Union Tel. Co.*, 69 S. C. 531; s. c. 48 S. E. Rep. 538 (whether negligence of telegraph company under circumstances was proximate cause of mental anguish); *Poulnot v. Western Union Tel. Co.*, 69 S. C. 545; s. c. 48 S. E. Rep. 622 (whether ordinary care was exercised in the effort to make timely delivery); *Evans v. Western Union Tel. Co.* (Tex. Civ. App.), 56 S. W. Rep. 609 (whether company was negligent in failing to comply with custom to notify the sending office of extra charges for special delivery); *Western Union Tel. Co. v. Shaw*, 33 Tex. Civ. App. 395; s. c. 77 S. W. Rep. 433 (whether the ordinary rule as to closing office hours should apply where evidence of agreement to send particular message on night it was received).

²⁰⁷ *Western Union Tel. Co. v. Love-Banks Co.*, 73 Ark. 205; s. c. 83 S. W. Rep. 949.

²⁰⁸ An instruction that "if you find

a verdict for the plaintiff, in estimating the damages, if any, you will take into consideration the mental suffering undergone by the plaintiff, if any, by reason of his not being present during the last hours of his mother's life," was held not open to the objection that it furnished no guide for ascertaining the damages to be awarded: *Western Union Tel. Co. v. Waller*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 695. In a case involving negligent delay in delivering a message transmitted at night, under a contract not requiring its delivery if the company maintained no operator at the receiving station, an instruction that if an operator at such station, who was authorized and undertook to act for the company, received the message and handed it to the messenger, who was negligent in failing to deliver it, the company would be liable for such negligence, was held erroneous in not stating that if the receipt and attempted delivery was the voluntary act of a railroad operator not in the employ of the company, the company would not be liable for the negligence of the messenger he selected: *Western Union Tel. Co. v. Rawls* (Tex. Civ. App.), 62 S. W. Rep. 136.

TITLE SEVENTEEN.

CARRIERS OF PASSENGERS BY LAND AND WATER.

[§§ 2535-3679.]

§ 2535. **Who are Common Carriers of Passengers.**—Railroad companies generally,¹ including corporations operating belt lines used in switching whole trains,² the trustees of committees purchasing railroads,³ street railroads, though operated by individual instead of corporate owners,⁴ and persons operating elevators for public use in buildings,⁵—are regarded as common carriers of passengers.

§ 2537. **Who are not Common Carriers of Passengers.**—Railroad companies are not common carriers of sleeping cars belonging to others and hence may impose such terms as a condition to their operation over their lines as they may elect.⁶ It is a matter of common knowledge that railroad work trains are not intended for the carriage of passengers, and the law charges persons availing themselves of this method of transportation with knowledge of this fact.⁷ There is a holding that the mere fact that the person was driver of a "licensed bus" does not make him a common carrier, and thus legally bound to carry passengers.⁸

§ 2541. **General Obligation of Common Carriers to Receive and Carry.**—A railroad company is not bound to receive and carry passengers on emergency wreck trains, and the fact that it has carried a person on such a train to a wreck does not of itself make it obligatory that it should allow him to ride back on such a train.⁹

¹ *Duck v. St. Louis &c. R. Co.* (Tex. Civ. App.), 63 S. W. Rep. 891 (all railroad companies in Texas are made common carriers by the constitution).

² *Fleming v. Kansas City &c. R. Co.*, 89 Mo. App. 129.

³ *O'Toole v. Faulkner*, 29 Wash. 544; s. c. 70 Pac. Rep. 58.

⁴ *Crump v. Davis*, 33 Ind. App. 88; s. c. 70 N. E. Rep. 886.

⁵ *Hensler v. Stix*, 113 Mo. App. 162; s. c. 88 S. W. Rep. 108.

⁶ *Chicago &c. R. Co. v. Hamler*, 215 Ill. 525; s. c. 74 N. E. Rep. 705; rev'g s. c. 114 Ill. App. 141.

⁷ *Pennsylvania Co. v. Coyer*, 163 Ind. 631; s. c. 72 N. E. Rep. 875 (injured person must show that he was rightfully on the train).

⁸ *Atlantic City v. Dehn*, 69 N. J. L. 233; s. c. 54 Atl. Rep. 220.

⁹ *Louisville &c. R. Co. v. Du Bose*, 120 Ga. 339; 47 S. E. Rep. 917.

§ 2542. **What will and what will not Excuse the Performance of this Obligation—Intoxication of the Intending Passenger.**—The railroad company can lawfully refuse to admit to its trains an unattended intoxicated person,¹⁰ though he has a ticket sold to him by an agent with knowledge of his intoxication. It is no part of the duty of the ticket seller to pass upon the fitness of persons offering themselves for transportation.¹¹ But the conductor may accept such a passenger, and if he does the company will be held to the exercise of reasonable care for his safety under the circumstances.¹² Where, however, a sober person is refused transportation on the ground of intoxication, he will be allowed to recover the actual damages suffered by him, and if the refusal is attended with undue force, calculated to humiliate him, or is accompanied with malice, or other willful wrong, the jury may in addition award exemplary damages.¹³

§ 2543. **Refusing to Carry Diseased Persons—Persons under Disability.**—The carrier may lawfully deny transportation to a person unable to care for himself, or liable to require extra attention from the trainmen or passengers on account of physical or mental disability. But where a person seemingly disabled is in fact able to travel alone without requiring extra care and attention and this fact is known to the carrier, it is bound to carry him.¹⁴ So the carrier may refuse transportation to a blind person, unless the agent of the carrier to whom application for transportation is made knows, or has reasonable grounds to believe that, although blind, such a person is fit to travel. In a case of this kind an allowance of punitive damages was sustained where the transportation was arbitrarily denied.¹⁵ It is the duty of the agent to listen to explanations made by the blind person as to his experience and capacity to travel alone, and to judge of his competency in the light of the facts presented.¹⁶ Again the carrier may refuse transportation to a lunatic not properly attended.¹⁷ In the latter case the carrier is entitled to seasonable notice in order that it may make proper arrangements for the transportation of the insane person.¹⁸

¹⁰ Price v. St. Louis &c. R. Co., 75 Ark. 479; s. c. 88 S. W. Rep. 575; Story v. Norfolk &c. R. Co., 133 N. C. 59; s. c. 45 S. E. Rep. 349.

¹¹ Korn v. Chesapeake &c. R. Co., 125 Fed. Rep. 897; s. c. 63 L. R. A. 872.

¹² Price v. St. Louis &c. R. Co., 75 Ark. 479; s. c. 88 S. W. Rep. 575.

¹³ Story v. Norfolk &c. R. Co., 133 N. C. 59; s. c. 45 S. E. Rep. 349.

¹⁴ Illinois Cent. R. Co. v. Smith, 85 Miss. 349; s. c. 37 South. Rep.

643; Mathew v. Wabash R. Co. (Mo. App.), 78 S. W. Rep. 271.

¹⁵ Illinois Cent. R. Co. v. Smith, 85 Miss. 349; s. c. 37 South. Rep. 643.

¹⁶ Illinois Cent. R. Co. v. Smith, 85 Miss. 349; s. c. 37 South. Rep. 643.

¹⁷ Owens v. Macon &c. R. Co., 119 Ga. 230; s. c. 46 S. E. Rep. 87; 63 L. R. A. 946.

¹⁸ Owens v. Macon &c. R. Co., 119 Ga. 230; s. c. 46 S. E. Rep. 87; 63 L. R. A. 946.

§ 2544. **Refusing to Carry Other Objectionable Persons.**—It is no ground for refusing transportation to a holder of a ticket that he had been engaged in the business of scalping the carrier's tickets,¹⁹ or had conducted himself in a way offensive and troublesome to other passengers at another time.²⁰ It has been held that a person travelling on free transportation and expelled from the train because of a violation of a rule of the carrier was entitled to resume his journey on tender of the proper fare for his transportation.²¹

§ 2547. **Obligation of Railway Companies to Establish Passenger Stations and to Stop Trains at them.**—The carrier having stopped long enough to allow passengers at a regular station to get off or get on is not obliged to hold its train for belated passengers.²² It is held that a willful, wanton, or capricious refusal to stop a train at a flag station on signal, will entitle the intending passenger to recover punitive in addition to actual damages.²³ In an action against a railway company for damages occasioned by the failure to stop a car at a given point in response to a signal of an intending passenger, the declaration should show that it was the duty of the company to stop the particular car in question at this point.²⁴

§ 2548. **Obligation to Serve all Persons Alike.**²⁵

§ 2553. **Duty to Run Trains on Schedule Time.**—It may be said generally that the carrier is under the obligation to exercise such care and effort to avoid delay to a passenger as is due under the circumstances.^{25a} The time tables and schedules of a railroad company par-

¹⁹ Ford v. East Louisiana R. Co., 110 La. 414; s. c. 34 South. Rep. 585.

²⁰ Story v. Norfolk & c. R. Co., 133 N. C. 59; s. c. 45 S. E. Rep. 349.

²¹ Choctaw & c. R. Co. v. Hill, 110 Tenn. 396; s. c. 75 S. W. Rep. 963.

²² Pickett v. Southern R. Co. Carolina Division, 69 S. C. 445; s. c. 48 S. E. Rep. 466. A New York statute making it the duty of elevated railroad companies to hold their trains at stations until every passenger upon the platform desiring to enter the cars shall have done so, unless due notice has been given that the cars are filled, is to be reasonably construed, and thus construed does not require the gates of cars to be opened after they have been closed, and a signal to start given, or after they have actually started, because people may thereafter come onto the platform and

desire to take the train, a procedure which might wholly prevent the operation of trains: Lauterer v. Manhattan R. Co., 128 Fed. Rep. 540; s. c. 63 C. C. A. 38.

²³ Southern R. Co. v. Lanning, 83 Miss. 161; s. c. 35 South. Rep. 417; Yazoo & c. R. Co. v. Mitchell, 83 Miss. 179; s. c. 35 South. Rep. 339.

²⁴ Battle v. Georgia R. & c. Co., 120 Ga. 992, 994; s. c. 48 S. E. Rep. 337, 338.

²⁵ One who solicits the services of a licensed hackman is a passenger, within the meaning of an ordinance providing that it shall be unlawful for the driver of an omnibus or automobile to refuse to convey a passenger from any one point to any other point in the city: Atlantic City v. Brown, 71 N. J. L. 81; s. c. 58 Atl. Rep. 110.

^{25a} Latour v. Southern R. Co., 71 S. E. 532; s. c. 51 S. E. Rep. 265.

take of the nature of a contract with the public that its trains will run in conformity therewith, and a railroad company may be held liable to a passenger damaged by reason of the failure of the railroad company to exercise reasonable diligence in running the trains in accordance with its published schedules.²⁶ The carrier may exempt itself from liability for this species of negligence by a condition incorporated in the contract. Thus in an English case where a laborer travelling on a workman's train, owing to delay in running the train, arrived so late that he lost a day's wages and sued the company therefor, it was held that the carrier was not liable to him, notwithstanding the negligence in the operation of the train was admitted, because the ticket on which he travelled bore a notice that the departure or arrival of the trains at the times specified in the time-table was not guaranteed.²⁷

§ 2557. Duty to Carry on the Particular Train for which a Ticket is Purchased.²⁸

§ 2559. Measure of Damages for Being Carried Beyond Destination.²⁹

§ 2561. What if Train does not Stop at Station Called for by the Ticket.—Without doubt a carrier may by express contract obligate itself to stop at a station at which it is not scheduled to stop, and will be liable in damages for breach of this contract.³⁰

§ 2562. Duty of Passenger to Make Inquiry as to whether Train Stops at his Station.—Here it is the rule that a passenger, claiming damages on the ground that he was carried past his station by a train not scheduled to stop at such station, must show that he exercised ordinary care to ascertain that the train that he took was the proper train; it is not enough that he was accepted on the train without protest.³¹

²⁶ *Miller v. Southern R. Co.*, 69 S. C. 116; s. c. 48 S. E. Rep. 99. See also *International & C. R. Co. v. Harder*, 36 Tex. Civ. App. 151; s. c. 81 S. W. Rep. 356.

²⁷ *Duckworth v. Lancashire & C. R.*, 84 L. T. 774; 49 Wkly. Rep. 541; 65 J. P. 517.

²⁸ That a ticket gives the purchaser a legal right to be transported by the first train stopping at his destination, see: *Coleman v. Southern R. Co.*, 138 N. C. 351; s. c. 50 S. E. Rep. 690; *Usher v. Chicago & C. R. Co.*, — Kan. —; s. c. 80 Pac. Rep. 956.

²⁹ Where there was no evidence of any physical injury and the utmost

damage proven was several hours' delay and the missing of a meal, and the conduct of the employes was in every respect gentlemanly and accommodating, a verdict for \$249.50 was held excessive: *Central of Georgia R. Co. v. Wood*, 118 Ga. 172; s. c. 44 S. E. Rep. 1001. A passenger carried to a place not called for by his ticket, against his will, is entitled to recover any damages suffered thereby: *Latour v. Southern R. Co.*, 71 S. C. 532; s. c. 51 S. E. Rep. 265.

³⁰ *Gulf & C. R. Co. v. Moore*, 98 Tex. 302; 83 S. W. Rep. 362; rev'g s. c. 80 S. W. Rep. 426.

³¹ *St. Louis & C. R. Co. v. Camp-*

§ 2568. **Passenger Acting on Erroneous Information Given by the Ticket Agent.**—Generally speaking, a passenger has a right to rely on the assurance of the ticket agent that a train will stop at his station, and the company will be liable for the damages sustained by the passenger taking such a train and compelled to leave it before arriving at his destination, because the train did not stop there.³²

§ 2569. **Passenger Acting on Erroneous Information Given by Conductor or Train Agent.**—Likewise a passenger may rely on the direction of the trainmen as to the proper car to be taken, and he will not be imputed with contributory negligence in following the directions given, although he could have obtained the correct information by making other inquiries.³³ It is not essential to liability for this species of negligence that the act of the trainman should have been negligent, willful or malicious.³⁴

§ 2571. **Passenger Acting upon Information Given by Inferior Employés.**³⁵

§ 2572. **Right of Passenger to a Seat.**—The courts of Texas announce the wholesome rule that the railroad company is bound to exercise more than ordinary care to provide its passengers with seats,³⁶ but the cases do not go to the extent of holding that the failure to furnish every passenger with a seat, and allowing a passenger to board a car when there is no seat for him is negligence *per se*.³⁷

§ 2574. **Right of Colored Persons to be Carried According to Contract.**³⁸

bell, 30 Tex. Civ. App. 35; s. c. 69 S. W. Rep. 451. See also Texas &c. R. Co. v. Bell, — Tex. Civ. App. —; 87 S. W. Rep. 730.

³²Kansas City &c. R. Co. v. Little, 66 Kan. 378; s. c. 71 Pac. Rep. 820; 61 L. R. A. 122.

³³Robertson v. Louisville &c. R. Co., 142 Ala. 216; s. c. 37 South. Rep. 831.

³⁴Robertson v. Louisville &c. R. Co., 142 Ala. 216; s. c. 37 South. Rep. 831.

³⁵A person voluntarily taking a seat in a smoking car at the direction of a porter without asking for other quarters cannot recover for sickness caused by riding in such car: Brezewitz v. St. Louis &c. R. Co., 75 Ark. 242; s. c. 87 S. W. Rep. 127.

³⁶Galveston &c. R. Co. v. Morris, 94 Tex. 505; s. c. 61 S. W. Rep. 709;

aff'g s. c. 60 S. W. Rep. 813. In the case of injuries to a person by reason of a negligent failure to furnish her a seat, it was the view of the court that the railroad company did not exercise proper diligence in anticipating the demand for extra accommodations on an excursion train, it appearing that the carrier had run these excursions for a number of years, and, in the particular case, though running another section on which the injured person could have been accommodated, failed to announce that fact: Texas &c. R. Co. v. Rea (Tex. Civ. App.), 74 S. W. Rep. 939.

³⁷Houston &c. R. Co. v. Bryant, 31 Tex. Civ. App. 483; s. c. 72 S. W. Rep. 885.

³⁸Under the Texas statute requiring railroad companies to furnish separate coaches for negroes and

§ 2576. **Measure of Damages for Refusing to Carry According to the Contract.**³⁹—Where special damages are not demanded, the measure of damages for breach of the ordinary contract of carriage is merely what it would cost the passenger to get from the point of departure to his destination in the most feasible and reasonable way.⁴⁰ Damages for negligent delay in furnishing transportation is merely compensation for the loss of time and for any expenses incurred during the delay.⁴¹ Where passage in a vessel was contracted for by an employer for himself and employes and the party landed at a point short of their destination, where they were compelled to remain for some time and to incur expenditures for an outfit and supplies to take them to their destination, it was held that the damages would include the living expenses of the party at the point where they were landed, the cost of the supplies and outfit to take them to their destination, the loss of time occasioned by the delay and wages for the lost time.⁴²

§ 2581. **Nature of Passage Tickets.**—The contract for transportation under an ordinary ticket is a contract between the person presenting the ticket and the carrier, though the ticket was paid for by another.⁴³

§ 2582. **Prima Facie, but not Conclusive Evidence of Right of Passage.**⁴⁴

whites, and making it their duty to remove passengers from the coaches in which they were not entitled to ride, it was error to refuse to instruct that if plaintiff, a negro, entered the negro coach, but, on account of white men occupying the seats and room, was crowded onto the platform, from which he was pushed or thrown by the swaying of the car, without negligence on his part, he was entitled to recover, there being evidence to support the instruction: *Williams v. International & C. R. Co.*, 28 Tex. Civ. App. 503; s. c. 67 S. W. Rep. 1085. Under the Kentucky separate-coach statute the fact that the accommodations for passengers were insufficient so that white passengers were compelled to ride in a compartment with colored people did not render the railroad company liable to prosecution: *Commonwealth v. Louisville & C. R. Co.*, 87 S. W. Rep. 262; s. c. 27 Ky. L. Rep. 932.

³⁹ Damages in these amounts were held not excessive:—\$2,500 (passenger with valid ticket was re-

pulsed insolently by a porter and denied admission without explanation), *Yazoo & C. R. Co. v. Mattingly*, — Miss. —; s. c. 37 South. Rep. 708; \$900 (mother with children and nurse on a crowded train removed from sleeper, where they had found seats, and compelled to stand on the platform of locked day coach where they were subjected to annoyance from drunken men), *Cincinnati & C. R. Co. v. Taylor*, 85 S. W. Rep. 168; s. c. 27 Ky. L. Rep. 351.

⁴⁰ *Rose v. King*, 76 App. Div. (N. Y.) 308; s. c. 78 N. Y. Supp. 419.

⁴¹ *Illinois Cent. R. Co. v. Head*, — Ky. —; s. c. 84 S. W. Rep. 751; 27 Ky. L. Rep. 270.

⁴² *Bullock v. White Star S. S. Co.*, 30 Wash 448; s. c. 70 Pac. Rep. 1106.

⁴³ *Georgia & C. R. Co. v. Brown*, 120 Ga. 380; s. c. 47 S. E. Rep. 942 (ticket for wife purchased by husband—no contract for safe transportation with husband).

⁴⁴ That the ticket is *prima facie* evidence of the right to carriage between the points indicated, see: *International & C. R. Co. v. Ing*, 29

§ 2583. **Transferability of Passage Tickets.**—A railroad ticket is generally regarded as transferable in the absence of constitutional or statutory prohibition or a stipulation to the contrary on its face, and entitles the transferee to the rights of the original purchaser.⁴⁵ But it is entirely competent for the carrier to issue special tickets, based on reduced rates and to make them non-transferable and valid only in the hands of the original purchaser;⁴⁶ and a purchaser of such a ticket from the original holder cannot rely on the assurance of a ticket agent that it will be accepted for the purchaser's passage, especially where it is expressly stipulated in the ticket that agents are without authority to limit, modify or waive its terms or conditions in any particular.⁴⁷

§ 2584. **Interpretation of Passage Tickets.**—Where a railroad ticket is ambiguous, courts will adopt the construction most favorable to the passenger.⁴⁸ A contract by a railroad company to carry passengers and baggage between points in different States is governed by the laws of the State in which the ticket is sold.⁴⁹

§ 2586. **Effect of Unstamped Tickets.**⁵⁰

§ 2587. **Mistakes and Misprisions of the Ticket Agent.**⁵¹—Generally speaking, a statement of a ticket agent that a train will make close connection with another train at a certain point is not a guaranty of such connection.⁵² A railroad company is liable for the representations of its agents as to the roads over which the passenger is to travel, where these representations are made in order to induce the purchase of the ticket over the railroad he represents.⁵³ In a case where a ticket agent was asked to sell the plaintiff a ticket on the next local train, and the demand was refused on the ground that a ticket could not be sold until a through train, which the agent erroneously stated was

Tex. Civ. App. 398; s. c. 68 S. W. Rep. 722.

⁴⁵ *International &c. R. Co. v. Ing*, 29 Tex. Civ. App. 398; s. c. 68 S. W. Rep. 722.

⁴⁶ *Schubach v. McDonald*, 179 Mo. 163; s. c. 78 S. W. Rep. 1020.

⁴⁷ *Coyle v. Southern R. Co.*, 112 Ga. 121; s. c. 37 S. E. Rep. 163.

⁴⁸ *Cleveland &c. R. Co. v. Kinsley*, 27 Ind. App. 135; s. c. 60 N. E. Rep. 169.

⁴⁹ *Hubbard v. Mobile &c. R. Co.*, 112 Mo. App. 459; s. c. 87 S. W. Rep. 52.

⁵⁰ The holder of a round-trip ticket cannot be deprived of his right to return passage thereon by a capricious and unreasonable re-

fusal of the agent at the point of destination to stamp and sign the ticket as required thereby: *Ft. Worth &c. R. Co. v. Jones*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 37.

⁵¹ The statement of a ticket agent to a passenger who had lost her ticket that the conductor would make it all right, and that she could travel without it, was not binding on the carrier: *Texas &c. R. Co. v. Smith*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 852.

⁵² *Latour v. Southern R. Co.*, 71 S. C. 532; s. c. 51 S. E. Rep. 265.

⁵³ *St. Louis &c. R. Co. v. White*, — Tex. —; s. c. 89 S. W. Rep. 746; rev'g s. c. 86 S. W. Rep. 71.

ahead of the local, had passed, it was held immaterial to the right of the plaintiff to recover for damages suffered in consequence of the refusal whether the erroneous announcement was due to the negligence of the ticket agent, or whether he was misled by the negligence of some other agent.⁵⁴

§ 2591. **Rights of Passengers Holding Excursion Tickets.**—A carrier selling excursion tickets at a reduced rate may limit the use of such tickets to any particular train or trains.⁵⁵ The mere fact that the ticket contains a statement that it was issued by a particular person, as "excursion agent," is not sufficient to justify an inference that this excursion agent was in charge of the train on which the injured person was carried, but rather indicated that the ticket was sold by such a person as the carrier's agent for the sale of excursion tickets.⁵⁶

§ 2592. **Tickets Over Connecting Lines.**⁵⁷

§ 2595. **Transfers Given to Street Railway Passengers.**—It is an entirely reasonable regulation of a street railway company to require as a condition to transportation over an intersecting line that the pas-

⁵⁴ *Coleman v. Southern R. Co.*, 138 N. C. 351; s. c. 50 S. E. Rep. 690.

⁵⁵ *England v. International & C. R. Co.*, 32 Tex. Civ. App. 86; s. c. 73 S. W. Rep. 24.

⁵⁶ *Estes v. Missouri Pac. R. Co.*, 110 Mo. App. 725; s. c. 85 S. W. Rep. 627.

⁵⁷ A railroad company selling a coupon ticket with coupons attached over a connecting line, in the absence of other evidence, is presumed as to such coupons to issue and sell the same as the agent of the connecting carrier: *Pennsylvania Co. v. Loftis*, 72 Ohio St. 288; s. c. 74 N. E. Rep. 179. In a case where the defendant sold a ticket over its road and other roads to C. and return, providing that in selling the ticket it acted as agent, and was not responsible beyond its line, and that the return passage must be commenced the day that the passenger identified herself to the ticket agent at C., and he punched the ticket, it was held that the ticket agent at C. was not the agent of the defendant, so as to make it responsible for his mistake in punching it on her arrival, and telling her that she could use it on a later day: *Boling v. St. Louis & C. R. Co.*, 189 Mo. 219; s. c. 88 S. W. Rep. 35. Under these cir-

cumstances the sale of a through ticket over the seller's own line and connecting lines was held not a guaranty that the passenger could reach his destination within a particular time:—A person desiring to reach Dawson City, in the Klondike, before the close of navigation contracted for through transportation at Chicago with a railroad terminating at Seattle, and paid the entire amount required for through transportation and received a ticket from Chicago to Seattle with an order on a steamship line at that point for the remainder of the trip. At Seattle he presented his order and entered into a new contract with the steamship company, which contained certain limitations which he assented to. The court concluded that the transaction in Chicago amounted merely to the purchase of a ticket and an order for further transportation, and that it was not transferred into a contract for through transportation with a time limitation by reason of a casual statement of the ticket agent in Chicago, after the sale of the ticket, that the purchaser could reach Dawson City before the close of navigation: *Dresser v. Canadian Pac. R. Co.*, 116 Fed. Rep. 281.

senger should tender to the conductor a printed transfer check within the time indicated thereon.⁵⁸ It is the duty of the street railway company to issue these transfers when applied to, and a refusal will not be excused on the ground that the conductor's supply of transfers was exhausted when the request was made,⁵⁹ or that the applicant could have travelled over another line belonging to the street car system without the use of the transfer,⁶⁰ or that the giving of transfers would cause undue crowding on the street and at a particular crossing;⁶¹ or that the persons applying were boys out "skylarking."⁶² An ordinance, making it obligatory on the street railway company to issue transfers over street railways within the city, requires the issuance of such transfers to portions of the city thereafter annexed.⁶³ The statutory penalty for a refusal to issue a transfer is recoverable by a passenger, though his fare was paid by another. Such a person is an "aggrieved person" within the meaning of the statute.⁶⁴

§ 2597. Right to Stop Off and Resume Journey on Same Ticket.—

It is a restatement of the rule of the principal section to say that in the absence of any agreement to the contrary, the purchaser of a railroad ticket, though entitled to passage thereon unlimited as to time, is entitled only to a continuous passage; his ticket gives him no right to stop over at an intermediate station, and afterward demand the completion of the contract on a later train.⁶⁵ Where a ticket with stop-over privileges is issued, the purchaser of such a ticket will not be deprived of his right to the privilege because of its denial by a conductor, and the fact that such conductor takes up his ticket. He is entitled to resume his journey after stopping off, and the railroad com-

⁵⁸ *Crowley v. Fitchburg &c. St. R. Co.*, 185 Mass. 279; s. c. 70 N. E. Rep. 56; *Hornesby v. Georgia R. &c. Co.*, 120 Ga. 913; s. c. 48 S. E. Rep. 339. Where plaintiff was injured by the fall of a trolley pole while he was passing from one street car to another at a junction point, and his evidence that he had a transfer, and that of his son that a transfer was taken from his pocket when he was brought home after the injury, was not contradicted, the fact that the transfer itself was not offered in evidence did not render the proof as to plaintiff's status as a passenger insufficient: *Chicago City R. Co. v. Carroll*, 206 Ill. 318; s. c. 68 N. E. Rep. 1087; aff'g s. c. 102 Ill. App. 202.

⁵⁹ *Rosenberg v. Brooklyn Heights R. Co.*, 91 App. Div. (N. Y.) 580; s. c. 86 N. Y. Supp. 871.

⁶⁰ *Topham v. Interurban St. R. Co.*, 42 Misc. (N. Y.) 503; s. c. 86 N. Y. Supp. 295.

⁶¹ *Moskowitz v. Brooklyn Heights R. Co.*, 47 Misc. (N. Y.) 119; s. c. 93 N. Y. 385; *Topham v. Interurban St. R. Co.*, 42 Misc. (N. Y.) 503; s. c. 86 N. Y. Supp. 295.

⁶² *Rosenberg v. Brooklyn Heights R. Co.*, 91 App. Div. 580; s. c. 86 N. Y. Supp. 871.

⁶³ *Indiana R. Co. v. Hoffman*, 161 Ind. 593; s. c. 69 N. E. Rep. 399.

⁶⁴ *McLaughlin v. New York City R. Co.*, 106 App. Div. (N. Y.) 1; s. c. 94 N. Y. Supp. 653; *Carpenter v. New York City R. Co.*, 93 N. Y. Supp. 600.

⁶⁵ *Louisville &c. R. Co. v. Klyman*, 108 Tenn. 304; s. c. 67 S. W. Rep. 472; 56 L. R. A. 769; *Dixon v. New England R. Co.*, 179 Mass. 242; s. c. 60 N. E. Rep. 581.

pany refusing him transportation will be liable for injuries resulting from ejection.⁶⁶

§ 2599. **Tickets Limited as to Time.**—It is the general rule that a railroad company may limit the time within which tickets of any class may be used, subject to the qualification that the limitation must be reasonable,⁶⁷ and it is the general,⁶⁸ though not universal, rule⁶⁹ that the purchaser of the ticket will be charged with knowledge of time limitations, printed, stamped or punched in the ticket, though his attention has not been specially called thereto. So it has been held that the mere fact that the agent selling the ticket concealed from the purchaser the fact that the carrier might not be able to return the passenger within the limit prescribed in the ticket did not give the passenger the right to use the ticket after the expiration of the time limit.⁷⁰

§ 2600. **Interpretation of Such Time Limits.**—A time limit of one day on a passenger ticket is not unreasonably short.⁷¹ Tickets making no provision as to the time of use are subject to the statute of limitations, which begins to run from the day of its issue.⁷² It seems the better rule that a passenger, commencing his journey within the time limit of the ticket, should be allowed to complete the trip, though his destination will be reached after the expiration of the time limit.⁷³ Similarly it has been held that a round-trip ticket, good only for one day, was good for the return trip on the only train returning that day, though such train was not scheduled to stop at the station of purchase.⁷⁴ A condition in a ticket that the return portion of it is good for a continuous passage commencing on the date of validation within a specified time is binding on the purchaser and the ticket cannot be

⁶⁶ *Scofield v. Pennsylvania Co.*, 112 Fed. Rep. 855; s. c. 50 C. C. A. 553.

⁶⁷ *Freeman v. Atchison & C. R. Co.*, — Kan. —; s. c. 80 Pac. Rep. 592; *Elliott v. Southern Pac. Co.*, 145 Cal. 441; s. c. 79 Pac. Rep. 420; *Rutherford v. St. Louis & C. R. Co.*, 28 Tex. Civ. App. 625; s. c. 67 S. W. Rep. 161.

⁶⁸ *Coburn v. Morgan's Louisiana & C. R. Co.*, 105 La. 398; s. c. 29 South. Rep. 882; *Freeman v. Atchison & C. R. Co.*, — Kan. —; s. c. 80 Pac. Rep. 592.

⁶⁹ In South Carolina it is the duty of the agent selling a ticket to call the attention of a passenger to limitations thereon; otherwise he may ride on the ticket for which he has

paid full fare at any time: *Dagnall v. Southern R. Co.*, 69 S. C. 110; s. c. 48 S. E. Rep. 97.

⁷⁰ *Elliott v. Southern Pac. Co.*, 145 Cal. 441; s. c. 79 Pac. Rep. 420.

⁷¹ *Coburn v. Morgan's Louisiana & C. R. Co.*, 105 La. 398; s. c. 29 South. Rep. 882.

⁷² *Cassiano v. Galveston & C. R. Co.*, — Tex. Civ. App. —; s. c. 82 S. W. Rep. 806; *Freeman v. Atchison & C. R. Co.*, — Kan. —; s. c. 80 Pac. Rep. 592.

⁷³ *Rutherford v. St. Louis & C. R. Co.*, 28 Tex. Civ. App. 625; s. c. 67 S. W. Rep. 161.

⁷⁴ *Illinois Cent. R. Co. v. Harris*, 81 Miss. 208; s. c. 32 South. Rep. 309.

used for a return passage on a later day, though within the time limit for return passage.⁷⁵

§ 2605. **Application of this Rule in the Case of Connecting Carriers.**⁷⁶—There is authority that the acceptance of a railroad ticket by one of the connecting carriers over whose lines it provides for passage is not binding on a subsequent carrier so as to require such carrier to accept the ticket, if the time limit thereon has expired.^{76a}

§ 2607. **Identity of the Holder of the Ticket.**—A railroad company may require the holder of a reduced rate ticket to identify himself as the original purchaser by writing his signature on the back thereof, and, if this is not satisfactory to the validating agent, to produce other proofs of his identity.⁷⁷ The agent is not compelled to accept as final the holder's verbal assurance of his identity, nor is he required to institute other inquiries with a view of satisfying himself on this subject. It is the duty of the person tendering the ticket to furnish this evidence.⁷⁸

§ 2608. **Collecting Extra Fare from Passengers without Tickets.**—The authorities on this question are not harmonious. In Georgia⁷⁹ and North Carolina⁸⁰ the right to collect the extra fare is upheld. In South Carolina⁸¹ the right is denied, though the passenger was afforded the opportunity to purchase his ticket at the regular ticket office before boarding the train.⁸²

§ 2610. **When Ticket Offices to be Kept Open.**⁸³—Thus a person prevented from having his ticket signed by the fact that the ticket

⁷⁵ *Boling v. St. Louis & C. R. Co.*, 189 Mo. 219; 88 S. W. Rep. 35.

⁷⁶ A contract for the carriage of a passenger and his baggage to his destination in Mexico and return, made by the initial carrier in Texas, is governed by the laws of Texas: *Mexican Nat. R. Co. v. Ware* (Tex. Civ. App.), 60 S. W. Rep. 343.

^{76a} *Boling v. St. Louis & C. R. Co.*, 189 Mo. 219; s. c. 88 S. W. Rep. 35.

⁷⁷ *Baltimore & C. R. Co. v. Hudson*, 116 Ky. 995; s. c. 80 S. W. Rep. 454; 25 Ky. L. Rep. 2154.

⁷⁸ *Baltimore & C. R. Co. v. Hudson*, 116 Ky. 995; s. c. 80 S. W. Rep. 454; 25 Ky. L. Rep. 2154.

⁷⁹ *Coyle v. Southern R. Co.*, 112 Ga. 121; s. c. 37 S. E. Rep. 163.

⁸⁰ *Ammons v. Southern R. Co.*, 138 N. C. 555; s. c. 51 S. E. Rep. 127.

⁸¹ *Weber v. Southern R. Co.*, 65 S. C. 356; s. c. 43 S. E. Rep. 888.

⁸² *Fulmer v. Southern R. Co.*, 67 S. C. 262; s. c. 45 S. E. Rep. 196.

⁸³ A ticket office was not open in time to allow the intending passenger to purchase his ticket. He attempted to board the train without a ticket and the conductor told him he would hold the train for him. Before the passenger could return the conductor ordered the train started and the passenger, in attempting to mount the car, suffered injuries. It was held, under a statute making it the duty of railroad companies to keep ticket offices open for thirty minutes before the departure of trains, that the railroad company was guilty of negligence in thus starting the train without giving the passenger a reasonable time to purchase his ticket and return to the train: *Missouri & C. R. Co. v. Gist*, 31 Tex. Civ. App. 662;

office was not open in time to allow validation, may recover damages for his expulsion on the ground that his ticket was not validated.⁸⁴ There is authority that a railroad company is not required to have a ticket agent at its office after the arrival of trains.⁸⁵

§ 2614. **Illegible Tickets.**—Mutilation of a railroad ticket to render it invalid requires that it should be deprived of some essential part. It is not enough that it is torn into two pieces, where both pieces are presented to the conductor at the same time, and it is apparent that they are parts of the same ticket and that no fraud has been perpetrated on the carrier.⁸⁶

§ 2616. **Commutation, Coupon and Round-Trip Tickets.**⁸⁷

§ 2617. **Rights of Persons Travelling on Free Passes.**—The fact that a passenger is being carried on a pass will not of itself deprive him of his right to recover for injuries the result of the carrier's negligence,⁸⁸ unless, by special agreement, he has assumed this risk.⁸⁹

§ 2626. **Assent of Passenger to Conditions in such Contracts—Theory under which Assent Presumed.**⁹⁰

s. c. 73 S. W. Rep. 857. Since the word "schedule," as used in a statute requiring a railroad company to keep its depots open for a specified period preceding the arrival of passenger trains allowed "by schedule" to stop at a station, implies that the operation of a train is governed by rule, an allegation, in a complaint in an action against a railroad company for injuries sustained by an intending passenger by reason of being compelled to wait out of doors for a train, that the train was due "to arrive and stop for the taking on of passengers," at a time stated, does not show a violation of the statute: *Draper v. Evansville & C. R. Co.*, 165 Ind. 117; s. c. 74 N. E. Rep. 889.

⁸¹ *Southern R. Co. v. Wood*, 114 Ga. 140; s. c. 39 S. E. Rep. 894; 55 L. R. A. 536.

⁸⁵ *Talbert v. Charleston & C. R. Co.*, 72 S. C. 137; s. c. 51 S. E. Rep. 564.

⁸⁹ *Young v. Central of Georgia R. Co.*, 120 Ga. 25; s. c. 47 S. E. Rep. 556; 65 L. R. A. 436.

⁸⁷ A round-trip ticket, providing that it should be used only by the original holder, whose signature it bears, but not signed by any one and sold with the express understanding that it should be used by one person in going to and by another in returning from a place of

destination, is not void when presented by the latter for return passage after having been used by the former for the first part of the journey: *Jervous v. Union Pac. R. Co.*, 70 Kan. 491; s. c. 78 Pac. Rep. 817.

⁸⁸ *Russell v. Pittsburgh & C. R. Co.*, 157 Ind. 305; s. c. 61 N. E. Rep. 678; 55 L. R. A. 253; *Young v. Missouri Pac. R. Co.*, 93 Mo. App. 267. Conditions printed on the back of a pass void because in violation of a statute forbidding discrimination, cannot be invoked by the railroad company in an action by the holder of the pass against the railroad company for injuries received while riding on the pass: *McNeill v. Durham & C. R. Co.*, 135 N. C. 682; s. c. 47 S. E. Rep. 765; rev'g s. c. 44 S. E. Rep. 34.

⁸⁹ *In re California Nav. & C. Co.*, 110 Fed. Rep. 670. Where a railroad company issues a newspaper editor an annual pass in violation of a statute forbidding discrimination, and the editor, while riding on the pass, is injured by the company's negligence, both parties being *in pari delicto*, he cannot recover for the injuries sustained: *McNeill v. Durham & C. R. Co.*, 132 N. C. 510; s. c. 44 S. E. Rep. 34.

⁹⁰ The purchaser of a return ticket at a reduced rate is deemed to have

§ 2628. **Waiver of Conditions in Passage Tickets.**—The bare statement of a ticket agent who did not sell a limited ticket the return portion of which the passenger could not use within the time limit because of a strike—that it would be good as soon as trains began to run after the strike was concluded, was held not equivalent to a waiver of the time limit, especially where the agent had no authority to make the waiver.⁹¹

§ 2633. **Relation of Carrier and Passenger, how Created.**—Whether the uncontroverted facts in a particular case show the relation to exist is a question of law for the court, and not a question of fact for the determination of the jury.⁹² The relation of carrier and passenger is created by contract, express or implied.⁹³

§ 2634. **Who Deemed a Passenger.**—A passenger is defined as one who enters in a vehicle of the carrier with the intention of paying in money the usual fare for his transportation, or who is supplied with a ticket or pass entitling him to ride to a given point.⁹⁴

§ 2635. **Persons on Board Carrier's Vehicle Presumed to be Passengers.**⁹⁵—But there is no presumption that a person riding in the private vehicle of another is being carried as a passenger therein for hire, as would be the case if the owner of the vehicle was a common carrier of passengers, and the allegation of this fact in a pleading must be sustained by proof.⁹⁶

§ 2636. **Who not Deemed a Passenger.**—These have been held not to be passengers:—A person, not an employé, riding on a work train in violation of a rule forbidding the transportation of passengers on work trains;⁹⁷ a newsboy jumping on a street car to sell papers to pas-

noticed that it is sold subject to special and unusual conditions: *Watson v. Louisville & C. R. Co.*, 104 Tenn. 194; s. c. 56 S. W. Rep. 1024; 49 L. R. A. 454. The binding force of a reasonable condition, plainly printed on the face of a railroad ticket, is not affected by the failure of the passenger to notice the same: *Freeman v. Atchison & C. R. Co.*, — Kan. —; s. c. 80 Pac. Rep. 592. The fact that one buying what he knew was a special-rate railroad ticket did not read it does not relieve him of the stipulation, plainly printed on its face, that return passage should be commenced on the date that he was identified, and the ticket was stamped and punched for return passage: *Boling v. St. Louis & C. R. Co.*, 189 Mo. 219; s. c. 88 S. W. Rep. 35.

⁹¹ *Elliott v. Southern Pac. Co.*, 145 Cal. 441; s. c. 79 Pac. Rep. 420.

⁹² *O'Donnell v. Chicago & C. R. Co.*, 106 Ill. App. 287.

⁹³ *Farley v. Cincinnati & C. R. Co.*, 108 Fed. Rep. 14; s. c. 47 C. C. A. 156; *O'Donnell v. Chicago & C. R. Co.*, 106 Ill. App. 287.

⁹⁴ *Holt v. Hannibal & C. R. Co.*, 87 Mo. App. 203.

⁹⁵ That the mere fact that a person is on a railroad train does not necessarily raise the presumption that he is there rightfully: *Pennsylvania Co. v. Coyer*, 163 Ind. 631; s. c. 72 N. E. Rep. 875.

⁹⁶ *Lydon v. Robert Smith Ale Brewing Co.*, 133 Fed. Rep. 830.

⁹⁷ *International & C. R. Co. v. Hanna* (Tex. Civ. App.), 58 S. W. Rep. 548.

sengers, and injured while on the footboard by a collision with a passing wagon;⁹⁸ a person riding on a train made up in a quarry to be switched onto a main line and this, though he was directed to ride on the car by the conductor, it being clear that such a train was not intended for the carriage of passengers.⁹⁹

§ 2637. **Who not Deemed a Trespasser.**¹⁰⁰

§ 2638. **Point of Time at which the Relation Commences.**—In order that a person on the premises of a railroad company may claim the protection owing by a common carrier to its passengers, he must intend to become a passenger, and must go to the station a reasonable time before the time fixed for the departure of the train on which he intends to take passage, and there either by the purchase of a ticket or in some other manner indicate to the carrier his intention to take passage.¹⁰¹ One becomes a passenger on a street car when he mounts the same,¹⁰² by stepping on the footboard,¹⁰³ or platform.¹⁰⁴ Having mounted an open street car, he does not lose his character as a passenger by descending to the footboard and passing to another part of the car.¹⁰⁵ There is a holding that excursionists, entitled to use a car at destination while awaiting return, are not regarded as passengers in going to the car for their own accommodation during this time.¹⁰⁶

⁹⁸ Padgitt v. Moll, 159 Mo. 143; s. c. 60 S. W. Rep. 121.

⁹⁹ Menaugh v. Bedford Belt R. Co., 157 Ind. 20; s. c. 60 N. E. Rep. 694.

¹⁰⁰ Albin v. Chicago & c. R. Co., 103 Mo. App. 308; s. c. 77 S. W. Rep. 153 (passenger on freight train boarded at direction of station agent—not a trespasser).

¹⁰¹ Louisville & c. R. Co. v. Reynolds (Ky.), 71 S. W. Rep. 516; 24 Ky. L. Rep. 1402; Illinois Cent. R. Co. v. Lalogue, 113 Ky. 896; s. c. 69 S. W. Rep. 795; 24 Ky. L. Rep. 693, 696 (person not a passenger where injuries received at station three hours before the departure of his train); Chicago & c. R. Co. v. Huston, 95 Ill. App. 350; s. c. aff'd, 196 Ill. 480; 63 N. E. Rep. 1028 (competent to show that person killed while awaiting train was provided with money to pay his fare); Albin v. Chicago & c. R. Co., 103 Mo. App. 308; s. c. 77 S. W. Rep. 153 (person injured while crossing intervening track with the intention of paying his fare on train on next track a passenger); Fremont & c. R. Co. v. Hagblad, — Neb. —; s. c. 101 N. W. Rep. 1033; Abbott v. Oregon

R. Co., — Or. —; s. c. 80 Pac. Rep. 1062; Andrews v. Yazoo & c. R. Co., 86 Miss. 129; s. c. 38 South. Rep. 773 (intending passenger victim of assault by station agent in depot office over an hour before arrival of train not a passenger). The mere fact that the person has a ticket and intends to take the train, does not conclusively create the relation of carrier and passenger; the person must be at some place which is under the control of the carrier and provided for passengers, so that it may exercise the degree of care exacted of it in its relation to passengers: O'Donnell v. Chicago & c. R. Co., 106 Ill. App. 287.

¹⁰² Duchemin v. Boston & c. R. Co., 186 Mass. 353; s. c. 71 N. E. Rep. 780.

¹⁰³ Citizens' St. R. Co. v. Merl, 26 Ind. App. 284; s. c. 59 N. E. Rep. 491.

¹⁰⁴ Gaffney v. St. Paul City R. Co., 81 Minn. 459; s. c. 84 N. W. Rep. 304.

¹⁰⁵ Haselton v. Portsmouth & c. St. R., 71 N. H. 589; s. c. 53 Atl. Rep. 1016.

¹⁰⁶ Archer v. Union Pac. R. Co.,

§ 2641. **Status of Passenger not Created by Mere Preparation to Become a Passenger.**¹⁰⁷

§ 2642. **Status of Passenger as Dependent upon Payment of Fare.**^{107a}—The actual payment of fare by one not having a ticket or pass is not essential to the creation of the relation, since the law will not presume that a demand for its payment would not be complied with.¹⁰⁸ A child under the age of five years is a passenger, though paying no fare, if he is in the charge of an older person travelling on a ticket.¹⁰⁹

§ 2645. **Prepayment of Fare not Necessary to Constitute One a Passenger on a Street Car.**¹¹⁰

§ 2646. **Persons Riding Gratuitously with the Invitation or Consent of the Carrier.**—These persons were held to have been passengers:—A person travelling on a special excursion train in good faith under the belief that the conductor, with knowledge that he was not a member of the excursion, had accepted him as a passenger;¹¹¹ workmen in the employ of a lumber company, carried by a railroad to and from their work on a logging train;¹¹² an attendant of stock allowed to accompany the train by permission of the railroad agent and conductor

110 Mo. App. 349; s. c. 85 S. W. Rep. 934.

¹⁰⁷ See generally in support of principle indicated: Chicago & C. R. Co. v. Jennings, 190 Ill. 478; s. c. 60 N. E. Rep. 818; rev'g s. c. 89 Ill. App. 335; Foster v. Seattle Electric Co., 35 Wash. 177; s. c. 76 Pac. Rep. 995.

^{107a} Atchison & C. R. Co. v. Holloway, — Kan. —; s. c. 80 Pac. Rep. 31 (relation exists on payment of fare).

¹⁰⁸ Cleveland & C. R. Co. v. Scott, 111 Ill. App. 234; Simmons v. Oregon R. & C. Co., 41 Ore. 151; s. c. 69 Pac. Rep. 440, 1022. A trainer of race horses was travelling in a railroad car equipped for their transportation, in charge of race horses, and was killed in a collision. The contract with the railroad provided that it would not assume any risk for feeding, watering, or caring for the stock. Decedent had not paid his fare, but had the money. It was shown to be customary in like cases to pay whenever the conductor called for the fare, and that the conductor had not done so. It also ap-

peared that it was necessary to have some one in charge of the horses. The evidence was held sufficient to show that decedent was not a trespasser: Alabama & C. R. Co. v. Beardsley, 79 Miss. 417; s. c. 30 South. Rep. 660.

¹⁰⁹ Rawlings v. Wabash R. Co., 97 Mo. App. 511; s. c. 71 S. W. Rep. 534.

¹¹⁰ See generally in support of principle indicated: Birmingham R. & C. Co. v. Bynum, 139 Ala. 389; s. c. 36 South. Rep. 736; Kane v. Cicero & C. R. Co., 100 Ill. App. 181; Reynolds v. St. Louis Transit Co., 189 Mo. 408; s. c. 88 S. W. Rep. 50; Dallas Rapid Transit Co. v. Payne, 98 Tex. 211; s. c. 82 S. W. Rep. 649; rev'g s. c. 78 S. W. Rep. 1085 (evidence held to show that plaintiff did not in good faith intend to pay his fare).

¹¹¹ Fitzgibbon v. Chicago & C. R. Co., 119 Iowa 261; s. c. 93 N. W. Rep. 276.

¹¹² Trinity Val. R. Co. v. Stewart (Tex. Civ. App.), 62 S. W. Rep. 1085.

of the train;¹¹³ and persons riding in work train cabooses by permission of the railroad company.¹¹⁴

§ 2648. **Stockdrovers.**—Generally speaking, a person travelling on a railroad train in charge of cattle on a drover's pass is a passenger for hire, the consideration for his passage being the service he renders in taking care of the cattle, and he is entitled to the same degree of protection and care that is extended to other passengers for hire.¹¹⁵ Such a person will be held to have sustained this relation, although his name did not appear on the written contract between the carrier and the shipper as an attendant, if he accompanies the stock in this capacity with the consent of the agent of the carrier and the conductor of the train.¹¹⁶ He will be regarded as a passenger while going along the tracks of the railroad company in order to get on board the caboose of the freight train on which he is to ride.¹¹⁷

§ 2649. **Mail Agents—Postal Clerks.**¹¹⁸

§ 2651. **Express Messengers.**—Generally speaking, an express messenger occupies a relation to the railroad company analogous to that of one of its own employes and the care, which the company owes to him in respect of its tracks, engines, cars, and the operation of its trains, is measured by that which it owes to those in its immediate service.¹¹⁹ Public policy does not forbid the parties from contracting for the exemption of the carrier from liability for negligence in carrying express messengers.¹²⁰

§ 2654. **Employes of the Carrier, when Deemed Servants.**¹²¹

¹¹³ American Exp. Co. v. Ogles, 36 Tex. Civ. App. 407; s. c. 81 S. W. Rep. 1023.

¹¹⁴ Pennsylvania Co. v. Coyer, 163 Ind. 631; s. c. 72 N. E. Rep. 875.

¹¹⁵ Pennsylvania Co. v. Greso, 102 Ill. App. 252; Lake Shore & C. Ry. Co. v. Teeters, — Ind. App. —; s. c. 74 N. E. Rep. 1014; Chicago & C. R. Co. v. Troyer, — Neb. —; s. c. 97 N. W. Rep. 308; 103 N. W. Rep. 680; Rowdin v. Pennsylvania R. Co., 208 Pa. 623; s. c. 57 Atl. Rep. 1125; Sprigg v. Rutland R. Co., 77 Vt. 347; s. c. 60 Atl. Rep. 143.

¹¹⁶ American Exp. Co. v. Ogles, 36 Tex. Civ. App. 407; s. c. 81 S. W. Rep. 1023.

¹¹⁷ Lake Shore & C. R. Co. v. Hotchkiss, 24 Ohio Cir. Ct. R. 431.

¹¹⁸ That a railway postal clerk is a passenger and not a servant of the railroad company, see: Chesa-

peake & C. R. Co. v. Patton, 23 App. (D. C.) 113. That a railroad company will not be liable to a postal clerk for injuries received after the termination of the journey and after the passenger's relation has ceased, see: Stoddard v. New York & C. R. Co., 181 Mass. 422; s. c. 63 N. E. Rep. 927. That a postal clerk cannot recover for injuries received where he has entered the mail car an unreasonable time before the train is made up, see: Farley v. Cincinnati & C. R. Co., 108 Fed. Rep. 14; s. c. 47 C. C. A. 156.

¹¹⁹ Chicago & C. R. Co. v. O'Brien, 132 Fed. Rep. 593; s. c. 67 C. C. A. 421.

¹²⁰ Long v. Lehigh Valley R. Co., 130 Fed. Rep. 870.

¹²¹ Where, at the time the plaintiff was injured, the defendant railroad company was building its line at

§ 2655. **When such Employés Deemed Passengers.**—The authorities are numerous which ascribe the relation of passenger to employés carried to and from their work gratuitously, with or without passes.¹²²

§ 2657. **Persons Engaged in Business on the Carrier's Vehicle.**^{122a}

§ 2658. **Persons Attending Passengers Arriving or Departing.**¹²³—

On the question whether the carrier was aware of a custom of persons to accompany passengers aboard trains, evidence is admissible to show instances of persons accompanying passengers aboard trains at a particular station;¹²⁴ and if the inquiry is whether a reasonable time was given for such a person to alight from the train, it may be shown that passengers were not given sufficient time to board on this particular occasion.¹²⁵ On the principle of negligence the carrier may be liable for injuries to a person rightfully on its premises for the sole purpose of meeting incoming passengers.¹²⁶

§ 2659. **Passenger Temporarily Absent from Carrier's Vehicle.**—

A through passenger will not lose his character as such by alighting from the train at an intermediate station for any reasonable or usual purpose, if such a station is one for the discharge and reception of passengers.¹²⁷ The relation of passenger and carrier will continue

the place in question, and was not then engaged in the business of a common carrier there, and its yard and premises were not provided or maintained for that purpose, the defendant did not owe to an ex-employé, entitled to transportation on its work trains, the care required of a carrier of passengers: *Hern v. Southern Pac. R. Co.*, 29 Utah 127; s. c. 81 Pac. Rep. 902. An engine wiper riding on an engine is not a passenger although the railroad company knew that he and others of its employés were habitually violating its express rules which prohibited them under any circumstances from riding on the engines: *Streets v. Grand Trunk R. Co.*, 76 App. Div. (N. Y.) 480; s. c. 78 N. Y. Supp. 729; s. c. aff'd, 178 N. Y. 553; 70 N. E. Rep. 1100. A servant employed by a railroad company, while riding home after the day's work on a work train, is an employé, and not a passenger: *Southern R. Co. v. Messick*, 35 Ind. App. 676; s. c. 74 N. E. Rep. 1097.

¹²² *Carswell v. Macon & C. R. Co.*, 118 Ga. 826; s. c. 45 S. E. Rep. 695 (a telephone lineman); *St. Louis & C. R. Co. v. Waggoner*, 90 Ill. App.

556; *Dickinson v. West End St. R. Co.*, 177 Mass. 365; s. c. 59 N. E. Rep. 60; 52 L. R. A. 326; *Chattanooga Rapid-Transit Co. v. Venable*, 105 Tenn. 460; s. c. 51 L. R. A. 886; 58 S. W. Rep. 861.

^{122a} A newsboy, boarding a street car to sell papers without intending to become a passenger by paying his fare or travelling to any particular point, is not entitled to the rights of a passenger: *Barry v. Union R. Co.*, 105 App. Div. (N. Y.) 520; s. c. 94 N. Y. Supp. 449.

¹²³ That such a person is a licensee, see: *Houston & C. R. Co. v. Phillio*, 96 Tex. Civ. App. 18; s. c. 69 S. W. Rep. 994; 59 L. R. A. 392; rev'g s. c. 67 S. W. Rep. 915.

¹²⁴ *Texas & C. R. Co. v. Crockett*, 27 Tex. Civ. App. 463; s. c. 66 S. W. Rep. 114.

¹²⁵ *Texas & C. R. Co. v. Crockett*, 27 Tex. Civ. App. 463; s. c. 66 S. W. Rep. 114.

¹²⁶ *Denver & C. R. Co. v. Spencer*, 27 Colo. 313; s. c. 61 Pac. Rep. 606.

¹²⁷ *Lemery v. Great Northern R. Co.*, 83 Minn. 47; s. c. 85 N. W. Rep. 908; *Chicago & C. R. Co. v. Sattler*, 64 Neb. 636; s. c. 90 N. W. Rep. 649; 57 L. R. A. 890; *St. Louis & C. R.*

during the time the passenger is changing from one car to another under a transfer entitling him to do so.¹²⁸ There is a holding that a person in charge of a stock shipment which was sidetracked at an intermediate point for the night did not lose his character as a passenger by leaving the train, though he did not return until the following morning.¹²⁹

§ 2660. **Doctrine that Temporary Absence Temporarily Suspends Relation of Carrier and Passenger.**—Where, however, the passenger leaves the train at a point where the train does not stop to receive or discharge passengers, and the stop is made for some purpose incidental to the operation and management of the train—as for example, to take a sidetrack to allow another train to pass—he will assume all the ordinary risks incident to his action.¹³⁰

§ 2663. **When the Relation of Carrier and Passenger Terminates.**—Generally speaking, the relation of carrier and passenger does not cease with the arrival of the train at the passenger's destination, but continues until the passenger has had a reasonable time and reasonable opportunity to leave the premises of the carrier.¹³¹ After a person has left the carrier's premises he is no longer regarded as a passenger,¹³²

Co. v. Humphreys, 25 Tex. Civ. App. 401; s. c. 62 S. W. Rep. 791; Galveston &c. R. Co. v. Mathes (Tex. Civ. App.), 73 S. W. Rep. 411; Texas Midland R. Co. v. Ellison, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 213.

¹²⁸ Walger v. Jersey City &c. St. R. Co., 71 N. J. L. 356; s. c. 59 Atl. Rep. 14.

¹²⁹ Hardin v. Ft. Worth &c. R. Co., 33 Tex. Civ. App. 448; s. c. 77 S. W. Rep. 431.

¹³⁰ Chicago &c. R. Co. v. Sattler, 64 Neb. 636; s. c. 90 N. W. Rep. 649; 57 L. R. A. 890; Lemery v. Great Northern R. Co., 83 Minn. 47; s. c. 85 N. W. Rep. 908.

¹³¹ See generally: Chicago &c. R. Co. v. Wood, 104 Fed. Rep. 663; s. c. 44 C. C. A. 118; Burke v. Chicago &c. R. Co., 108 Ill. App. 565; Chicago Terminal Transfer R. Co. v. Schmelling, 197 Ill. 619; s. c. 64 N. E. Rep. 714; aff'g s. c. 99 Ill. App. 577; Chicago &c. R. Co. v. Tracey, 109 Ill. App. 563; Pittsburgh &c. R. Co. v. Gray, 28 Ind. App. 588; s. c. 64 N. E. Rep. 39; Glenn v. Lake Erie &c. R. Co., — Ind. App. —; s. c. 73 N. E. Rep. 861; Chicago &c. R. Co. v. Troyer, — Neb. —; s. c. 97 N. W. Rep. 308; 103 N. W. Rep.

680 (passenger on caboose at end of freight train injured while passing from caboose to the station held a passenger); Fremont &c. R. Co. v. Hagblad, — Neb. —; s. c. 101 N. W. Rep. 1033; Davis v. Houston &c. R. Co., 25 Tex. Civ. App. 8; s. c. 59 S. W. Rep. 844; Hardin v. Ft. Worth &c. R. Co., 33 Tex. Civ. App. 448; s. c. 77 S. W. Rep. 431; Houston &c. R. Co. v. Batchler, 32 Tex. Civ. App. 14; s. c. 73 S. W. Rep. 981; Houston &c. R. Co. v. Batchler, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 902; St. Louis &c. R. Co. v. Martin, 26 Tex. Civ. App. 231; s. c. 63 S. W. Rep. 1089; St. Louis &c. R. Co. v. Wallace, 32 Tex. Civ. App. 312; s. c. 74 S. W. Rep. 581; Texas &c. R. Co. v. Dick, 26 Tex. Civ. App. 256; s. c. 63 S. W. Rep. 895.

¹³² Lake St. Elevated R. Co. v. Gormley, 108 Ill. App. 59. A passenger alighted from the train at a depot at night, and for purposes of his own passed along an open space on the right of way used by the public by permission in passing from one street to another. He left the right of way, and went into an open door in the depot building twelve feet away, and fell down a stairway and was injured. It was held that

and does not become such by returning to the premises or to the cars.¹³³

§ 2665. When the Relation Terminates in Case of Passengers on Street Cars.—A passenger on a street car ceases to be a passenger when he releases his hold on the car¹³⁴ and alights.¹³⁵ On street car lines where the carrier is entitled to collect two fares, the passenger will cease to be such on failing to pay the second fare when due.¹³⁶ The passenger sustains that relation while transferring from one car to another under a transfer.^{136a}

§ 2666. Who Deemed Passengers on Freight Trains.—Generally speaking, one riding on a freight train with the consent of the conductor to whom he pays his fare is a passenger, and, if negligently injured, can recover for such injuries.¹³⁷ But a person boarding a caboose standing in a railroad yard in violation of a rule against the transportation of passengers on freight trains is not a passenger, and the carrier is not liable for injuries in a collision due to carelessness in shifting cars and not to wanton or willful negligence.¹³⁸

§ 2667. Persons Riding on Freight Train by the Mere Permission of the Conductor.—In a case where the conductor of a train on discovering the presence of a trespasser on the train, gave him permission to ride to a certain station if he would throw the switch at that place, it was held that on his return to the train without permission of the conductor, after throwing the switch, he again became a trespasser and the company owed him no duty except to exercise reasonable care for his protection after his peril was discovered.¹³⁹

§ 2668. Person Riding on Freight Train by Invitation of Inferior Train Servants.—The presumption that a brakeman on a freight train has authority to agree to carry passengers does not arise merely because

his relation to the carrier, growing out of the contract of carriage, or the assumption of a public duty by the company, was at an end at the time of the injury: *Quantz v. Southern R. Co.*, 137 N. C. 136; s. c. 49 S. E. Rep. 79.

¹³³ *Ratteree v. Galveston & C. R. Co.*, 36 Tex. Civ. App. 197; s. c. 81 S. W. Rep. 566.

¹³⁴ *MacDonald v. St. Louis Transit Co.*, 108 Mo. App. 374; s. c. 83 S. W. Rep. 1001.

¹³⁵ *Indianapolis St. R. Co. v. Terner*, 32 Ind. App. 311; s. c. 67 N. E. Rep. 1044; *Chattanooga Electric R. Co. v. Boddy*, 105 Tenn. 666; s. c. 58 S. W. Rep. 646; 51 L. R. A. 885;

Conroy v. Boston & C. R. Co., 188 Mass. 411; s. c. 74 N. E. Rep. 672.

¹³⁶ *Hudson v. Lynn & C. R. Co.*, 185 Mass. 510; s. c. 71 N. E. Rep. 66.

^{136a} *Clark v. Durham Traction Co.*, 138 N. C. 77; s. c. 50 S. E. Rep. 518; *Walger v. Jersey City & C. R. Co.*, 71 N. J. L. 356; s. c. 59 Atl. Rep. 14.

¹³⁷ *Crawleigh v. Galveston & C. R. Co.*, 28 Tex. Civ. App. 260; s. c. 67 S. W. Rep. 140; *Pennsylvania Co. v. Greso*, 102 Ill. App. 252.

¹³⁸ *St. Louis & C. R. Co. v. Reed*, — Ark. —; s. c. 88 S. W. Rep. 836.

¹³⁹ *Cincinnati & C. R. Co. v. Jackson (Ky.)*, 58 S. W. Rep. 526; s. c. 22 Ky. L. Rep. 630.

the railroad company knew that such acts were done. It is apparent that such assumption of authority might occur while the company was actually endeavoring to enforce rules forbidding it,¹⁴⁰ and in any event the plaintiff would have the burden of proving the authority of the brakeman.¹⁴¹

§ 2669. Who not Deemed such a Passenger.¹⁴²

§ 2671. Person Riding in Improper Place on Carrier's Vehicle.—From the very nature of his employment an engineer is without authority to accept persons as passengers on his engine, nor will the company be charged with the ratification of such an act by reason of the conductor's knowledge that a person was riding on the engine and did not object thereto.¹⁴³

§ 2672. Persons Riding on Hand Cars.—A section foreman is not generally regarded as such an agent of a railroad company that he may agree to carry passengers on his hand car and charge the carrier with the high degree of care imposed by the law in this relation.¹⁴⁴

§ 2673. Passengers Riding upon the Wrong Train.—A person without a ticket boarding the wrong train by mistake is nevertheless a passenger on this train and it is the duty of the railroad company to exercise toward him the same degree of care that it does toward other passengers.¹⁴⁵ So it has been held that a passenger, entering a train with the knowledge that it sometimes stops at the station to which he is destined, is not regarded as a trespasser on the train until he has been notified by the conductor that it would not stop, and failed to comply with the conductor's request to leave the train at a station, before reaching his destination or go to the one beyond.¹⁴⁶

¹⁴⁰ Missouri &c. R. Co. v. Huff, 98 Tex. 110; s. c. 81 S. W. Rep. 525; rev'g s. c. 78 S. W. Rep. 249.

¹⁴¹ Missouri &c. R. Co. v. Huff, 98 Tex. 110; s. c. 81 S. W. Rep. 525; rev'g s. c. 78 S. W. Rep. 249.

¹⁴² One who boarded a freight train believing that he had a right to ride on it because he had been erroneously informed by the railroad's track superintendent that he could ride on the train is nevertheless a trespasser though not a willful one: Alabama &c. R. Co. v. Livingston, 84 Miss. 1; s. c. 36 South. Rep. 256.

¹⁴³ Radley v. Columbia Southern R. Co., 44 Ore. 332; s. c. 75 Pac. Rep. 212.

¹⁴⁴ Rathbone v. Oregon R. Co., 40 Ore. 225; s. c. 66 Pac. Rep. 909.

¹⁴⁵ St. Louis &c. R. Co. v. Pruitt, 79 S. W. Rep. 598; 97 Tex. 487; s. c. 80 S. W. Rep. 72. Where the passenger by mistake boards the wrong train, it is the duty of the carrier to return him to the place where the mistake occurred or to leave him at some point, where he will not be subjected to any serious annoyances, and to return him to the place where he took the wrong train by the first returning train: St. Louis &c. R. Co. v. Pruitt, 97 Tex. 487; s. c. 80 S. W. Rep. 72; 79 S. W. Rep. 598.

¹⁴⁶ Baldwin v. Grand Trunk R. Co. of Canada, 128 Mich. 417; s. c. 87 N. W. Rep. 380; 8 Det. Leg. N. 706.

§ 2678. **A General Statement of Duty as to Stations and Approaches.**¹⁴⁷—It has been held that there is no common-law obligation resting on a railroad company to establish stations for waiting passengers. The obligation is a charter or statutory obligation.¹⁴⁸ But a railroad company which permits a place to be used as a stopping place and allows passengers to get upon its trains at such place, assists them in so doing, and collects fares from such place, will be held to have established the point as a place for the reception and discharge of passengers and invited the public to take and leave its trains there.¹⁴⁹

§ 2679. **Not an Insurer, but Liable for Reasonable Care Only.**—The general rule under this head makes it the duty of the carrier to exercise reasonable care in the construction and maintenance of its stations and platforms to protect passengers using ordinary care from injury.¹⁵⁰ The highest degree of care in the matter of station accommodations is not demanded.¹⁵¹ The carrier will be liable for injuries from defective premises that are unsafe to its knowledge and the likelihood of injury therefrom ought to have been foreseen.¹⁵²

§ 2681. **Doctrine that Carrier is Bound to use Extraordinary Care as to the Safety of Stations, Grounds, etc.**—Courts of Texas announce the rule that a carrier owes the same degree of care to a passenger at any point on its premises, where its act has made it necessary or proper for him to go to board a train, that it owes to him after he has boarded the train.¹⁵³

§ 2682. **To What Portions of the Carrier's Grounds this Duty Extends.**—It may be said generally that the duty to exercise reasonable care in maintenance of stations applies to any part of the premises where it is made necessary for the passenger to go to enter the station or board the train.¹⁵⁴ In one case a carrier was held liable for injuries

¹⁴⁷ It is the duty of the carrier to adopt all reasonable precautions to insure both the safety and comfort of persons at its stations as passengers: *Southern R. Co. v. Reeves*, 116 Ga. 743; s. c. 42 S. E. Rep. 1015; *Barker v. Ohio River R. Co.*, 51 W. Va. 423; s. c. 41 S. E. Rep. 148.

¹⁴⁸ *Page v. Louisville & C. R. Co.*, 129 Ala. 232; s. c. 29 South. Rep. 676. The complaint in action for damages for failure to maintain station should show that the station had been ordered by the State railroad commission where the statute confers that authority on the commission: *Page v. Louisville & C. R. Co.*, 129 Ala. 232; s. c. 29 South. Rep. 676.

¹⁴⁹ *Chicago & C. R. Co. v. Doan*, 93 Ill. App. 247.

¹⁵⁰ *Lauterer v. Manhattan R. Co.*, 128 Fed. Rep. 540; s. c. 63 C. C. A. 38.

¹⁵¹ *Cleveland & C. R. Co. v. Anderson*, 21 Ohio Cir. Ct. R. 288; s. c. 11 Ohio C. D. 765; *Glenn v. Lake Erie & C. R. Co.*, — Ind. App. —; s. c. 73 N. E. Rep. 861.

¹⁵² *Mayne v. Chicago & C. R. Co.*, 12 Okl. 10; s. c. 69 Pac. Rep. 933.

¹⁵³ *San Antonio & C. R. Co. v. Turney*, 33 Tex. Civ. App. 626; s. c. 78 S. W. Rep. 256.

¹⁵⁴ *San Antonio & C. R. Co. v. Turney*, 33 Tex. Civ. App. 626; s. c. 78 S. W. Rep. 256.

from a defect in a stile erected over a fence dividing the right of way from an adjoining pleasure park where the stile had been used as a means of ingress and egress with the knowledge and under the implied invitation of the company, though it was erected by the adjacent owner and the defect causing the injury was wholly on his premises.¹⁵⁵ The case seems clear against the liability of the carrier where the injuries are occasioned by defects in the premises remote from the portion intended for the use of passengers,¹⁵⁶ as in one case, a corner of the depot grounds one hundred thirty feet from the depot proper, occupied by a fuel company as a wood yard, and there was no occasion for the intending passenger to cross over this portion of the carrier's premises to reach the depot.¹⁵⁷

§ 2683. Extends to Providing Safe Waiting-Rooms for Passengers.

—It is the duty of the carrier to furnish comfortable waiting-rooms,¹⁵⁸ and keep them open for a reasonable time before and after the departure of trains, and a failure to perform this duty will subject the carrier to liability for damages the proximate result of this breach of duty.¹⁵⁹ The diligence demanded of the carrier is that known as ordinary diligence.¹⁶⁰ The fact that an intending passenger was already cold when he entered an unwarmed waiting-room will not affect his

¹⁵⁵ *Cotant v. Boone Suburban R. Co.*, 125 Iowa 46; s. c. 99 N. W. Rep. 115.

¹⁵⁶ *Holcombe v. Southern R. Co.*, 66 S. C. 6; s. c. 44 S. E. Rep. 68.

¹⁵⁷ *Davis v. Houston &c. R. Co.*, 29 Tex. Civ. App. 42; s. c. 68 S. W. Rep. 733.

¹⁵⁸ *Missouri &c. R. Co. v. McCutcheon*, 33 Tex. Civ. App. 557; s. c. 77 S. W. Rep. 232; *St. Louis &c. R. Co. v. Wilson*, 70 Ark. 136; s. c. 66 S. W. Rep. 661. In an action for injuries resulting from the failure of the carrier in midwinter to properly heat its waiting room at a station, an instruction making the company liable if it failed to keep a fire in its depot waiting room at a time when the weather required a fire there to make it comfortable, and a person waiting to become a passenger was in consequence injured, was not erroneous as eliminating the question of defendant's negligence, and making it an insurer, it having maintained that the waiting room was properly heated, and requested no instruction on the subject: *St. Louis &c. R. Co. v. Wilson*, 70 Ark. 136; s. c. 66 S. W. Rep. 661.

¹⁵⁹ *St. Louis &c. R. Co. v. Wilson*, 70 Ark. 136; s. c. 66 S. W. Rep. 661; *Brown v. Georgia &c. R. Co.*, 119 Ga. 88; s. c. 46 S. E. Rep. 71. The Texas statute, requiring carriers to keep their depots lighted, warm, and open to all passengers who are entitled to go therein for a time not less than one hour before the arrival and after the departure of all passenger trains, did not require a station agent to permit a passenger to leave his wife and children in a waiting room from one o'clock A. M. until he could go four and a half miles into the country and obtain a conveyance, and the carrier was, therefore, not liable for injuries sustained from exposure of the passenger and family while walking the distance after shelter for such a time was refused: *International &c. R. Co. v. Pevey*, 30 Tex. Civ. App. 460; s. c. 70 S. W. Rep. 778.

¹⁶⁰ *Georgia &c. R. Co. v. Brown*, 120 Ga. 380; s. c. 47 S. E. Rep. 942; *St. Louis &c. R. Co. v. Wallace*, 32 Tex. Civ. App. 312; s. c. 74 S. W. Rep. 581.

right to recover for continued or increased cold thereafter suffered because of the temperature of the waiting-room.¹⁶¹

§ 2686. **Extends to all Persons Lawfully there on Business with the Carrier.**—Persons not passengers on the premises of a carrier for any lawful purpose are regarded as licensees toward whom the carrier is required to exercise only ordinary care and prudence in the maintenance of its station and grounds to avoid injuring him.¹⁶²

§ 2688. **Extends to Providing Safe Platforms.**—It is the duty of the carrier so to construct its platforms that they shall be reasonably safe for the use of passengers, and locate them in such proximity to the tracks that they may be safely and conveniently used by passengers in boarding and alighting from cars, and a failure in this duty is negligence.¹⁶³ It is not required that the platform should be so contrived that a person accidentally falling from an incoming train can suffer no injury therefrom.¹⁶⁴ Having constructed such a platform, the car-

¹⁶¹ Texas Midland R. R. v. Little (Tex. Civ. App.), 77 S. W. Rep. 958.

¹⁶² Smoak v. Savannah &c. R. Co., 65 S. C. 299; s. c. 43 S. E. Rep. 662.

¹⁶³ Dotson v. Erie R. Co., 68 N. J. L. 679; s. c. 54 Atl. Rep. 827; Harris v. Pittsburg &c. R. Co., 32 Ind. App. 600; s. c. 70 N. E. Rep. 407; Newcomb v. New York &c. R. Co., 182 Mo. 687; s. c. 81 S. W. Rep. 1069; Maxfield v. Maine Cent. R. Co., 100 Me. 79; s. c. 60 Atl. Rep. 710; Falkins v. Boston &c. R. Co., 188 Mass. 153; s. c. 74 N. E. Rep. 338; Willworth v. Boston &c. R. Co., 188 Mass. 220; s. c. 74 N. E. Rep. 333; McCormick v. Detroit &c. R. Co., 141 Mich. 17; s. c. 104 N. W. Rep. 390; 12 Det. Leg. N. 326; Abbott v. Oregon R. Co., — Or. —; s. c. 80 Pac. Rep. 1012. A railroad was negligent in maintaining a platform, on which passengers were expected to alight, with a space of twelve or thirteen inches between it and the lower steps of the car: Gulf &c. R. Co. v. Shelton, 30 Tex. Civ. App. 72; s. c. 69 S. W. Rep. 653; 70 S. W. Rep. 359. It was held a question for the jury whether it was negligence for a carrier to have a space ten or twelve inches between the car and the station platform, into which a passenger stepped while alighting from the car, when only four inches were necessary, and it was not shown that there was a uniform custom as to the width of the space: Randolph v. Chicago &c. R. Co., 106

Mo. App. 646; s. c. 79 S. W. Rep. 1170. The fact that a platform at a railroad station was fourteen inches below the step of a car and six inches distant from such step horizontally does not alone establish negligence upon the part of the company, which will render it liable for an injury resulting to a passenger from stepping between the step and platform in alighting from the car, in the absence of other evidence that such construction is unusual, faulty, or dangerous, or has resulted in injury to others: Gabriel v. Long Island R. Co., 54 App. Div. (N. Y.) 41; s. c. 66 N. Y. Supp. 301. In one case the tracks in a railway station were laid in pairs; between each pair there being platforms about seven or eight inches above the rails; and at intervals there were "cross-overs," or places where the platforms were even with the rails, such depressions being accomplished by inclining the platforms, the inclines being fifteen feet long, and the rise about half an inch to the foot. It was held, in an action for injuries sustained by a passenger in jumping from a moving train in the station and slipping on the incline, that there was no negligence in the construction of the platforms: Newcomb v. New York &c. R. Co., 169 Mo. 409; s. c. 69 S. W. Rep. 348.

¹⁶⁴ Garneau v. Illinois Cent. R. Co., 109 Ill. App. 169.

rier owes the passenger the duty of stopping the train at the platform, or at a place convenient thereto where he can, in the exercise of reasonable care, alight with safety.¹⁶⁵ Care should be exercised not to obstruct the platform with baggage dangerous to persons using the platform¹⁶⁶ and likely to brush against passing trains and injure passengers thereon.¹⁶⁷ The platform should be protected by suitable guard rails, where elevated above the ground, to prevent the likelihood of injury to persons falling therefrom while using the platform at night.¹⁶⁸ The carrier is required only to keep the portion of the platform used by passengers in a safe condition for its passengers. The law does not demand this degree of care as to the part of the platform used exclusively for the handling of freight.¹⁶⁹ Where a passenger alighting from a train steps on some slippery object on the platform and is injured, the company is charged with liability for this negligence only where it appears that the object had been allowed to remain on the platform for such a length of time as to charge the company with knowledge of the fact.¹⁷⁰ A railroad company using a platform or steps leading thereto is liable for injuries from defects therein, though they were constructed by others.¹⁷¹ Whether the defendant has exercised reasonable care in the maintenance of a platform is generally a question of fact for the jury.¹⁷²

§ 2691. Duty to Keep Platforms, Approaches thereto, and Stations Lighted at Night.—The duty of ordinary care to provide and maintain safe alighting places is not fully discharged by providing a reasonably safe platform. It is still the duty of the carrier to see that the platform and approaches are properly lighted¹⁷³ for a reasonable time before and after the departure of trains, to enable passengers to enter

¹⁶⁵ *Simmons v. Oregon R. & Co.*, 41 Ore. 151; s. c. 69 Pac. Rep. 440, 1022. *Co.*, 110 La. 399; s. c. 34 South. Rep. 579.

¹⁶⁶ *Cleveland & C. R. Co. v. Reese*, 93 Ill. App. 657; *Chicago & C. R. Co. v. Gore*, 105 Ill. App. 16; *Matthieson v. Burlington & C. R. Co.*, 125 Iowa 90; s. c. 100 N. W. Rep. 51. ¹⁷² *McGuire v. Interborough Rapid Transit Co.*, 104 App. Div. (N. Y.) 105; s. c. 93 N. Y. Supp. 316.

¹⁷³ *Gulf & C. R. Co. v. Shelton*, 30 Tex. Civ. App. 72; s. c. 69 S. W. Rep. 653; 70 S. W. Rep. 359; *Duell v. Chicago & C. R. Co.*, 115 Wis. 516; s. c. 92 N. W. Rep. 269. An assault by a negro on a female passenger, in an unlighted waiting room after dark, is not such a proximate consequence of the railroad company's failure to light the room as to charge it with having foreseen the danger and render it liable therefor: *Prokop v. Gulf & C. R. Co.*, 34 Tex. Civ. App. 520; s. c. 79 S. W. Rep. 101.

¹⁶⁷ *Kird v. New Orleans & C. R. Co.*, 105 La. 226; s. c. 29 South. Rep. 729. ¹⁶⁸ *Gerhart v. Wabash R. Co.*, 110 Mo. App. 105; s. c. 84 S. W. Rep. 100.

¹⁶⁹ *Houston & C. R. Co. v. Grubbs*, 28 Tex. Civ. App. 367; s. c. 67 S. W. Rep. 519. ¹⁷⁰ *Goddard v. Boston & C. R. Co.*, 179 Mass. 52; s. c. 60 N. E. Rep. 486 (banana skin).

¹⁷¹ *Leveret v. Shreveport Belt R.*

and depart therefrom with reasonable safety.¹⁷⁴ This duty cannot be delegated. Thus in one case where a railroad company had made diligent efforts to have the city furnish lights for its platforms where passengers alighted and the city had undertaken to do so, it was held that if the city was negligent in the performance of this duty such negligence was to be imputed to the railroad company.¹⁷⁵ The number and character of the lights depend on the character and extent of the business transacted at the particular station.^{175a} This duty is not owed to bare licensees on the carrier's premises at other times. Thus where a railroad company had given an express company permission to store its packages in the baggage room of a depot, and the express company's deliveryman was storing packages intended for shipment in the room in the evening, at a time when no express train was due for several hours, it was held that the railroad company was not liable for an injury received by him owing to its failure to light the depot or grounds.¹⁷⁶ Whether the light furnished is sufficient is a question of fact for the determination of the jury.¹⁷⁷

§ 2696. Care of Platform Maintained Jointly by Two Companies.

—A railroad company using a union station along with other railroad companies as a tenant of a terminal company will have discharged its duty to a passenger where it carries him safely and furnishes him a safe place to alight, and will not be liable for injuries caused by a defect in the premises of the terminal company.¹⁷⁸ So a carrier whose track crosses the tracks of another railroad company, and who furnishes a safe platform for the use of its own passengers, will not be liable for injuries from a defect in the platform of the other inter-

¹⁷⁴ *St. Louis &c. R. Co. v. Battle*, 69 Ark. 369; s. c. 63 S. W. Rep. 805. The knowledge of a train dispatcher that passengers arriving on a special train over another road at night intended to take a train on his road did not bind his road to light its depot platform until a reasonable time prior to the arrival of its train: *Abbott v. Oregon R. Co.*, — Ore. —; s. c. 80 Pac. Rep. 1012.

¹⁷⁵ *Owen v. Washington &c. R. Co.*, 29 Wash. 207; s. c. 69 Pac. Rep. 757.

^{175a} *St. Louis &c. R. Co. v. Marshall*, — Kan. —; s. c. 81 Pac. Rep. 169.

¹⁷⁶ *Texas Cent. R. Co. v. Harbison*, — Tex. —; s. c. 85 S. W. Rep. 1138.

¹⁷⁷ *Chadbourne v. Illinois Cent. R. Co.*, 104 Ill. App. 333.

¹⁷⁸ *Frazier v. New York &c. R. Co.*,

180 Mass. 427; s. c. 62 N. E. Rep. 731. An instruction, in an action for injuries sustained in falling on an approach to a union depot after procuring a ticket, that a railway ticket may be lawfully sold by any one with whom the company places it, and it will not be necessarily required to keep the premises where such person may sell the tickets in repair, is erroneous, as placing the burden on the purchaser to ascertain whether he was dealing with a broker or an agent of the carrier before assuming that the carrier was obligated to furnish a safe approach to its depot: *Herrman v. Great Northern R. Co.*, 27 Wash. 472; s. c. 68 Pac. Rep. 82; 57 L. R. A. 390.

secting carrier, at least where this defective platform is not near enough to become a necessary approach to its platform.¹⁷⁹

§ 2699. This Duty Extends to Providing Safe Passage-Ways.—Thus a carrier was held liable for injuries to a passenger by falling into an uncovered ditch while going to his car at the direction of the station agent.¹⁸⁰ So a railroad company was held liable for injuries to a person slipping on snow and ice which it had knowingly allowed to accumulate on steps leading to the station.¹⁸¹ So a carrier may be imputed with negligence in allowing a train on a side track to block the passageway to the station at a time when a passenger train is due so that persons desiring to take passage thereon cannot reach the depot in time to purchase their tickets.¹⁸² In one case, however, a railroad company was absolved from the charge of negligence in allowing the approach to its station to be blocked by a train, at a time when a train not scheduled to stop passed the station, though an arrangement had been made between the complaining passenger and the station agent to flag the train, but the engineer of the blockading train was without knowledge of this arrangement.¹⁸³ Where a passenger is injured through a defect in the carrier's premises, it is not a defense that he was intoxicated at the time.¹⁸⁴

§ 2701. Extends to Care in Moving Trains so as not to Injure Passengers.—A carrier placing coaches for the reception of passengers on a side track adjacent to a main track, thereby compelling intending passengers to cross over the intervening track to reach the train, is guilty of a very reprehensible form of negligence where it allows an engine to be driven along the open track at such time at a high rate of speed and without lookouts.¹⁸⁵

§ 2703. Extends to Providing Passengers with Safe Means of Alighting from Carrier's Vehicle.¹⁸⁶

¹⁷⁹ *St. Louis &c. R. Co. v. Battle*, 69 Ark. 369; s. c. 63 S. W. Rep. 805.

¹⁸⁰ *San Antonio &c. R. Co. v. Turney*, 33 Tex. Civ. App. 626; s. c. 78 S. W. Rep. 256.

¹⁸¹ *Illinois Cent. R. Co. v. Keegan*, 210 Ill. 150; s. c. 71 N. E. Rep. 321; aff'g s. c. 112 Ill. App. 28; *Lemon v. Grand Rapids &c. R. Co.*, 136 Mich. 647; s. c. 100 N. W. Rep. 22; 11 Det. Leg. N. 151.

¹⁸² *Mayne v. Chicago &c. R. Co.*, 12 Okl. 10; s. c. 69 Pac. Rep. 933.

¹⁸³ *Eakins v. Chicago &c. R. Co.*, 126 Iowa 324; s. c. 102 N. W. Rep. 104.

¹⁸⁴ *Chicago &c. R. Co. v. Lawrence*, 96 Ill. App. 635.

¹⁸⁵ *St. Louis &c. R. Co. v. Tomlinson*, 69 Ark. 489; s. c. 64 S. W. Rep. 347.

¹⁸⁶ It was held that the carrier had not fulfilled its duty in this regard where the place provided was between five and seven inches below the level of the tracks, filled with stone and sand, and not wider than six feet, and located between the tracks of two railroad companies: *Chicago Terminal R. Co. v. Schmelling*, 197 Ill. 619; s. c. 64 N. E. Rep. 714; aff'g s. c. 99 Ill. App. 577.

§ 2704. **And Safe Means of Egress Therefrom.**¹⁸⁷

§ 2705. **Duty to Protect Alighting Passengers from being Struck by Other Trains.**—Actionable negligence may be predicated on the conduct of a carrier in permitting trains to run past its station at a rapid rate of speed at a time when another train is receiving and discharging passengers at such station.¹⁸⁸

§ 2711. **Passengers Injured by Throwing Mail Sacks from Moving Trains.**—Here it is reasoned that since the government compels railroads to carry the mail, designates the trains upon which they are carried, appoints the clerks and agents to receive and discharge the same, and pays for their services, a railroad company is not liable for this species of injury. But this is not the case where the postal clerk has been guilty of frequent negligent or reckless acts or conduct likely to cause injury to passengers or others lawfully on platforms to the knowledge of the carrier. Hence a railroad company will be held liable under this rule for injury to a person on a platform by being struck by a mail sack thrown from a moving train where it knows of the practice of the clerk carelessly to throw such sacks on the platform or could have known of it by the exercise of reasonable diligence.¹⁸⁹

§ 2712. **Application of these Principles to Street Railways.**—It is the duty of the street railroad company to see that the place where it stops its cars for passengers to alight is safe for that purpose. Thus, in one case a street railroad company was held liable where it stopped its car in the night-time alongside a lumber pile on which the alighting passenger stepped and was thrown to the ground and suffered the injuries sued for.¹⁹⁰ A street railroad company, having adopted a plat-

Where the distance from the step of a railroad passenger car to the platform was not more than eighteen inches, the fact that the company did not provide a stool or box for passengers to use in alighting to such platform, was held not such negligence as would authorize a recovery for injuries sustained by a fall of a passenger while alighting: *Texas Midland R. Co. v. Frey*, 25 Tex. Civ. App. 386; s. c. 61 S. W. Rep. 442.

¹⁸⁷ Where a carrier has provided a safe egress from its station free from danger from passing trains, it is not liable for an injury sustained by a passenger in attempting to cross at another place which the

carrier has not permitted or invited passengers to use: *Abbott v. Delaware & C. R. Co.*, 65 N. J. L. 310; s. c. 47 Atl. Rep. 588.

¹⁸⁸ *Chicago Terminal Transfer Co. v. Schmelling*, 197 Ill. 619; s. c. 64 N. E. Rep. 714; aff'g s. c. 99 Ill. App. 577; *Chicago & C. R. Co. v. Doan*, 93 Ill. App. 247; *Chicago & C. R. Co. v. Taylor*, 102 Ill. App. 445; *Gulf & C. R. Co. v. Morgan*, 26 Tex. Civ. App. 378; s. c. 64 S. W. Rep. 688.

¹⁸⁹ *St. Louis & C. R. Co. v. Waggoner*, 90 Ill. App. 556.

¹⁹⁰ *Montgomery St. Ry. v. Mason*, 133 Ala. 508; s. c. 32 South. Rep. 261.

form and notified the public to use it in getting on and off the cars, is under the duty to keep the platform in a reasonably safe condition for that purpose without regard to whether the platform was built by the company or another.¹⁹¹

§ 2713. **In the Case of Passengers on Elevated Railways.**—An elevated railroad company may be imputed with actionable negligence where it allows the platform at its station to become overcrowded, and because of this condition an intending passenger is injured.¹⁹² It has been held that an elevated railroad company was not to be charged with actionable negligence merely because of a failure to put sand, ashes or sawdust on a light snow and thin ice on a platform at the bottom of stairs leading to its station, there being no such obvious danger to passengers that the company was bound to anticipate that injury might be sustained by reason of this condition.¹⁹³

§ 2716. **Injuries to Waiting Passengers through Carelessness of the Carrier's Servants.**¹⁹⁴

§ 2720. **Grounds on which this Liability Rests.**—Generally speaking, the rights, privileges and protection attaching to the relation of a passenger are imposed by law upon common carriers upon considerations of public policy independent of contract, and they arise from the nature of their public employment.¹⁹⁵

§ 2721. **Carriers of Passengers not Liable as Insurers.**¹⁹⁶—The law does not require that the carrier should make it impossible for passen-

¹⁹¹ Haselton v. Portsmouth &c. R. Co., 71 N. H. 589; s. c. 53 Atl. Rep. 1016.

¹⁹² Dittmar v. Brooklyn Heights R. Co., 91 App. Div. (N. Y.) 378; s. c. 86 N. Y. Supp. 878.

¹⁹³ Rusk v. Manhattan R. Co., 46 App. Div. (N. Y.) 100; s. c. 61 N. Y. Supp. 384.

¹⁹⁴ A recovery was sustained in a case where a waiting passenger, standing on the platform of a depot as a freight train passed, was struck by a brakeman hanging on the side of the train and in such a position as to throw a part of his body an unusual distance from the car and over the platform: Texas &c. R. Co. v. Russell (Tex. Civ. App.), 74 S. W. Rep. 569. A carrier is not imputed with negligence *per se* merely by reason of running a special train past a platform shortly before the scheduled time of the arrival of a regular train without notice to the

station master, even though such train is run at an excessively high rate of speed (Lehigh Valley R. Co. v. Dupont, 128 Fed. Rep. 840); nor is the carrier to be imputed with negligence solely by reason of using an engine with a bumper which projects slightly over the edge of the company's platforms (Dotson v. Erie R. Co., 68 N. J. L. 679; s. c. 54 Atl. Rep. 827).

¹⁹⁵ McNeill v. Durham & C. R. Co., 135 N. C. 682; s. c. 47 S. E. Rep. 765; rev'g s. c. 44 S. E. Rep. 34.

¹⁹⁶ See generally in support of this well-settled principle: Shadletskey v. New York City R. Co., 88 N. Y. Supp. 1014; Cronk v. Wabash R. Co., 123 Iowa 349; s. c. 98 N. W. Rep. 884; Taillon v. Mears, 29 Mont. 161; s. c. 74 Pac. Rep. 421; Houston Electric Co. v. Nelson, 34 Tex. Civ. App. 72; s. c. 77 S. W. Rep. 978. An instruction that railway companies are not insurers of the safety of their pas-

gers to expose themselves to danger, nor is it required that the carrier should adopt any particular method in the construction of cars.¹⁹⁷ A statute, making every railroad company liable for all damages inflicted on the persons of passengers while being transported over its railroad, except in cases where the injuries arise from the criminal negligence of the persons injured, has been held not to make a common carrier an insurer of the safety of passengers, but that it merely establishes a presumption that damages inflicted on a passenger are entirely attributable to the negligence of the railroad company.¹⁹⁸ It has been held that an instruction that a carrier owes the duty to its passengers to use the highest degree of care, skill and prudence in the operation of its cars, "so as to prevent injuries to those passengers," did not, by the use of the quoted phrase, make the carrier an insurer.¹⁹⁹

§ 2722. Carriers of Passengers Bound to Use Extraordinary Care.²⁰⁰

§ 2724. Bound to Use the Highest Practicable Degree of Care.—

These expressions descriptive of the degree of care demanded of the carrier have received judicial approval:—The highest practicable care in the operation of trains;²⁰¹ the highest practicable degree of care for the safety of passengers;²⁰² the highest degree of care compatible with the practicable operation of the road or the highest degree of care, skill and diligence practically consistent with the efficient use of the mode of transportation adopted;²⁰³ to do all that human care,

sengers, but are required to exercise the highest degree of care that very cautious persons would exercise under similar circumstances, was not objectionable as requiring the greatest care which would have been exercised by the most skillful and careful individuals to be found in the class named: *St. Louis & C. R. Co. v. Byers* (Tex. Civ. App.), 70 S. W. Rep. 558.

¹⁹⁷ *Merchant v. South Chicago City R. Co.*, 104 Ill. App. 122.

¹⁹⁸ *Clark v. Zarniko*, 106 Fed. Rep. 607; s. c. 45 C. C. A. 494.

¹⁹⁹ *Clukey v. Seattle Electric Co.*, 27 Wash. 70; s. c. 67 Pac. Rep. 379.

²⁰⁰ *Southern R. Co. v. Cunningham*, 123 Ga. 90; s. c. 50 S. E. Rep. 979 (rule applies equally to passenger, freight and mixed trains); *Richmond Traction Co. v. Williams*, 102 Va. 253; s. c. 46 S. E. Rep. 292. The rule of extraordinary diligence of carriers applies only to the receiv-

ing, keeping, carrying, and discharging of passengers: *Southern R. Co. v. Reeves*, 116 Ga. 743; s. c. 42 S. E. Rep. 1015.

²⁰¹ *Indianapolis St. R. Co. v. Brown*, 32 Ind. App. 130; s. c. 69 N. E. Rep. 407.

²⁰² *Crump v. Davis*, 33 Ind. App. 88; s. c. 70 N. E. Rep. 886.

²⁰³ The tenor of all the Illinois cases: *Chicago City R. Co. v. Carroll*, 206 Ill. 318; s. c. 68 N. E. Rep. 1087; aff'g s. c. 102 Ill. App. 202; *Chicago Union Traction Co. v. Mommsen*, 107 Ill. App. 353; *Chicago City R. Co. v. Morse*, 98 Ill. App. 662; s. c. aff'd, 197 Ill. 327; 64 N. E. Rep. 304; *Chicago & C. R. Co. v. Murphy*, 198 Ill. 462; s. c. 64 N. E. Rep. 1011; aff'g s. c. 99 Ill. App. 126; *North Chicago St. R. Co. v. Polkey*, 203 Ill. 225; s. c. 67 N. E. Rep. 793; *Chicago Union Traction Co. v. Kallberg*, 107 Ill. App. 90; *Cleveland & C. R. Co. v. Scott*, 111 Ill.

vigilance and foresight can reasonably do under the circumstances, and consistently with the mode of conveyance employed for the safety of passengers;²⁰⁴ the highest degree of care consistent with the practical conduct of its business;²⁰⁵ the highest degree of care in the maintenance of its tracks, consistent with the nature of the undertaking;²⁰⁶ the highest degree of practical care which is consistent with the mode of transportation adopted;²⁰⁷ the highest degree of practical care to provide a safe roadbed, sound cross-ties and safe cars to transport passengers;²⁰⁸ the highest degree of care and diligence reasonably practicable in securing the safety of passengers by keeping its cars and appliances in a safe condition, and at all times under the control and management of skilled and competent servants;²⁰⁹ the greatest care consistent with the practicable operation of its cars toward a passenger, not only while he is on the train but also until he has alighted in safety;²¹⁰ to do all that human care, vigilance and foresight can reasonably do in view of the character of the conveyance adopted to prevent accidents to passengers;²¹¹ the highest degree of care consistent with the uses of the train to a passenger on a mixed train.²¹²

§ 2725. Bound to Use the Highest Care.²¹³

App. 234; *Elwood v. Chicago City R. Co.*, 90 Ill. App. 397; *Illinois Southern R. Co. v. Hubbard*, 106 Ill. App. 162; *Pennsylvania Co. v. Greso*, 102 Ill. App. 252; *West Chicago St. R. Co. v. Winters*, 107 Ill. App. 221. See also *Denham v. Washington Water Power Co.*, 38 Wash. 354; s. c. 80 Pac. Rep. 546.

²⁰⁴ *Burke v. Chicago & C. R. Co.*, 108 Ill. App. 565; *Kane v. Cicero & C. R. Co.*, 100 Ill. App. 181.

²⁰⁵ *Cavin v. Southern Pac. Co.*, 136 Fed. Rep. 592; s. c. 69 C. C. A. 366; *Foster v. Seattle Electric Co.*, 35 Wash. 177; s. c. 76 Pac. Rep. 995; *Johnson v. Seattle Electric Co.*, 35 Wash. 382; s. c. 77 Pac. Rep. 677; *Wanzer v. Chippewa Val. Electric R. Co.*, 108 Wis. 319; s. c. 84 N. W. Rep. 423.

²⁰⁶ *Galligan v. Old Colony St. R. Co.*, 182 Mass. 211; s. c. 65 N. E. Rep. 48. See also *Galligan v. Old Colony St. R. Co.*, 182 Mass. 211; s. c. 65 N. E. Rep. 48.

²⁰⁷ *Palmer v. Warren St. R. Co.*, 206 Pa. 574; s. c. 56 Atl. Rep. 49.

²⁰⁸ *Louisiana & C. R. Co. v. Crumpler*, 122 Fed. Rep. 425.

²⁰⁹ *McAllister v. People's R. Co.*, — Del. —; s. c. 54 Atl. Rep. 743.

²¹⁰ *O'Brien v. St. Louis Transit Co.*, 185 Mo. 263; s. c. 84 S. W. Rep. 939.

²¹¹ *Larkin v. Chicago & C. R. Co.*, 118 Iowa 652; s. c. 92 N. W. Rep. 891.

²¹² *Stembridge v. Southern R.*, 65 S. C. 440; s. c. 43 S. E. Rep. 968.

²¹³ That the carrier is bound to exercise the highest degree of care to avoid injury to passengers, see: *Southern R. Co. v. Crowder*, 130 Ala. 256; s. c. 30 South. Rep. 592; *Southern R. Co. v. Roebuck*, 132 Ala. 412; s. c. 31 South. Rep. 611; *Osgood v. Los Angeles Traction Co.*, 137 Cal. 280; s. c. 70 Pac. Rep. 169; *Knauss v. Lake Erie & C. R. Co.*, 29 Ind. App. 216; s. c. 64 N. E. Rep. 95; *Fitch v. Mason City & C. Traction Co.*, 124 Iowa 665; s. c. 100 N. W. Rep. 618; *Olson v. Chicago & C. R. Co.*, 94 Minn. 241; s. c. 102 N. W. Rep. 449; *McKinstry v. St. Louis Transit Co.*, 108 Mo. App. 12; s. c. 82 S. W. Rep. 1108; *Tillman v. St. Louis Transit Co.*, 102 Mo. App. 553; s. c. 77 S. W. Rep. 320; *Schlotterer v. New York & C. Ferry Co.*, 75 App. Div. (N. Y.) 330; s. c. 78 N. Y. Supp. 202; *Citizens' R. Co. v. Craig* (Tex. Civ. App.), 69 S. W. Rep. 239; *Houston & C. R. Co. v. George* (Tex. Civ.

§ 2726. **Bound to Use the Utmost Skill, Diligence, Care and Foresight.**—Other courts, in describing the degree of care to be exercised by the carrier, have used these expressions:—The utmost care to provide for the safety of passengers;²¹⁴ the utmost degree of care towards its passengers in the proper construction and maintenance of its tracks;²¹⁵ the utmost human skill in operating and keeping in repair its tracks and switches to save the passenger from harm;²¹⁶ the highest degree of care and to do all that human foresight can to prevent accident to passengers while in their actual transportation.²¹⁷

§ 2727. **Further Judicial Expressions on this Subject.**—These expressions, meeting the approval of appellate courts, are encountered in the recent decisions:—The carrier is liable for the slightest negligence;²¹⁸ carriers must conduct themselves with reasonable care under all circumstances, with a view to protecting their passengers;²¹⁹ must exercise the highest degree of care which skillful and practical operatives would exercise under similar circumstances;²²⁰ a very high degree of care and skill to secure safety to passengers and prevent accidents;²²¹ carriers are under the duty to transport passengers safely, so far as human care and skill will enable it to be done.²²² In New Jersey an instruction that the duty of the carrier in running the cars required a very considerable degree of care was held not an overstatement of the carrier's duty.²²³

§ 2728. **Not Bound to Exercise the "Utmost Degree of Care" of which Men are Capable.**²²⁴

App.), 60 S. W. Rep. 313; International &c. R. Co. v. Shuford, 81 S. W. Rep. 1189; Missouri &c. R. Co. v. Mitchell, 34 Tex. Civ. App. 394; s. c. 79 S. W. Rep. 94.

²¹⁴ Ft. Worth &c. R. Co. v. Rogers, 24 Tex. Civ. App. 382; s. c. 60 S. W. Rep. 61; Hardin v. Ft. Worth &c. R. Co., 33 Tex. Civ. App. 448; s. c. 77 S. W. Rep. 431; Knauff v. San Antonio Traction Co. (Tex. Civ. App.), 70 S. W. Rep. 1011; Norfolk &c. R. Co. v. Tanner, 100 Va. 379; s. c. 41 S. E. Rep. 721.

²¹⁵ Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106; s. c. 64 S. W. Rep. 202.

²¹⁶ Klinger v. United Traction Co., 92 App. Div. (N. Y.) 100; s. c. 87 N. Y. Supp. 864.

²¹⁷ Maxfield v. Maine Cent. R. Co., 100 Me. 79; s. c. 60 Atl. Rep. 710.

²¹⁸ Sambuck v. Southern Pac. Co., 138 Cal. xix; s. c. 71 Pac. Rep. 174.

²¹⁹ Merrill v. Metropolitan St. R.

Co., 73 App. Div. (N. Y.) 401; s. c. 77 N. Y. Supp. 122.

²²⁰ Heyde v. St. Louis Transit Co., 102 Mo. App. 537; s. c. 77 S. W. Rep. 127; Robinson v. St. Louis &c. R. Co., 103 Mo. App. 110; s. c. 77 S. W. Rep. 493.

²²¹ Little Rock Traction &c. Co. v. Kimbro, 75 Ark. 211; s. c. 87 S. W. Rep. 121, 644.

²²² Williams v. Spokane Falls &c. R. Co., 39 Wash. 77; s. c. 80 Pac. Rep. 1100.

²²³ Shay v. Camden &c. R. Co., 66 N. J. L. 334; s. c. 49 Atl. Rep. 547.

²²⁴ These cases condemn the use of expressions conveying the idea that the carrier must exercise the utmost degree of care of which men are capable: Feary v. Metropolitan St. R. Co., 162 Mo. 75; s. c. 62 S. W. Rep. 452; Magrane v. St. Louis &c. R. Co., 183 Mo. 119; s. c. 81 S. W. Rep. 1158; Freeman v. Metropolitan St. R. Co., 95 Mo. App. 314; s. c. 68

§ 2729. **Bound to Use the Highest Degree of Care of Very Cautious Persons.**—The later Texas decisions, defining the degree of care to be exercised by the carrier, show partiality to an expression making it the duty of the carrier to exercise the high degree of care and prudence that would be exercised by very cautious, prudent and competent persons under like circumstances.²²⁵ In Kentucky the carrier is bound to use “the utmost human care and foresight known to prudent and careful men.”²²⁶ In Georgia it is not erroneous to instruct the jury that it is the duty of a railroad company to use the extreme care and caution which very prudent persons exercise in securing and preserving their own property.²²⁷ In Missouri an instruction was held proper which stated that it was the duty of the defendant to use the utmost skill and care which prudent men would use and exercise in like business and under like circumstances safely to transport the plaintiff to his destination.²²⁸ In California an instruction that the carrier must exercise the care of a very cautious person, surrounded by the same circumstances, was held not objectionable as exacting a greater degree of care than the law demands of a common carrier.²²⁹ The operators of passenger elevators are held to the exercise of the highest degree of care and diligence of very cautious and prudent persons.²³⁰

§ 2730. **Strict Diligence and High Degree of Care, etc.**²³¹

§ 2735. **To whom this Measure of Care is Due—The Feeble, Sick, Aged, Decrepit, Intoxicated.**—The law demands from the carrier the exercise of ordinary care in looking after and protecting passengers who become sick or unconscious while travelling.²³²

S. W. Rep. 1057; *Wanzer v. Chipewa Val. Electric R. Co.*, 108 Wis. 319; s. c. 84 N. W. Rep. 423.

²²⁵ *Contreras v. San Antonio Trac-tion Co.*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 870; *International &c. R. Co. v. Clark*, 36 Tex. Civ. App. 195; s. c. 81 S. W. Rep. 821; *St. Louis &c. R. Co. v. Harrison*, 32 Tex. Civ. App. 368; s. c. 73 S. W. Rep. 38; *St. John v. Gulf &c. Co.* (Tex. Civ. App.), 80 S. W. Rep. 235; *Tyler v. Texas &c. R. Co.* (Tex. Civ. App.), 79 S. W. Rep. 1075; *Williams v. International &c. R. Co.*, 28 Tex. Civ. App. 503; s. c. 67 S. W. Rep. 1085.

²²⁶ *Louisville &c. R. Co. v. Harmon* (Ky.), 64 S. W. Rep. 640; s. c. 23 Ky. L. Rep. 871.

²²⁷ *Macon Consol. St. R. Co. v. Barnes*, 113 Ga. 212; s. c. 38 S. E. Rep. 756.

²²⁸ *Fullerton v. St. Louis &c. R. Co.*, 84 Mo. App. 498.

²²⁹ *Bosqui v. Sutro R. Co.*, 131 Cal. 390; s. c. 63 Pac. Rep. 682.

²³⁰ *Luckel v. Century Bldg. Co.*, 177 Mo. 608; s. c. 76 S. W. Rep. 1035; *Winheim v. Field*, 107 Ill. App. 145.

²³¹ An instruction that the cab driver was bound to exercise a very high degree of care to prevent collision was proper: *Stiner v. Metropolitan St. R. Co.*, 84 N. Y. Supp. 285. A common carrier must exercise the strictest diligence in receiving a passenger and conveying him to his destination: *Le Blanc v. Sweet*, 107 La. 355; s. c. 31 South. Rep. 766.

²³² *Atchison &c. R. Co. v. Parry*, 67 Kan. 515; s. c. 73 Pac. Rep. 105 (question for jury whether this degree of care has been exercised).

§ 2738. Greater Care Required in Favor of Passengers under Disabilities.—In case a passenger is known to be in any manner affected by a disability, physical or mental, whereby the hazards of travel are increased, the carrier should bestow on him a degree of attention to his safety beyond that of the ordinary passenger and in proportion to the liability to injury from such disability.²³³ It follows that the mere fact that the injuries complained of would not have happened to a younger person or one better able to move about will not relieve the carrier from liability for injuries the result of negligence.²³⁴

§ 2740. In the Case of a Passenger who is Intoxicated.—A carrier, accepting a passenger so drunk that he is unable to look after himself, is bound to exercise reasonable care to protect him from danger, but the law does not impose upon the carrier even here the liability of an insurer.²³⁵ The carrier cannot urge as a defense that the intoxication was a violation of law.²³⁶

§ 2744. The Modern English Rule of Reasonable Care.—The Canadian courts announce the rule that the carrier owes a passenger the duty of carrying him to his destination and using reasonable care and diligence in providing for his comfort and safety while so conveying him.²³⁷

§ 2749. Circumstances under which the Carrier is Bound Only to Ordinary Care as toward the Passenger.—Only ordinary and reasonable care and diligence for the safety of the passengers is required as to dangers and perils not incident to the mode of travel.²³⁸

²³³ *Burke v. Chicago &c. R. Co.*, 108 Ill. App. 565; *Denison &c. R. Co. v. Carter*, 98 Tex. 196; s. c. 82 S. W. Rep. 782; rev'g s. c. 79 S. W. Rep. 320 (children riding on street cars). See generally, *Mathew v. Wabash R. Co.* (Mo. App.), 78 S. W. Rep. 271; *Young v. Missouri Pac. R. Co.*, 93 Mo. App. 267; *Memphis St. R. Co. v. Shaw*, 110 Tenn. 467; s. c. 75 S. W. Rep. 713. A railroad company is liable for an injury to a pregnant passenger, caused by its negligence in allowing a car to collide with a train, though such collision would not have injured an ordinary passenger, and the company or its agents had no knowledge of passenger's condition: *St. Louis &c. R. Co. v. Ferguson*, 26 Tex. Civ. App. 460; s. c. 64 S. W. Rep. 797. Evidence is admissible to show that the operatives of the train were ac-

quainted with the crippled condition of a passenger injured by bringing the car to a sudden stop: *Louisville &c. R. Co. v. Bowlds*, 64 S. W. Rep. 957; s. c. 23 Ky. L. Rep. 1202.

²³⁴ *Staines v. Central R. Co.*, — N. J. L. —; s. c. 61 Atl. Rep. 385.

²³⁵ *Price v. St. Louis &c. R. Co.*, 75 Ark. 479; s. c. 88 S. W. Rep. 575.

²³⁶ *Wheeler v. Grand Trunk R. Co.*, 70 N. H. 607; s. c. 50 Atl. Rep. 103; 54 L. R. A. 955; *Wheeler v. Grand Trunk R. Co.*, 70 N. H. 607; s. c. 50 Atl. Rep. 103; 54 L. R. A. 955 (complaint in an action for injuries to intoxicated passenger upheld).

²³⁷ *Blain v. Canadian Pacific R. Co.* (C. A.), 5 Ont. L. Rep. 334.

²³⁸ *Chicago &c. R. Co. v. Murphy*, 99 Ill. App. 126; s. c. aff'd, 198 Ill. 462; 64 N. E. Rep. 1011.

§ 2754. **Nature of the Presumption of Negligence.**²⁴⁰—It is the doctrine of this section that where the circumstances attending an injury to a passenger are so unusual and of such a nature that the accident could not well have happened without the defendant being negligent, or where it is caused by something connected with the equipment, or operation of the train, the presumption of negligence on the part of the carrier will arise.²⁴⁰ The rule does not relieve the plaintiff from the necessity of making out a *prima facie* case,²⁴¹ by proof that he was a passenger, was injured, the extent of this injury and how it occurred.²⁴² The principle does not change the rule that the plaintiff has the burden of proof; it merely lightens the burden.²⁴³ There is a holding that the passenger waives the operation of this rule by the purchase of a low rate ticket, under which he assumes all risk of accident and damages.²⁴⁴

§ 2756. **This Presumption Arises, not from the Happening of the Accident, but from a Consideration of the Cause of the Accident.**^{244a}

§ 2757. **Arises Only where the Accident Proceeds from Something within the Control of the Carrier.**—Here it is the rule that where it is shown that the injury to a passenger was caused by the act of the carrier in the operation of trains, under its control, there is a presumption of negligence, and the carrier has the burden of showing its freedom from negligence.²⁴⁵ The principle finds application in cases of in-

²³⁹ That a presumption of negligence on the part of the carrier arises from an injury to a passenger, see: *Springer v. Schultz*, 105 Ill. App. 544; s. c. *aff'd*, 205 Ill. 144; 68 N. E. Rep. 753; *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360; s. c. 71 N. E. Rep. 201; *Aston v. St. Louis Transit Co.*, 105 Mo. App. 226; s. c. 79 S. W. Rep. 999; *Chicago &c. R. Co. v. Winfrey*, 67 Neb. 13; s. c. 93 N. W. Rep. 526; *Chicago &c. R. Co. v. Wolfe*, 61 Neb. 502; s. c. 86 N. W. Rep. 441; *Lincoln Traction Co. v. Heller*, — Neb. —; s. c. 100 N. W. Rep. 197; *Cooper v. Georgia &c. R. Co.*, 61 S. C. 345; s. c. 39 S. E. Rep. 543.

²⁴⁰ *Feitl v. Chicago City R. Co.*, 113 Ill. App. 381; s. c. *aff'd*, 211 Ill. 279; 71 N. E. Rep. 991; *Fitch v. Mason City &c. Traction Co.*, 124 Iowa 665; s. c. 100 N. W. Rep. 618; *Yazoo &c. R. Co. v. Humphrey*, 83 Miss. 721; s. c. 36 South. Rep. 154.

²⁴¹ *Brimmer v. Illinois Cent. R. Co.*, 101 Ill. App. 198; *Ault v. Cowan*, 20 Pa. Super. Ct. 616.

²⁴² *Davis v. Paducah R. &c. Co.*, 113 Ky. 267; s. c. 68 S. W. Rep. 140; 24 Ky. L. Rep. 135; *Western Maryland R. Co. v. State*, 95 Md. 637; s. c. 53 Atl. Rep. 969; *Lincoln Traction Co. v. Webb*. — Neb. —; s. c. 102 N. W. Rep. 258; *Paynter v. Bridgeton &c. Traction Co.*, 67 N. J. L. 619; s. c. 52 Atl. Rep. 367.

²⁴³ *Thurston v. Detroit United R. Co.*, 137 Mich. 231; s. c. 100 N. W. Rep. 395; 11 Det. Leg. N. 252; *Young v. Missouri Pac. R. Co.* (Mo. App.), 84 S. W. Rep. 175; *Lincoln Traction Co. v. Webb*. — Neb. —; s. c. 102 N. W. Rep. 258; *Lynch v. Metropolitan St. R. Co.*, 90 N. Y. Supp. 378.

²⁴⁴ *Crary v. Lehigh Val. R. Co.*, 203 Pa. 525; s. c. 53 Atl. Rep. 363; 59 L. R. A. 815.

^{244a} *State v. United R. &c. Co.*, 101 Md. 183; s. c. 60 Atl. Rep. 249.

²⁴⁵ *Texas &c. R. Co. v. Gardner*, 114 Fed. Rep. 186; s. c. 52 C. C. A. 142; *Bassett v. Los Angeles Traction Co.*, 133 Cal. xix; s. c. 65 Pac. Rep. 470; *Denver &c. R. Co. v. Fo-*

juries caused by derailments,²⁴⁶ collisions,²⁴⁷ the sudden starting²⁴⁸ or stopping of trains,²⁴⁹ sudden increase of speed as passengers are in the act of boarding²⁵⁰ or alighting²⁵¹ from the car, the separation of trains,²⁵² the explosion of a locomotive boiler²⁵³ or an electric car controller,²⁵⁴ the casting of live sparks into a passenger car,²⁵⁵ the throwing of coal from the tender of a passing engine.²⁵⁶

§ 2759. This Presumption Arises from Accident to Carrier's Vehicle.²⁵⁷

§ 2764. No Such Presumption where the Accident Proceeds in Part from a Voluntary Movement on the Part of the Passenger.—
"The doctrine of *res ipsa loquitur* does not apply in cases where the

theringham, 17 Colo. App. 410; s. c. 68 Pac. Rep. 978; Southern R. Co. v. Cunningham, 123 Ga. 90; s. c. 50 S. E. Rep. 979; Chicago Union Traction Co. v. Crosby, 109 Ill. App. 644. But see: Allen v. Northern Pac. R. Co., 35 Wash. 221; s. c. 77 Pac. Rep. 204.

²⁴⁶ See *post*, § 2809.

²⁴⁷ Green v. Pacific Lumber Co., 130 Cal. 435; s. c. 62 Pac. Rep. 747; Sambuck v. Southern Pac. Co., 138 Cal. xix; s. c. 71 Pac. Rep. 174; Chicago City R. Co. v. Mead, 107 Ill. App. 649; s. c. aff'd, 206 Ill. 174; 69 N. E. Rep. 19; Fitch v. Mason City & C. Traction Co., 124 Iowa 665; s. c. 100 N. W. Rep. 618; Savage v. Marlborough St. R. Co., 186 Mass. 203; s. c. 71 N. E. Rep. 531; Estes v. Missouri Pac. R. Co., 110 Mo. App. 725; s. c. 85 S. W. Rep. 627; Wilbur v. Southwest Missouri & C. R. Co., 110 Mo. App. 689; s. c. 85 S. W. Rep. 671; Shay v. Camden & C. R. Co., 66 N. J. L. 334; s. c. 49 Atl. Rep. 547 (collision between car and wagon on public street); Palmer v. Warren St. R. Co., 206 Pa. 574; s. c. 56 Atl. Rep. 49; 63 L. R. A. 507 (passenger jumped from car because of a well-grounded fear of an impending collision); Rowdin v. Pennsylvania R. Co., 208 Pa. 623; s. c. 57 Atl. Rep. 1125; Southern R. Co. v. Dawson, 98 Va. 577; s. c. 36 S. E. Rep. 996; 2 Va. Sup. Ct. Rep. 486; Howe v. Northern Pac. R. Co., 30 Wash. 569; s. c. 70 Pac. Rep. 1100.

²⁴⁸ Kefauver v. Philadelphia & C. R. Co., 122 Fed. Rep. 966; Barringer v. St. Louis & C. R. Co., 73 Ark. 548; s. c. 85 S. W. Rep. 94; 87 S. W. Rep. 814; Fine v. Interurban St. R. Co.,

45 Misc. (N. Y.) 587; s. c. 91 N. Y. Supp. 43.

²⁴⁹ Johnson v. Interurban St. R. Co., 88 N. Y. Supp. 866; Redmon v. Metropolitan St. R. Co., 185 Mo. 1; s. c. 84 S. W. Rep. 26.

²⁵⁰ Allen v. Northern Pac. R. Co., 35 Wash. 221; s. c. 77 Pac. Rep. 204.

²⁵¹ El Paso Electric R. Co. v. Harry, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 735.

²⁵² Feldschneider v. Chicago & C. R. Co., 122 Wis. 423; s. c. 99 N. W. Rep. 1034.

²⁵³ Kelly v. Chicago & C. R. Co., 113 Mo. App. 468; s. c. 87 S. W. Rep. 583.

²⁵⁴ Chicago Union Traction Co. v. Newmiller, 215 Ill. 383; s. c. 74 N. E. Rep. 410; aff'g s. c. 116 Ill. App. 625; South Covington & C. R. Co. v. Smith, 86 S. W. Rep. 970; s. c. 27 Ky. L. Rep. 811.

²⁵⁵ Texas Midland R. Co. v. Juniper, 24 Tex. Civ. App. 671; s. c. 60 S. W. Rep. 797; St. Louis & C. R. Co. v. Parks (Tex. Civ. App.), 73 S. W. Rep. 439.

²⁵⁶ Louisville & C. R. Co. v. Reynolds (Ky.), 71 S. W. Rep. 516; s. c. 24 Ky. L. Rep. 1402.

²⁵⁷ Stoddy v. Detroit & C. R. Co., 124 Mich. 420; s. c. 83 N. W. Rep. 26 (passenger in caboose injured by the fall of bed frame fastened to the ceiling above him and jarred loose by bumped cars); Chicago City R. Co. v. Carroll, 206 Ill. 318; s. c. 68 N. E. Rep. 1087; aff'g s. c. 102 Ill. App. 202 (fall of trolley pole); McCarty v. St. Louis & C. R. Co., 105 Mo. App. 596; s. c. 80 S. W. Rep. 7 (defective hand-rail on street railway).

accident or injury, unexplained by attendant circumstances, might as plausibly have resulted from negligence on the part of the passenger as the carrier. Nor is it applicable to the death of a passenger that comes by reason of circumstances and conditions that are personal and peculiar to him, and not by reason of any management of or accident to or condition in the train itself, over which the carrier has exclusive control."²⁵⁸

§ 2767. Nor where the Injury Proceeds from the Act of Another Passenger or Other Third Person.—The presumption was held not to have arisen in these cases:—Where the car was derailed by obstructions placed on the track at the time of a strike;²⁵⁹ where the injuries were caused by stones thrown into the car by malicious persons outside;²⁶⁰ where a passenger on a street car was injured by a collision with a bicycle^{260a} or a vehicle drawn by a frightened horse.²⁶¹

§ 2770. Burden of Rebutting this Presumption Rests on the Carrier.²⁶²

§ 2774. Evidence to Overthrow this Presumption.²⁶³

²⁵⁸ Wood, J., in *Price v. St. Louis &c. R. Co.*, 75 Ark. 479; s. c. 88 S. W. Rep. 575.

²⁵⁹ Cheetham v. Union R. Co., — N. H. —; s. c. 58 Atl. Rep. 881.

²⁶⁰ Swigelsky v. Interurban St. R. Co., 91 N. Y. Supp. 350.

^{260a} Fagan v. Rhode Island Co., 27 R. I. 51; s. c. 60 Atl. Rep. 672.

²⁶¹ Munzer v. Interurban St. R. Co., 91 N. Y. Supp. 21; *Grant v. Metropolitan St. R. Co.*, 99 App. Div. (N. Y.) 422; s. c. 91 N. Y. Supp. 202.

²⁶² See generally: *Springer v. Schultz*, 105 Ill. App. 544; s. c. aff'd, 205 Ill. 144; 68 N. E. Rep. 753; *Fitch v. Mason City &c. Traction Co.*, 124 Iowa 665; s. c. 100 N. W. Rep. 618; *Magrane v. St. Louis R. Co.*, 183 Mo. 119; s. c. 81 S. W. Rep. 1158; *Lincoln Traction Co. v. Heller*, — Neb. —; s. c. 102 N. W. Rep. 262; rev'g s. c. 100 N. W. Rep. 197; *Lincoln Traction Co. v. Webb*, — Neb. —; s. c. 102 N. W. Rep. 258; *Cheetham v. Union R. Co.*, — N. H. —; s. c. 58 Atl. Rep. 881; *Glassberg v. Interurban St. R. Co.*, 92 N. Y. Supp. 731; *Stern v. Westchester Electric R. Co.*, 99 App. Div. (N. Y.) 491; s. c. 90 N. Y. Supp. 870; *Texas Midland R. Co. v. Jumper*, 24 Tex. Civ.

App. 671; s. c. 60 S. W. Rep. 797. The burden of proof is on a carrier by water to show that the accident by which a passenger was drowned while being transferred to shore did not result from the fault of its officers or representatives: *Le Blanc v. Sweet*, 107 La. 355; s. c. 31 South. Rep. 766.

²⁶³ The presumption was held to have been rebutted in a case where the defendant introduced evidence showing that at the time of the derailment the train was being run at a reasonable rate of speed; that the track and roadbed were in first-class condition; that the cause of the derailment was a freshly-broken flange on one of the wheels of a car; that the wheel was properly made, and before being used was thoroughly tested at the manufactory, again tested before being placed under the car, and was inspected during the trip the day the accident occurred, and was apparently in perfect condition,—and such evidence was not only uncontradicted, but was the only evidence introduced as to the cause of the derailment: *Florida &c. R. Co. v. Rudolph*, 113 Ga. 143; s. c. 38 S. E. Rep. 328.

§ 2778. **The Negligence of the Carrier must have been the Proximate Cause of the Injury.**²⁶⁴

§ 2779. **Concurring Negligence of the Carrier and a Third Person.**—Thus, it was held no defense to an action for injuries in a collision between a street car and a wagon that the driver was also negligent.²⁶⁵ So the negligent starting of a street car, which threw a passenger to the ground, was held the proximate cause of injuries not the result of striking the ground, but of being run over by a wagon in one case,²⁶⁶ and of being trampled upon by passing horses in another case.²⁶⁷

§ 2782. **Remoteness of Damages in Such Cases.**—In these instances the negligence of the carrier was declared to be the proximate cause of the passenger's injuries:—The act of a motorman in allowing a boy to ride on his car in a place of danger and the subsequent act of the boy in jumping from the car while in motion;²⁶⁸ the angry and threatening attitude of a conductor towards a boy riding on his car and the act of the boy in jumping off the car while running at a high rate of speed;²⁶⁹ the negligence of a carrier's servant in directing an intending passenger to board the wrong train and injuries to the passenger in jumping off the train after discovery of the error;²⁷⁰ the act of a carrier in leaving a disabled train between stations exposed to collision with other trains and the act of a passenger in leaving such train under a well-grounded fear of collision and being poisoned by contact with plants on the side of the track;²⁷¹ injuries caused by

²⁶⁴ *Simmons v. Seaboard Air Line R.*, 120 Ga. 225; s. c. 47 S. E. Rep. 570; *Garneau v. Illinois Cent. R. Co.*, 109 Ill. App. 169; *Rawlings v. Wabash R. Co.*, 97 Mo. App. 515; s. c. 71 S. W. Rep. 535 (whether the negligence was the proximate cause of the injuries a question for the jury); *Taillon v. Mears*, 29 Mont. 161; s. c. 74 Pac. Rep. 421; *Mayne v. Chicago & c. R. Co.*, 12 Okl. 10; s. c. 69 Pac. Rep. 933; *Doolittle v. Southern R. Co.*, 62 S. C. 130; s. c. 40 S. E. Rep. 133. The negligence of a conductor in carrying a passenger past his destination in the night and causing him to alight at an unfamiliar place was the proximate cause of his injuries in falling through a bridge on his return and not the mere darkness: *Indianapolis & c. R. Co. v. Barnes*, — Ind. App. —; s. c. 74 N. E. Rep. 583. The carrier is liable for injuries the result of negligent operation of its trains, though an act of God con-

curs therein: *Chicago & c. R. Co. v. Cain*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 682.

²⁶⁵ *Frank v. Metropolitan St. R. Co.*, 91 App. Div. (N. Y.) 485; s. c. 86 N. Y. Supp. 1018; *West Chicago St. R. Co. v. Tuerk*, 90 Ill. App. 105.

²⁶⁶ *Fine v. Interurban St. R. Co.*, 45 Misc. (N. Y.) 587; s. c. 91 N. Y. Supp. 43.

²⁶⁷ *Parker v. St. Louis Transit Co.*, 108 Mo. App. 465; s. c. 83 S. W. Rep. 1016.

²⁶⁸ *Denison & c. R. Co. v. Carter*, 98 Tex. 196; s. c. 82 S. W. Rep. 782; *rev'g* s. c. 79 S. W. Rep. 320.

²⁶⁹ *Indianapolis St. R. Co. v. Hockett*, 161 Ind. 196; s. c. 67 N. E. Rep. 106.

²⁷⁰ *Newcomb v. New York & c. R. Co.*, 182 Mo. 687; s. c. 81 S. W. Rep. 1069.

²⁷¹ *Estes v. Missouri Pac. R. Co.*, 110 Mo. App. 725; s. c. 85 S. W. Rep. 627.

the premature starting of a car and their fatal termination because of the weakened physical condition of the passenger at the time.²⁷²

§ 2783. Damages in Such Cases held too Remote.²⁷³

§ 2785. Degree of Care Imposed upon Carrier as to Vehicles.

—It is another form of statement to say that the carrier owes to his passenger the high degree of care to keep his engines, cars and appliances in good repair that a very prudent and cautious person would use in similar circumstances.²⁷⁴ The carrier is not an insurer and hence is not absolutely bound to furnish safe seats. His duty is to exercise a very high degree of care to provide reasonably safe seats.²⁷⁵ Where the makeup of a vestibule train requires passengers to pass from one car to another—as, for example, to reach the dining car—

²⁷² *Guenther v. Metropolitan R. Co.*, 23 App. (D. C.) 493.

²⁷³ In these cases the connection between the carrier's negligent act and the passenger's injury was held too remote:—Between the failure of the trainmen to assist children to board a train, and injuries sustained by their mother while attempting to alight from the train while in motion after she had seated them (*Flaherty v. Boston & C. R. Co.*, 186 Mass. 567; s. c. 72 N. E. Rep. 66); between the fact that a passenger was compelled to ride on a mixed train and injuries sustained by him in slipping on a banana peel on the floor of the car closet (*Chicago & C. R. Co. v. Gragg*, 36 Tex. Civ. App. 102; s. c. 81 S. W. Rep. 93); between the fact of a collision necessitating a stop and injuries to a passenger, unnecessarily leaving the car, caused by stepping into a stake hole while crossing flat cars on an adjoining track (*Vandercook v. Detroit & C. R. Co.*, 125 Mich. 459; s. c. 84 N. W. Rep. 616; 7 Det. Leg. N. 585); between the failure of a carrier properly to light a platform and injuries to a person leaving a car while in motion after having helped his wife aboard (*Berry v. Louisville & C. R. Co.*, 109 Ky. 727; s. c. 60 S. W. Rep. 699; 22 Ky. L. Rep. 1410); between the negligent carrying of a passenger one block beyond his destination and injuries sustained by such passenger from a fall on an icy sidewalk while returning to the point of original destination (*Haley v. St. Louis Transit Co.*, 179 Mo. 30; s. c. 77 S. W. Rep. 731); between the

negligence of a street car running past a street crossing and an injury to a passenger thereon in attempting to alight at the crossing (*Lynch v. St. Louis Transit Co.*, 102 Mo. App. 630; s. c. 77 S. W. Rep. 100); between the refusal of a street car to stop at a signal of a passenger and his attempt to board the moving car as it passed him (*South Chicago City R. Co. v. Dufresne*, 200 Ill. 456; s. c. 65 N. E. Rep. 1075; aff'g s. c. 102 Ill. App. 493); between the act of a street car conductor in stopping his car on discovery that it was on fire and the act of a passenger in falling into an excavation some distance from the car after he had alighted therefrom with safety (*Goldberg v. Interurban St. R. Co.*, 90 N. Y. Supp. 347).

²⁷⁴ *Missouri & C. R. Co. v. Flood*, 35 Tex. Civ. App. 197; s. c. 79 S. W. Rep. 1106; *St. Louis & C. R. Co. v. Parks*, 97 Tex. 131; s. c. 76 S. W. Rep. 740; rev'g s. c. 69 S. W. Rep. 125 (duty to provide safe spark arrester to prevent injury to passengers from flying cinders). An instruction that the defendant owed its passengers the duty of exercising "great care and caution" to keep the machinery and appliances of its cars in a reasonably safe condition and repair, was not objectionable as imposing on the company a higher degree of care than is required by law: *Dallas Consol. Electric St. R. Co. v. Broadhurst*, 28 Tex. Civ. App. 630; s. c. 68 S. W. Rep. 315.

²⁷⁵ *Boyles v. Texas & C. R. Co.*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 936.

it is the duty of the carrier to see that the vestibule doors are closed so as to prevent passengers from being thrown from the platform, and the carrier cannot escape liability for its failure to perform this duty by showing a contract with the Pullman Car Company to do it.²⁷⁶

§ 2786. **Carrier Bound to Make What Tests.**—It is not enough that the appliances were recently inspected or that the inspection was made by a competent employé. The law requires of the carrier in this matter the exercise of “the utmost care and skill which prudent men are accustomed to use under similar circumstances.”²⁷⁷ Negligence will be imputed where an inspection of a car before the train was made up would have disclosed the defects which caused the passenger’s injury.²⁷⁸ Another court has announced the rule that a carrier receiving a foreign freight car from another road is not required to make a scientific inspection of the car to ascertain whether it is safe, but is only required to make a practical inspection, or an inspection consistent with the reasonable discharge of its business.²⁷⁹ Whether the inspection of the appliance was sufficient in a given case is a question of fact for the jury.²⁸⁰

§ 2787. **Obligation to Adopt the Latest Improvements.**—A railroad company in equipping a train should use appliances of the standard in general use; but the law does not require that they should be of the most approved pattern in use.²⁸¹

§ 2789. **No Liability for Accidents Caused by Latent Undiscoverable Defects.**²⁸²

§ 2790. **Obligation Extends to Adopting a Suitable Kind of Appliance.**—The carrier by rail owes to passengers using its coaches the

²⁷⁶ Robinson v. Chicago &c. R. Co., 135 Mich. 254; s. c. 97 N. W. Rep. 689; 10 Det. Leg. N. 727.

²⁷⁷ Davis v. Paducah R. &c. Co., 113 Ky. 267; s. c. 68 S. W. Rep. 140; 24 Ky. L. Rep. 135.

²⁷⁸ Robinson v. Chicago &c. R. Co., 135 Mich. 254; s. c. 97 N. W. Rep. 689; 10 Det. Leg. N. 727.

²⁷⁹ Western Maryland R. Co. v. State, 95 Md. 637; s. c. 53 Atl. Rep. 969.

²⁸⁰ Western Maryland R. Co. v. State, 95 Md. 637; s. c. 53 Atl. Rep. 969.

²⁸¹ Alabama Midland R. Co. v. Guilford, 119 Ga. 523; s. c. 46 S. E. Rep. 655.

²⁸² Buckland v. New York &c. R.

Co., 181 Mass. 3; s. c. 62 N. E. Rep. 955. In a case where the passenger sued for injuries occasioned by a collision between the cars of a broken train, it was held prejudicial error to refuse an instruction that if the cars were equipped with automatic couplers and air brakes in good order, and that no defects could be discovered in either by careful examination, and that cars of the kind in question did become uncoupled when handled as these cars were, and “that these cars became uncoupled without apparent cause or discoverable defect,” then defendant would not be liable: Holland v. St. Louis &c. R. Co., 105 Mo. App. 117; s. c. 79 S. W. Rep. 508.

duty to equip its engines with the most approved devices to prevent the escape of sparks or cinders,²⁸³ and keep them in reasonably good repair and condition,²⁸⁴ and where this duty is performed it will not be liable for injuries to passengers caused by escaping cinders.²⁸⁵ The carrier is under a like obligation as to other equipments such as couplers,^{285a} and tools for emergency use.^{285b} It has been held that the carrier fulfilled his duty where he showed that the appliance causing the injury was on the car when it was obtained from an approved builder, and was in the same condition at the time of the accident, except as improved by the carrier, and it did not appear that any safer appliance was in use or could be procured in the market.²⁸⁶ Similarly a street car company was absolved from liability for injuries to passengers caused by its car escaping down an incline where it was shown that it used the best machinery known—such as experience had shown to be safe—and the accident was caused by something it could not have foreseen or guarded against, though the evidence failed to show the immediate cause of the accident.²⁸⁷

§ 2792. **Not Enough that the Appliance was Such as was Ordinary in Use, unless it was Reasonably Safe.**²⁸⁸

§ 2793. **Care Demanded in Inspecting a Railroad Passenger Train.**—In a case where a train was derailed by the breaking of an axle, and a passenger jumping from the car through fear received injuries from which he died, it was held that, if the breaking of the axle was the result of the defect, which could have been discovered by an ordinary inspection, the carrier was liable, though the breaking of the axle was not the immediate cause of the passenger's death.²⁸⁹

§ 2796. **Duty of Railway Carrier in Respect of the Safety of its Roadway.**—The rule of law requiring railroad companies to exercise

²⁸³ *St. Louis &c. R. Co. v. Parks* (Tex. Civ. App.), 73 S. W. Rep. 439; *Missouri &c. R. Co. v. Flood*, 35 Tex. Civ. App. 197; s. c. 79 S. W. Rep. 1106; *Texas Midland R. Co. v. Jumper*, 24 Tex. Civ. App. 671; s. c. 60 S. W. Rep. 797.

²⁸⁴ *Missouri &c. R. Co. v. Flood*, 35 Tex. Civ. App. 197; s. c. 79 S. W. Rep. 1106.

²⁸⁵ *Missouri &c. R. Co. v. Orton*, 67 Kan. 848; s. c. 73 Pac. Rep. 63.

^{285a} *Williams v. Spokane Falls &c. R. Co.*, 39 Wash. 77; s. c. 80 Pac. Rep. 1100.

^{285b} *Jackson v. Natchez &c. R. Co.*, 114 La. 981; s. c. 38 South. Rep. 701.

²⁸⁶ *Smith v. Kingston City R. Co.*,

55 App. Div. (N. Y.) 143; s. c. 67 N. Y. Supp. 185.

²⁸⁷ *Feary v. Metropolitan St. R. Co.*, 162 Mo. 75; s. c. 62 S. W. Rep. 452.

²⁸⁸ So a street car company was held negligent in allowing a ring in the floor of its car to get into and remain in such a condition that it rose when the car started, and remained standing unless replaced, and this was the conclusion, though the builder of the car was reputable, and the ring was a usual device: *Kingman v. Lynn &c. R. Co.*, 181 Mass. 387; s. c. 64 N. E. Rep. 79.

²⁸⁹ *Western Maryland R. Co. v. State*, 95 Md. 637; s. c. 53 Atl. Rep. 969.

a degree of diligence and care but little short of extraordinary in protecting their passengers from injury applies as well to the construction and maintenance of tracks as to the operation of trains thereupon.²⁹⁰

§ 2798. **Application of these Principles to Washouts Caused by Extraordinary Storms.**—A railroad company, seeking to avoid liability to an injured passenger on the ground that the accident in which the injuries were received was due to an unprecedented rainfall, must go farther and also show its freedom from proximate negligence contributing to the injury.²⁹¹ The law does not demand that a railroad company in the construction of its roadbed should build culverts sufficient to withstand unprecedented rainfalls.²⁹²

§ 2804. **Negligence of Manufacturer or Contractor Imputed to Carrier.**—There is authority that a carrier is responsible for defects in its cars though such defects could not have been discovered after the cars came into its possession if they could have been discovered by the exercise of the proper care and skill in their construction.²⁹³

§ 2807. **Competency of Manufacturer or Contractor an Evidentiary Fact Tending to Rebut Presumption of Negligence.**²⁹⁴

§ 2809. **Presumption of Negligence from Derailment of Train.**²⁹⁵

²⁹⁰ Macon Consol. St. R. Co. v. Barnes, 113 Ga. 212; s. c. 38 S. E. Rep. 756.

²⁹¹ Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106; s. c. 64 S. W. Rep. 202.

²⁹² Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106; s. c. 64 S. W. Rep. 202.

²⁹³ Siemsen v. Oakland & C. R. Co., 134 Cal. 494; s. c. 66 Pac. Rep. 672.

²⁹⁴ In one case it was held that the recovery was properly denied where the carrier showed not only that it purchased the appliance responsible for the accident from a reputable dealer, but also, that it had subjected the appliance to a daily inspection by an expert employé, and the plaintiff offered no rebuttal, relying wholly on the doctrine of *res ipsa loquitur*: Murray v. Pawtuxet Valley St. R. Co., 25 R. I. 209; s. c. 55 Atl. Rep. 491.

²⁹⁵ That the derailment and injury having been shown by the plaintiff, the burden is on the defendant to show that the accident was not occasioned by its negligence, see: Minahan v. Grand Trunk Western R. Co., 138 Fed. Rep. 37; Alabama Midland

R. Co. v. Guilford, 114 Ga. 627; s. c. 40 S. E. Rep. 794 (presumption rebutted by proof that the accident was attributable to act of God); Cronk v. Wabash R. Co., 123 Iowa 349; s. c. 98 N. W. Rep. 884; Whitteley v. Burlington & C. R. Co., 121 Iowa 597; s. c. 90 N. W. Rep. 516; 97 N. W. Rep. 66; Western Maryland R. Co. v. State, 95 Md. 637; s. c. 53 Atl. Rep. 969; Logan v. Metropolitan St. R. Co., 183 Mo. 582; s. c. 82 S. W. Rep. 126; Klinger v. United Traction Co., 92 App. Div. (N. Y.) 100; s. c. 87 N. Y. Supp. 864; Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106; s. c. 64 S. W. Rep. 202; McNeill v. Durham & C. R. Co., 130 N. C. 256; s. c. 41 S. E. Rep. 383; St. Louis & C. R. Co. v. Harkney, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 506. Where plaintiff does not rest on the presumption of negligence arising from the fact of the derailment, but proceeds to show just how the accident happened, he is not entitled to go to the jury unless such evidence tends to show negligence on the part of the defendant: Buckland v. New York & C. R. Co., 181 Mass. 3; s. c. 62 N. E. Rep. 955. The presumption of

§ 2813. Derailment Caused by Giving Away of the Track.^{295a}

§ 2815. Questions of Procedure and Evidence Connected with Injuries from Defects in Vehicles and Roadway.—A complaint in an action for injuries caused by a derailment was upheld as sufficiently specific which alleged that the train on which the plaintiff was riding was derailed and that he was injured in consequence thereof.²⁹⁶ Where the injuries were caused by the dangerous condition of the roadbed, evidence that the operatives of the train were warned of the danger before starting is admissible to show their knowledge of this condition.²⁹⁷ Persons experienced in the use of a particular coupling may be permitted to tell how often, in their experience, this type of coupling had become uncoupled or broken loose.²⁹⁸ An instruction, in an action against a carrier for injuries to a mail clerk, that it was the carrier's duty to keep its track in a safe condition for the passage of trains under all known conditions, was held not erroneous, where the court also charged that this duty was fulfilled when the carrier used the legal degree of care in the premises, no matter whether a safe condition was attained or not.²⁹⁹

§ 2822. Injuries from Overloading Passenger Cars.—A railroad company running an overcrowded train rests under the obligation to exercise a degree of care commensurate with dangers and perils in which the passengers are placed by reason of this fact.¹ On the question of care in furnishing cars sufficient to accommodate the passengers, evidence is admissible that the carrier had advertised the train in question for an excursion and had expected large crowds.² Where the train is so crowded that passengers are required to ride on the platform the servants of the carrier are chargeable with negligence where they fail to notify these passengers of the approach to dangerous curves.³

§ 2823. Injuries in Consequence of Collisions between Trains of the Same Company.—Under these circumstances the carrier was im-

negligence arising from the derailment of a train, by reason of which a passenger's baggage was destroyed, is not rebutted by proof that the derailment and wrecking of the train were caused by a slide of dirt and rocks on the track: *Thomas v. Southern R. Co.*, 131 N. C. 590; s. c. 42 S. E. Rep. 964.

^{295a} *Jackson v. Natchez & C. R. Co.*, 114 La. 981; s. c. 38 South. Rep. 701 (collapse of bridge—carrier liable).

²⁹⁶ *Bryce v. Southern R. Co.*, 129 Fed. Rep. 966.

²⁹⁷ *Chicago & C. R. Co. v. Cain*, —

Tex. Civ. App. —; s. c. 84 S. W. Rep. 682.

²⁹⁸ *Birmingham R. & C. Co. v. Bynum*, 139 Ala. 389; s. c. 36 South. Rep. 736.

²⁹⁹ *Southern Pac. Co. v. Schuyler*, 135 Fed. Rep. 1015; s. c. 68 C. C. A. 409.

¹ *Chicago & C. R. Co. v. Newell*, 113 Ill. App. 263.

² *Williams v. International & C. R. Co.*, 28 Tex. Civ. App. 503; s. c. 67 S. W. Rep. 1085.

³ *Chicago & C. R. Co. v. Newell*, 113 Ill. App. 263.

puted with negligence:—Where a freight train running at least twenty-five or thirty miles an hour and making no stops, left a station from four to eleven minutes behind a heavy passenger train having a schedule of twenty-three miles an hour and required to make many stops and the inevitable rear-end collision occurred;⁴ where a freight train behind time stopped on the main track at a time when a following passenger train was due and sent no one back to signal its position and was run into by the passenger train, killing a passenger in the caboose;⁵ where a passenger train was run into by cars escaping from a side-track located on a descending grade and reasonable care had not been displayed in blocking the cars on the side-track.⁶ A complaint alleging that through the negligence of defendant's agents and in disregard of the plaintiff's rights and safety and the defendant's duty to the plaintiff, the trains were permitted to collide, was held sufficiently definite without a more precise specification as to the acts of negligence of which the defendant was guilty.⁷ Evidence as to the number of persons killed in the collision is admissible as tending to show the severity of the collision.⁸

§ 2825. **Collisions with Trains of other Companies.**—The operatives of cars or trains belonging to different companies are held to the exercise only of reasonable or ordinary care under the surrounding circumstances to avoid collisions and injury to passengers.⁹ Where the negligence of a railroad company operates as the proximate cause of a collision with a street car, the fact that the street railway company was also guilty of negligence will not relieve the railroad company of its liability to an injured passenger in the street car.¹⁰

§ 2827. **Injuries in Consequence of Excessive Speed.**—The carrier will be imputed with actionable negligence in running around curves at such a rate of speed as to derail the train,¹¹ or dislodge passengers riding on the platform because of the crowded condition of the train.¹²

§ 2829. **Injuries to Passengers from Leaving Ice on the Platforms of Cars.**—The carrier is required to exercise the highest degree of care

⁴ *Louisville &c. R. Co. v. Richmond (Ky.)*, 67 S. W. Rep. 25; s. c. 110 Mo. App. 725; s. c. 85 S. W. Rep. 627.
⁵ *Klinger v. United Traction Co.*, 92 App. Div. (N. Y.) 100; s. c. 87 N. Y. Supp. 864.

⁶ *Alabama &c. R. Co. v. Beardsley*, 79 Miss. 417; s. c. 30 South. Rep. 660.
⁷ *Dunn v. Pennsylvania R. Co.*, 71 N. J. L. 21; s. c. 58 Atl. Rep. 164.

⁸ *Estes v. Missouri Pac. R. Co.*, 110 Mo. App. 725; s. c. 85 S. W. Rep. 627.
⁹ *Chicago &c. R. Co. v. McDonnell*, 91 Ill. App. 488.

¹⁰ *Stembridge v. Southern R.*, 65 S. C. 440; s. c. 43 S. E. Rep. 968.
¹¹ *Chicago &c. R. Co. v. Newell*, 212 Ill. 332; s. c. 72 N. E. Rep. 416.

¹² *Estes v. Missouri Pac. R. Co.*,

to keep its platforms and steps in safe condition for use in so far as it practically can do so in consideration of the climate, temperature and condition of the air with respect to snow, moisture and frost.¹³ It is essential in cases of injury from this source that the length of time the ice or snow had been on the steps or platform should be shown as bearing on the question whether a reasonable time for its removal had elapsed.¹⁴

§ 2830. **Injuries to Passengers through Sudden Jerking, Lurching, etc., of the Car.**¹⁵—A railroad company may be guilty of negligence in coupling a switch engine to a train while passengers are being discharged, and jolting the car so as to throw down and injure alighting passengers, and this though the coupling is made in the usual manner and with no more force than necessary to effect it.¹⁶ In one case a carrier negligently throwing a passenger to the ground by a sudden jerk was held liable for his injuries, though the greater part of these injuries were inflicted by a train closely following, which belonged to another company. In this case the transporting carrier was bound to anticipate the presence of the other train on the track and the dangers consequent to a passenger thrown from its train from this source.¹⁷ There is authority that the carrier is only bound to use reasonable care and diligence to prevent injuries to passengers from articles falling from racks in the car.¹⁸

§ 2833. **Duty of Railway Companies to Heat their Cars.**—It is the duty of a carrier to exercise such a high degree of foresight and prudence in heating cars as cautious, prudent and competent persons would use under similar circumstances.¹⁹ A carrier's knowledge of the

¹³ *Herbert v. St. Paul City R. Co.*, 85 Minn. 341; s. c. 88 N. W. Rep. 996.

¹⁴ *Pittsburgh &c. R. Co. v. Alldridge*, 27 Ind. App. 498; s. c. 61 N. E. Rep. 741.

¹⁵ Cases where the carrier was held liable for injuries resulting from this species of negligence: *Mack v. Savannah &c. R. Co.*, 118 Ga. 629; s. c. 45 S. E. Rep. 509 (example of sufficient complaint in action for injury—sudden stop when passenger was about to alight); *Farnon v. Boston &c. R. Co.*, 180 Mass. 212; s. c. 62 N. E. Rep. 254 (backing train to take up slack); *Moorman v. Atchison &c. R. Co.*, 105 Mo. App. 711; s. c. 78 S. W. Rep. 1089 (sudden jerk of car just before stopping at a station); *Field v. Delaware &c. R. Co.*, 69 N. J. L. 433;

s. c. 55 Atl. Rep. 241 (sudden jerk); *Missouri &c. R. Co. v. Moody*, 35 Tex. Civ. App. 46; s. c. 79 S. W. Rep. 856 (complaint sufficient as against general exception); *St. Louis &c. R. Co. v. Keitt* (Tex. Civ. App.), 76 S. W. Rep. 311 (passenger's injuries while passing between coaches caused by movement of planks placed across platform); *Southern R. Co. v. Cunningham*, 123 Ga. 90; s. c. 50 S. E. Rep. 979.

¹⁶ *Raughley v. West Jersey &c. R. Co.*, 202 Pa. 43; s. c. 51 Atl. Rep. 597.

¹⁷ *Southern R. Co. v. Webb*, 116 Ga. 152; s. c. 42 S. E. Rep. 395; 59 L. R. A. 109.

¹⁸ *Whiting v. New York &c. R. Co.*, 97 App. Div. (N. Y.) 11; s. c. 89 N. Y. Supp. 584.

¹⁹ *Arrington v. Texas &c. R. Co.*

chilly condition of a car is shown by proof that, after the passenger entered the car on a cold day, employes opened the windows and doors and swept the car.²⁰ There is a holding that an initial carrier selling a ticket for the transportation of a passenger over its own and connecting lines in one of its cars, under an agreement with the connecting carriers, is liable for injuries to the passenger occasioned by furnishing a car incapable of being made comfortably warm, irrespective of whether the injuries occur on its own line or on the line of a connecting carrier, for whose negligence the contract purported to exempt the initial carrier.²¹

§ 2834. Duty to Light Their Cars.²²

§ 2836. Application of these Principles in the Case of Elevated Railways.²³—Since an elevated railroad company has the power to limit the number of passengers who shall go onto the station platform and into its cars, it will be liable for an injury to a passenger by the overcrowding of the car, though the passengers crowded on of their own accord and were not pushed on by the guard.²⁴

§ 2837. Statutory Safeguards.—Municipal corporations generally have the power to pass ordinances requiring street railway companies to equip their cars with devices necessary to protect the public;²⁵ and their discretion in this regard will not generally be interfered with if the regulation tends toward better and safer transportation.²⁶ It is not an objection to an ordinance of this kind that it will require the street railway company to make a large expenditure of money to instal the equipment.²⁷ An ordinance making it unlawful to operate a street car

(Tex. Civ. App.), 70 S. W. Rep. 551; *St. Louis & C. R. Co. v. Campbell*, 30 Tex. Civ. App. 35; s. c. 69 S. W. Rep. 451.

²⁰ *Texas & C. R. Co. v. Kingston*, 30 Tex. Civ. App. 24; s. c. 68 S. W. Rep. 518.

²¹ *Missouri & C. R. Co. v. Foster*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 879.

²² *Chicago & C. R. Co. v. Rhodes*, 35 Tex. Civ. App. 432; s. c. 80 S. W. Rep. 869 (carrier and lighting company both liable for injuries to a passenger from explosion of gas tank).

²³ To facilitate the rapid handling of passengers on an elevated road, the cars were so arranged that the side doors for the exit of the passengers were opened by guards on the platforms at the stations. A passenger who had his hand on one

of the doors was injured by the guard's opening it before the train came to a full stop. The guard had no knowledge of the position of the passenger's hand, and the train was so nearly stopped that the opening of the door was the occasion of no danger. It was held that the guard was not guilty of negligence: *Hannon v. Boston Elevated R. Co.*, 182 Mass. 425; s. c. 65 N. E. Rep. 809.

²⁴ *Viemeister v. Brooklyn Heights R. Co.*, 91 App. Div. (N. Y.) 510; s. c. 87 N. Y. Supp. 162.

²⁵ *People v. Detroit United R. Co.*, 134 Mich. 682; s. c. 97 N. W. Rep. 36; 10 Det. Leg. N. 648.

²⁶ *People v. Detroit United R. Co.*, 134 Mich. 682; s. c. 97 N. W. Rep. 36; 10 Det. Leg. N. 648.

²⁷ *People v. Detroit United R. Co.*, 134 Mich. 682; s. c. 97 N. W. Rep. 36; 10 Det. Leg. N. 648.

unless provided with a fender of approved design and construction, and obligating street railway companies to have a conductor and motorman on every electric street car, requires a fender and motorman only on motor cars and not on trailers.²⁸ A statute requiring railroad companies to provide the rear of each train transporting passengers and merchandise with a good and sufficient brake, and to station a competent brakeman on such coach is construed to apply to mixed and not to passenger trains.²⁹

§ 2836. Derailments from other Causes than Defects in Carrier's Roadway, Vehicle, etc.³⁰

§ 2840. Instances where the Carrier was Exonerated from the Charge of Negligence.³¹

§ 2841. Questions of Fact for the Jury.³²

§ 2845. Not, in General, Bound to Assist Passengers in Getting on and Off, and in Finding Seats, etc.—The duty of the carrier's servants to assist passengers to alight may arise when the circumstances suggest such necessity, and whether in a given case the circumstances are of this character is a question for the jury.³³ In a case where it ap-

²⁸ Von Diest v. San Antonio Trac-tion Co., 33 Tex. Civ. App. 577; s. c. 77 S. W. Rep. 632.

²⁹ Texas &c. R. Co. v. Storey, 29 Tex. Civ. App. 483; s. c. 68 S. W. Rep. 534.

³⁰ Trinity Val. R. Co. v. Stewart (Tex. Civ. App.), 62 S. W. Rep. 1085 (train run at excessive speed and derailed by running over an animal on the track).

³¹ In a case where a passenger passing around a car after alighting was injured by catching her foot in a rope attached to the rear of the car by some unknown person, and it appeared that the rope had been attached only a short time, it was held that the company was not guilty of negligence in failing by inspection to ascertain the presence of the rope and remove it: La Fond v. Detroit &c. R. Co., 131 Mich. 586; s. c. 92 N. W. Rep. 99; 9 Det. Leg. N. 456.

³² Larkin v. Chicago &c. R. Co., 118 Iowa 652; s. c. 92 N. W. Rep. 891 (whether the *prima facie* case of negligence made out by proof of injury to a passenger by the collision of the parts of a broken train was overcome); Texas &c. R. Co. v. Rea, 27 Tex. Civ. App. 549; s. c. 65

S. W. Rep. 1115 (whether a passenger whose health was endangered by riding in a cold car was to be imputed with contributory negligence for failing to leave the train); Redhing v. Central R. Co., 68 N. J. L. 641; s. c. 54 Atl. Rep. 431 (whether defendant is liable for negligence, when its train, passing slowly through depot grounds, strikes a passenger on a track, he supposing the train was about to stop, when it was not designed that it should).

³³ Southern R. Co. v. Reeves, 116 Ga. 743; s. c. 42 S. E. Rep. 1015. Plaintiff's wife was injured by a fall in alighting from a train. When she entered the train, plaintiff requested the conductor to assist her and her child in alighting, and advised him that she had a large valise and bundle with her. Before the train arrived at her destination, she requested the conductor to have the porter take out her valise. After waiting for the porter, but who did not come, she left her seat, holding a valise and bundle behind her in one hand, and directing her child in front with the other. Upon reaching the step of the car, she felt her way down it

peared that the height of the last step of a car above the platform was not greater than that between the ground and the last step of vehicles in general use, and thousands of persons had made their exit unassisted from such car without the happening of a single accident to them, it was held that the carrier was not to be charged with negligence in not furnishing a portable step for the use of passengers in leaving the car.³⁴ The conductor of a train, finding a passenger in a wrong coach, though directed thereto by the station agent, performs his whole duty when he directs the passenger to the right car. He is not required to assist him in reaching the car unless his physical condition is such as to require assistance.³⁵ A conductor is under no obligation to a passenger leaving the train before reaching his destination to discover this fact and induce him to return to the train.³⁶ Neither is he required to enter a sleeping car and awaken a sleeping passenger and inform him that his destination is reached.^{36a}

§ 2846. **Exceptions to this Rule.**—A recovery was sustained in a case where a passenger, alighting in the dark at a station, the platform of which was twenty-three inches below the lowest step of the car, was injured by a fall caused by the absence of the customary attendant and the failure to place in position a stool which she had been accustomed to find there to shorten the distance.³⁷

§ 2847. **What if the Conductor or Trainman Promises Assistance.**³⁸

§ 2854. **Duty to Afford Reasonable Time for Passenger to Get Aboard Train.**³⁹—It is plain that a railroad company guilty of starting

with her foot, and fell. It was held that the jury were warranted in finding that defendant was negligent in not assisting her to alight: *Missouri &c. R. Co. v. Buchanan*, 31 Tex. Civ. App. 209; s. c. 72 S. W. Rep. 96.

³⁴ *Young v. Missouri Pac. R. Co.*, 93 Mo. App. 267.

³⁵ *Illinois Cent. R. Co. v. Harper*, 83 Miss. 560; s. c. 35 South. Rep. 764.

³⁶ *Cain v. Louisville &c. R. Co.*, 84 S. W. Rep. 583; s. c. 27 Ky. L. Rep. 201.

^{36a} *Seaboard Air Line R. Co. v. Rainey*, 122 Ga. 307; s. c. 50 S. E. Rep. 88.

³⁷ *Cincinnati &c. R. Co. v. Bell* (Ky.), 74 S. W. Rep. 700; 25 Ky. L. Rep. 10.

³⁸ It is the duty of a conductor where a female passenger, partially blind, informs him of her infirmity

and requests assistance in alighting at her destination, which he promises to give, to stop the train at such station a sufficient length of time to enable her without undue haste to leave the train in safety, but it is not his duty to enter the car and take charge of her bundles and escort her from her seat, down the aisle and out upon the platform, unless she is so helpless as to require this extra attention: *Southern R. Co. v. Hobbs*, 118 Ga. 227; s. c. 45 S. E. Rep. 23.

³⁹ That it is the duty of the servants of a railroad company in charge of a train to stop it a reasonable time to allow an intending passenger to board with safety, see: *Chicago &c. R. Co. v. Flaharty*, 96 Ill. App. 563; *Mobile &c. R. Co. v. Reeves*, 80 S. W. Rep. 471; s. c. 25 Ky. L. Rep. 2236; *Kelly v. Vicksburg &c. R. Co.*, 108 La. 423; s. c.

its train while a passenger is actually boarding it, to the knowledge of the trainman, will be liable for injuries to such passenger caused by the premature start regardless of the length of the stop.⁴⁰ But the railroad company will not be regarded as negligent where the signal to start is given after every one reasonably to be regarded as a passenger is safely on.⁴¹ A statute requiring trains to stop at stations for a sufficient length of time to allow passengers to get aboard, applies to excursion trains.⁴²

§ 2856. **Negligence of Passenger Injured in Boarding Train While in Motion.**⁴³

§ 2857. **Duty to Afford Time to Enable Passengers to Become Seated.**⁴⁴

§ 2860. **Duty to Allow Passenger a Reasonable Opportunity to Alight Safely.**⁴⁵—The carrier has a right to designate certain doors and steps by which its passengers shall leave its trains and reserve others for its own purposes, and having done so will not be liable for injuries to a passenger caused by his seeking egress from a door clearly not intended for the use of passengers.⁴⁶ In jurisdictions where sleeping car companies are made common carriers by law and subject

32 South. Rep. 388; *Hatch v. Philadelphia & C. R. Co.*, 212 Pa. 29; s. c. 61 Atl. Rep. 480; *Texas & C. R. Co. v. Gray* (Tex. Civ. App.), 71 S. W. Rep. 316; *St. Louis & C. R. Co. v. Germany* (Tex. Civ. App.) 56 S. W. Rep. 586.

⁴⁰ *Texas & C. R. Co. v. Gardner*, 114 Fed. Rep. 186; s. c. 52 C. C. A. 142; *Alabama Midland R. Co. v. Horn*, 132 Ala. 407; s. c. 31 South. Rep. 481; *St. Louis & C. R. Co. v. Cannon* (Tex. Civ. App.), 81 S. W. Rep. 778.

⁴¹ *Hatch v. Philadelphia & C. R. Co.*, 212 Pa. 29; s. c. 61 Atl. Rep. 480.

⁴² *Oliver v. Columbia & C. R. Co.*, 65 S. C. 1; s. c. 43 S. E. Rep. 307.

⁴³ A recovery was denied in a case where a passenger attempted to climb on the steps of a moving car, when a jerk of the train occasioned by an increase of speed necessary to ascend an incline overbalanced him, and he was struck by some obstruction close to the car, but necessary to the operation of the road: *Allen v. Northern Pac. R. Co.*, 35 Wash. 221; s. c. 77 Pac. Rep. 204.

⁴⁴ *Sheffer v. Louisville & C. R. Co.*, 60 S. W. Rep. 403; s. c. 22 Ky. L.

Rep. 1305 (passenger injured by violent jerking of train in starting before he had time to be seated—carrier liable).

⁴⁵ The law was held to have been correctly stated in an instruction telling the jury, in substance, that a passenger has the right to rely on the carrier's performance of its duty to provide for his safety in furnishing suitable platforms at stations, such assistance from its trainmen and employes as may be necessary to enable him to alight in safety, the stopping of trains at stations in a proper place and long enough to allow the passenger to alight safely, and if negligent in the performance of any or all of such duties and injury results to a passenger therefrom, free from negligence, the carrier will be liable: *Lake Erie & C. R. Co. v. Taylor*, 25 Ind. App. 679; s. c. 58 N. E. Rep. 852.

⁴⁶ *Ratteree v. Galveston & C. R. Co.*, 36 Tex. Civ. App. 197; s. c. 81 S. W. Rep. 566 (passenger left car through vestibule door opened for the purpose of filling water coolers).

to liability as such, it is their duty to notify passengers when they have reached their destinations, and to afford them a reasonable opportunity to alight.⁴⁷

§ 2862. Degree of Care Required of Railroad Company in this Respect.—In the manner of discharging passengers from its vehicle the law imposes upon the carrier the same high degree of care that it does while the passenger is in course of transportation.⁴⁸ This rule requires the carrier to stop and hold its trains at stations a reasonably sufficient time to enable passengers using reasonable expedition to alight therefrom;⁴⁹ that is, such a length of time as one of ordinary care under the circumstances should be allowed to take.⁵⁰ Where such a length of time is not allowed, it is not a sufficient excuse that the conductor thought that all the passengers had alighted at the time he gave the signal to start.⁵¹

§ 2863. Duty of Conductor to Know whether he Has on Board Passengers Desiring to Alight at a Particular Station.—Again, the carrier will be charged with negligence in starting a train with knowledge that a passenger is attempting to alight, though a reasonable time to alight has been given him.⁵² There is authority that a carrier, after the lapse of a reasonable time for passengers to alight, is not required

⁴⁷ Pullman Co. v. Kelly, 86 Miss. 87; s. c. 38 South. Rep. 317.

⁴⁸ McKinstry v. St. Louis Transit Co., 108 Mo. App. 12; s. c. 82 S. W. Rep. 1108.

⁴⁹ Barringer v. St. Louis & C. R. Co., 73 Ark. 548; s. c. 85 S. W. Rep. 94; 87 S. W. Rep. 814; Southern R. Co. v. Bandy, 120 Ga. 463; s. c. 47 S. E. Rep. 923; Cullar v. Missouri & C. R. Co., 84 Mo. App. 340; Gress v. Missouri Pac. R. Co., 109 Mo. App. 716; s. c. 84 S. W. Rep. 122; Young v. Missouri Pac. R. Co. (Mo. App.), 84 S. W. Rep. 175; Brown v. Manhattan R. Co., 82 App. Div. (N. Y.) 222; s. c. 81 N. Y. Supp. 755; Chicago & C. R. Co. v. Armes, 32 Tex. Civ. App. 32; s. c. 74 S. W. Rep. 77; Galveston & C. R. Co. v. Hubbard, 33 Tex. Civ. App. 343; s. c. 76 S. W. Rep. 764; Gulf & Ry. Co. v. Shelton, 30 Tex. Civ. App. 72; s. c. 69 S. W. Rep. 653; 70 S. W. Rep. 359; Keith v. Ottawa & C. R. Co. (C. A.), 5 Ont. L. Rep. 116; aff'g s. c. 3 Ont. L. Rep. 265.

⁵⁰ Barringer v. St. Louis & C. R.

Co., 73 Ark. 548; s. c. 85 S. W. Rep. 94; 87 S. W. Rep. 814.

⁵¹ Walters v. Chicago & C. R. Co., 113 Wis. 367; s. c. 89 N. W. Rep. 140.

⁵² Louisville & C. R. Co. v. Harmon, 64 S. W. Rep. 640; s. c. 23 Ky. L. Rep. 871. Where a train has stopped at a passenger's destination a reasonably sufficient time for him to alight, the carrier's duty toward such passenger, in starting its train, is only to use ordinary care not to injure him, and a charge imposing on the carrier that degree of care which "a very cautious person" would have exercised was error: St. Louis & C. R. Co. v. Turner, 33 Tex. Civ. App. 604; s. c. 77 S. W. Rep. 255. An instruction that the plaintiff could not recover if the train started while the passenger was in the act of getting off, unless the conductor knew he was in such act, is properly amended by inserting "or by the exercise of reasonable care could have known:" Cullar v. Missouri & C. R. Co., 84 Mo. App. 340.

to ascertain whether all the passengers desiring to get off at the station have in fact done so.⁵³

§ 2869. **Duty to Announce the Names of Stations.**—The failure to announce a station can only be complained of by a passenger misled by the omission.⁵⁴ It is not required that the conductor should personally enter a car on its arrival at a station to inform passengers that they have reached the station, but it is sufficient if the name of the station is duly announced by any employé of the company.⁵⁵ There is authority that a railroad company, in the absence of a statute requiring it to announce the arrival of trains at stations, is not negligent as a matter of law in failing to make such announcement.⁵⁶

§ 2870. **Stopping Train before Reaching Station.**⁵⁷

§ 2871. **Stopping Train at Improper or Dangerous Place.**⁵⁸

§ 2875. **To whom the Carrier Owes this Duty: Persons Entering the Cars to Assist Passengers.**—The conductor, having notice of a person going on his train for the purpose of assisting a passenger to a seat, must detain the train a reasonable length of time to enable the person to render the passenger such assistance and to leave the train

⁵³ *Shealey v. South Carolina &c. R. Co.*, 67 S. C. 61; s. c. 45 S. E. Rep. 119; *St. Louis R. Co. v. Haynes*, —Tex. Civ. App. —; s. c. 86 S. W. Rep. 934. See also *Barringer v. St. Louis &c. R. Co.*, 73 Ark. 548; 85 S. W. Rep. 94; 87 S. W. Rep. 814.

⁵⁴ *Southern R. Co. v. Hobbs*, 118 Ga. 227; s. c. 45 S. E. Rep. 23.

⁵⁵ *Southern R. Co. v. O'Bryan*, 115 Ga. 659; s. c. 42 S. E. Rep. 42.

⁵⁶ *Houston &c. R. Co. v. Goodyear*, 28 Tex. Civ. App. 206; s. c. 66 S. W. Rep. 862.

⁵⁷ Where the trainmen have announced the name of the station and the train stops short of or beyond the station, it is the duty of the trainmen to announce this fact before the passengers attempt to leave the train, and a failure to do so is negligence rendering the carrier liable for resulting injuries: *St. Louis &c. R. Co. v. Farr*, 70 Ark. 264; s. c. 68 S. W. Rep. 243; *Cincinnati &c. R. Co. v. Worthington*, 30 Ind. App. 663; s. c. 65 N. E. Rep. 557; 66 N. E. Rep. 478; *Coe v. Louisville &c. R. Co.*, 78 S. W. Rep. 439; s. c. 25 Ky. L. Rep. 1679; *Larson v. Minneapolis &c. R. Co.*, 85 Minn.

387; s. c. 88 N. W. Rep. 994 (a question for the jury); *Englehaup v. Erie R. Co.*, 209 Pa. 182; s. c. 58 Atl. Rep. 154.

⁵⁸ These cases illustrate the principle of liability for this species of negligence:—*Leveret v. Shreveport Belt R. Co.*, 110 La. 399; s. c. 34 South. Rep. 579; *MacDonald v. St. Louis Transit Co.*, 108 Mo. App. 374; s. c. 83 S. W. Rep. 1001 (unfenced ditch at side of place where passenger alighted); *Chesapeake &c. R. Co. v. Smith*, 103 Va. 326; s. c. 49 S. E. Rep. 487 (passenger let off at place eighty yards from depot and injured by falling into an unprotected cattle-guard on his way to the station). A carrier was charged with actionable negligence where it stopped its train on a dark night in an unlighted locality, where there was no platform, and failed to provide any light or intermediate rest between the lower step of the car and the surface of the ground, which was rough, and by reason thereof a female passenger was injured while attempting to alight: *Ellis v. Chicago &c. R. Co.*, 120 Wis. 645; s. c. 98 N. W. Rep. 942.

in safety.⁵⁹ Such a person is not a trespasser on the train; his status is rather that of a licensee.⁶⁰ But he should in some way notify the trainmen of his object in going aboard, otherwise they may assume that he is a passenger.⁶¹ The obligation of the carrier is stronger in cases where the conductor requests bystanders to assist in getting helpless persons aboard, and promises to hold the train a sufficient length of time to allow the helpers to alight in safety.⁶² A railroad company owes to one who comes to a passenger station to meet an incoming passenger ordinary care for his safety, and is liable for an injury from the negligence of an employé in handling baggage.⁶³

§ 2876. Injuries from Starting Trains with a Sudden Motion.⁶⁴

§ 2878. Injuries to Passengers Alighting while Train in Motion.

—A conductor, agreeing to slacken the speed of the train at a certain point to allow a passenger to alight, is bound to use ordinary care to have the train running at that point at such a rate of speed that the passenger can, by the exercise of ordinary care, alight in safety.⁶⁵

⁵⁹ *Bishop v. Illinois Cent. R. Co.*, 77 S. W. Rep. 1099; s. c. 25 Ky. L. Rep. 1363; *Saxton v. Missouri Pac. R. Co.*, 98 Mo. App. 494; s. c. 72 S. W. Rep. 717; *Dunne v. New York & c. R. Co.*, 99 App. Div. (N. Y.) 571; s. c. 91 N. Y. Supp. 145; *Morrow v. Atlanta & c. R. Co.*, 134 N. C. 92; s. c. 46 S. E. Rep. 12; *Davis v. Seaboard Air Line R.*, 132 N. C. 291; s. c. 43 S. E. Rep. 840; *Texas & c. R. Co. v. Funderburk* (Tex. Civ. App.), 68 S. W. Rep. 1006.

⁶⁰ *Morrow v. Atlanta & c. R. Co.*, 134 N. C. 92; s. c. 46 S. E. Rep. 12.

⁶¹ *Dunne v. New York & c. R. Co.*, 99 App. Div. (N. Y.) 571; s. c. 91 N. Y. Supp. 145; *Oxsher v. Houston & c. R. Co.*, 29 Tex. Civ. App. 420; 67 S. W. Rep. 550.

⁶² *Bishop v. Illinois Cent. R. Co.*, 77 S. W. Rep. 1099; s. c. 25 Ky. L. Rep. 1363.

⁶³ *Atlantic & c. R. Co. v. Owens*, 123 Ga. 393; s. c. 51 S. E. Rep. 404.

⁶⁴ That the carrier will be liable for this species of negligence, see: *Rutledge v. New Orleans & c. R. Co.*, 129 Fed. Rep. 94; s. c. 63 C. C. A. 596; *Cincinnati & c. R. Co. v. Worthington*, 30 Ind. App. 663; s. c. 65 N. E. Rep. 557; 66 N. E. Rep. 478. An allegation in a petition that "the car was negligently and carelessly put in motion" was sufficient to admit proof that "the car gave a jerk" when plaintiff was in the act

of alighting: *Houston & c. R. Co. v. Moss* (Tex. Civ. App.), 63 S. W. Rep. 894.

⁶⁵ *St. Louis & c. R. Co. v. Highnote*, — Tex. —; s. c. 86 S. W. Rep. 923; rev'g s. c. 84 S. W. Rep. 365. In one case a passenger boarded a regular passenger train, and paid his fare to a regular station, at which the train did not stop, under the rules of the company. Plaintiff was ignorant of such rules, and the conductor agreed to stop the train at or near the station for him to get off. At a bridge near the station the train slowed down to a speed of about four miles an hour, and plaintiff and the conductor went out on the platform, where the conductor repeatedly told him to get off, which he at first declined to do, because of scantlings piled on the ground. When he finally did attempt to get off, the train gave a sudden jerk, throwing him to the ground and injuring him. It was held that defendant was guilty of negligence causing the injuries: *Texas & c. R. Co. v. Elliott*, 26 Tex. Civ. App. 106; s. c. 61 S. W. Rep. 726. An instruction that if the station was distinctly called in a passenger's presence and hearing just before the train arrived, and she negligently failed to hear the same, and the train was held a reasonable time for passengers to alight, and she attempted to alight

§ 2880. Effect of an Invitation to Alight, Express or Implied.⁶⁶—

A carrier, causing a passenger to go out on the steps of the car where a sudden stopping of the train would throw him off, may be liable for injuries thus caused, though the train is stopped in the usual manner.⁶⁷ But the mere remark of a conductor to a passenger "this door," as he started to alight, was held to amount only to a direction to the passenger as to the door by which he should leave the car when it stopped, and not an invitation for him to alight while the car was in motion.⁶⁸ On the question whether a person commanding a passenger to alight was an employé, evidence that such person was in possession of a lantern and went through the train collecting tickets from the passengers is sufficient to place upon the carrier the burden of showing that he was not in charge of the train.⁶⁹

§ 2881. Whether Calling out the Name of the Station Constitutes an Invitation to Alight.—Generally speaking, the porter of the train is only required to announce the name of the station and is under no duty to inquire whether the station announced is the destination of particular passengers.⁷⁰

§ 2883. What other Acts Constitute an Invitation to Alight.⁷¹

§ 2885. Injuries through Defective Appliances to Passengers while Alighting.⁷²

§ 2890. Carrying Passenger Beyond his Station.⁷³—The damages recoverable for this species of negligence include all injuries which

without the knowledge of defendant's employés, and was injured in such attempt, she was not entitled to recover, was proper: *Galveston &c. R. Co. v. Mathes* (Tex. Civ. App.), 73 S. W. Rep. 411.

⁶⁶ *Gulf &c. R. Co. v. Shelton*, 30 Tex. Civ. App. 72; s. c. 69 S. W. Rep. 653; 70 S. W. Rep. 359 (passenger injured by alighting from moving train on defective platform at command of employé—carrier liable).

⁶⁷ *Southern R. Co. v. Roebuck*, 132 Ala. 412; s. c. 31 South. Rep. 611.

⁶⁸ *Alabama &c. R. Co. v. Jones*, 86 Miss. 263; s. c. 38 South. Rep. 545.

⁶⁹ *Coursey v. Southern R. Co.*, 113 Ga. 297; s. c. 38 S. E. Rep. 866.

⁷⁰ *Texas Midland R. Co. v. Terry*, 27 Tex. Civ. App. 341; s. c. 65 S. W. Rep. 697.

⁷¹ Whether the statement of a conductor to the plaintiff, desiring to

board a train, that, "I am going; you had better get on the train," was a warning or an invitation to get on, was held a question of fact for the jury, and not to be determined by the court on demurrer: *Talbert v. Charleston &c. R. Co.*, 72 S. C. 137; s. c. 51 S. E. Rep. 564.

⁷² *West v. St. Louis &c. R. Co.*, 187 Mo. 351; s. c. 86 S. W. Rep. 140 (woman passenger carried beyond her station was returned on flat car and suffered a miscarriage as a result of jumping from the car, no other way of alighting being provided—carrier liable).

⁷³ That the carrier is liable in damages to passenger carried beyond his station, see: *Southern R. Co. v. O'Bryan*, 112 Ga. 127; s. c. 37 S. E. Rep. 161; *Rawlings v. Wabash R. Co.*, 97 Mo. App. 515; s. c. 71 S. W. Rep. 535.

the carrier should have reasonably foreseen would have resulted from his negligent act.⁷⁴

§ 2895. Duty of the Conductor when the Passenger has been Carried Beyond his Station.—Where a passenger and the conductor agree that the passenger carried past his station shall leave the train at a wayside point, the carrier is bound to use the same care for his safety in stopping at this point that it would in stopping at the station.⁷⁵

§ 2901. What Care Due to Passengers on Freight Trains.—Here it may be broadly stated that it is the duty of the carrier, operating a mixed train, to use the highest degree of care for the safety of passengers practicable in the efficient operation of such trains.⁷⁶

§ 2903. What Risks Passengers Assume on Freight Trains.—While a passenger on a mixed train assumes the risks of jars, jerks and concussions incidental to its ordinary operation,⁷⁷ he does not assume the

⁷⁴ St. Louis & C. R. Co. v. Ricketts, 96 Tex. 68; s. c. 70 S. W. Rep. 315 (injuries of female passenger due to exposure in cold, unlighted station); Pecos & C. R. Co. v. Williams, 34 Tex. Civ. App. 100; s. c. 78 S. W. Rep. 5 (sickness to a passenger in delicate health because of exposure during a storm). The recovery was refused where a female passenger, carried beyond her station, was put off the train at a crossing nearly a mile beyond her destination in a storm. No unnecessary force or rudeness was shown to her, no extra expense was incurred, and she could not have avoided the storm had she been put off at the right station: Smith v. Wilmington & C. R. Co., 130 N. C. 304; s. c. 41 S. E. Rep. 481. In another case where the carrier failed to awaken a sleeping passenger and carried him about a mile beyond his station, putting him off and directing him to his station, and he was robbed and beaten on the way, it was held that the carrier was not liable to him for these damages in the absence of evidence that its agents had knowledge of the moral repute of the locality in which he was ejected: Atkinson v. Pacific R. Co., 90 Mo. App. 489.

⁷⁵ Chesapeake & C. R. Co. v. Topping, 78 S. W. Rep. 135; s. c. 25 Ky. L. Rep. 1390.

⁷⁶ Southern R. Co. v. Crowder, 130 Ala. 256; s. c. 30 South. Rep. 592;

Southern R. Co. v. Cunningham, 123 Ga. 90; s. c. 50 S. E. Rep. 979; Illinois Cent. R. Co. v. Vinson, 76 S. W. Rep. 167; s. c. 25 Ky. L. Rep. 652; 74 S. W. Rep. 671; Western Maryland R. Co. v. State, 95 Md. 637; s. c. 53 Atl. Rep. 969; Symonds v. Minneapolis & C. R. Co., 87 Minn. 408; s. c. 92 N. W. Rep. 409; Erwin v. Kansas & C. R. Co., 94 Mo. App. 289; s. c. 68 S. W. Rep. 88; Young v. Missouri Pac. R. Co. (Mo. App.), 84 S. W. Rep. 175; Chicago & C. R. Co. v. Troyer, — Neb. —; s. c. 103 N. W. Rep. 680; aff'g s. c. 97 N. W. Rep. 308. In coupling cars onto a freight train, a railroad company owes passengers thereon the duty to use such degree of care, prudence, and foresight as would be used by very cautious, prudent, and competent persons under similar circumstances: Chicago & C. R. Co. v. Buie, 31 Tex. Civ. App. 654; s. c. 73 S. W. Rep. 853.

⁷⁷ Southern R. Co. v. Crowder, 135 Ala. 417; s. c. 33 South. Rep. 335; Cincinnati & C. R. Co. v. Jackson (Ky.), 58 S. W. Rep. 526; s. c. 22 Ky. L. Rep. 630; Illinois Cent. R. Co. v. Vinson, 74 S. W. Rep. 671; s. c. 25 Ky. L. Rep. 38; 76 S. W. Rep. 167; Yazoo & C. R. Co. v. Humphrey, 83 Miss. 721; s. c. 36 South. Rep. 154; Wait v. Omaha & C. R. Co., 165 Mo. 612; s. c. 65 S. W. Rep. 1028; Erwin v. Kansas & C. R. Co., 94 Mo. App. 289; s. c. 68 S. W. Rep. 88; Portuchek v. Wabash R. Co., 101

risks of such extraordinary movements of the train as to be attributable to the unskillful handling of the engine or train.⁷⁸

§ 2912. **Riding in Cars other than the Caboose.**—The fact that a caretaker of stock rides in the stock car instead of the caboose, with knowledge that the caboose is solely intended for the carriage of persons, will not conclusively impute him with contributory negligence as a matter of law if his presence in the stock car was known to the trainmen and continued without protest from them, and his act did not violate any provision of the contract under which he was being transported.⁷⁹

§ 2914. **Injuries Received by Sudden Jolts and Jars while the Train is at a Standstill.**—The question whether a stockman accompanying live stock had the right to ride in the car with his stock when the train was in motion, under the terms of the contract of shipment, does not arise where the injury to the shipper was received while he was in the car feeding the stock when it was standing still on the track.⁸⁰

§ 2922. **Application of the Doctrine of Contributory Negligence in the Case of Injuries to Passengers.**—The carrier, as we have seen,⁸¹ is held to the exercise of the highest degree of care consistent with his undertaking, while the passenger on his part is only required to exercise ordinary or reasonable care for his safety.⁸² But he cannot recover for injuries which he could have avoided by the exercise of ordinary care notwithstanding the carrier's negligence.⁸³ So generally the contract of carriage implies an agreement on the part of the passenger that he

Mo. App. 52; s. c. 74 S. W. Rep. 368; Texas &c. R. Co. v. Adams, 32 Tex. Civ. App. 112; s. c. 72 S. W. Rep. 81.

⁷⁸ Young v. Missouri Pac. R. Co. (Mo. App.), 84 S. W. Rep. 175; Chicago &c. R. Co. v. Troyer, — Neb. —; s. c. 103 N. W. Rep. 680; aff'g s. c. 97 N. W. Rep. 308; Southern R. Co. v. Vandergriff, 108 Tenn. 14; s. c. 64 S. W. Rep. 481. He does not assume the risk of a jar occasioned by a collision between the cars after the parting of a coupling, though it is no greater than those which are customary: Holland v. St. Louis &c. R. Co., 105 Mo. App. 117; s. c. 79 S. W. Rep. 508.

⁷⁹ Lake Shore &c. R. Co. v. Teeters, — Ind. App. —; s. c. 74 N. E. Rep. 1014.

⁸⁰ Bolton v. Missouri Pac. R. Co.,

172 Mo. 92; s. c. 72 S. W. Rep. 530.

⁸¹ See *ante*, § 2721, *et seq.*

⁸² Davis v. Paducah R. &c. Co., 113 Ky. 267; s. c. 68 S. W. Rep. 140; 24 Ky. L. Rep. 135; Clerc v. Morgan's &c. R. Co., 107 La. 370; s. c. 31 South. Rep. 886; Topp v. United Railways &c. Co., 99 Md. 630; s. c. 59 Atl. Rep. 52; Carroll v. Charleston &c. R. Co., 65 S. C. 378; s. c. 43 S. E. Rep. 870; St. John v. Gulf &c. R. Co. (Tex. Civ. App.), 80 S. W. Rep. 235.

⁸³ Southern R. Co. v. Cunningham, 123 Ga. 90; s. c. 50 S. E. Rep. 979; Hornstein v. United R. Co., 97 Mo. App. 271; s. c. 70 S. W. Rep. 1105; Kleffman v. Dry Dock &c. R. Co., 104 App. Div. (N. Y.) 416; s. c. 93 N. Y. Supp. 741; Shealey v. South Carolina &c. R. Co., 67 S. C. 61; s. c. 45 S. E. Rep. 119.

will obey the reasonable rules of the carrier, and where he purposely violates such rules and is injured as a consequence, he cannot recover from the carrier for his injuries.⁸⁴ In Georgia, where the doctrine of comparative negligence still lingers, the passenger cannot recover if his negligence is equal to or greater than that of the carrier.⁸⁵ In Nebraska, where the statute requires that the negligence of the passenger to defeat a recovery shall amount to "criminal negligence," the term is defined as such gross negligence as amounts to a reckless disregard of one's own safety and a willful indifference to the consequences likely to follow.⁸⁶ Evidence that the passenger carried accident insurance and collected thereon is not admissible in evidence on the issue of contributory negligence, as it can have no tendency to illuminate that issue.⁸⁷

§ 2924. Whether Contributory Negligence in this Relation is a Substantive Defense which must be Pleaded and Proved.⁸⁸—In South Carolina the contributory negligence of the passenger may be shown under a general denial.⁸⁹ In that State a complaint is held not open to demurrer merely because an inference of contributory negligence may be drawn from the facts alleged. It is necessary that the facts conclusively show contributory negligence.⁹⁰

§ 2926. Want of Care on the Part of the Passenger must Contribute Materially and Directly to the Injury.⁹¹—Under the doctrine of

⁸⁴ *Cincinnati &c. R. Co. v. Lohe*, 68 Ohio St. 101; s. c. 67 N. E. Rep. 161.

⁸⁵ *Central of Georgia R. Co. v. McKinney*, 116 Ga. 13; s. c. 42 S. E. Rep. 229.

⁸⁶ *Chicago &c. R. Co. v. Winfrey*, 67 Neb. 13; s. c. 93 N. W. Rep. 526. See also *Clarke v. Zarniko*, 106 Fed. Rep. 607; s. c. 45 C. C. A. 494.

⁸⁷ *Missouri &c. R. Co. v. Flood*, 35 Tex. Civ. App. 197; s. c. 79 S. W. Rep. 1106.

⁸⁸ Cases holding that contributory negligence is a substantive defense which must be pleaded and proved: *Texas &c. R. Co. v. Gardner*, 114 Fed. Rep. 186; s. c. 52 C. C. A. 142; *Boone v. Oakland Transit Co.*, 139 Cal. 490; s. c. 73 Pac. Rep. 243; *Citizens' St. R. Co. v. Jolly*, 161 Ind. 80; s. c. 67 N. E. Rep. 935; *St. John v. Gulf &c. R. Co.* (Tex. Civ. App.), 80 S. W. Rep. 235 (instruction casting this burden on the plaintiff held erroneous). Cases imposing this burden on the plaintiff: *Hunterson v. Union Traction Co.*, 205 Pa. 568;

s. c. 55 Atl. Rep. 543; *Brown v. New York &c. R. Co.*, 181 Mass. 365; s. c. 63 N. E. Rep. 941.

⁸⁹ *Kennedy v. Southern R. Co.*, 59 S. C. 535; s. c. 38 S. E. Rep. 169.

⁹⁰ *Cooper v. Atlantic Coast Line R. Co.*, 69 S. C. 479; s. c. 48 S. E. Rep. 458.

⁹¹ These cases announce and illustrate the rule indicated: *Pittsburgh &c. R. Co. v. Gray* (Ind. App.), 59 N. E. Rep. 1000; *Cooper v. Georgia &c. R. Co.*, 61 S. C. 345; s. c. 39 S. E. Rep. 543; *Doolittle v. Southern R. Co.*, 62 S. C. 120; s. c. 40 S. E. Rep. 133; *St. Louis &c. R. Co. v. Smith*, 34 Tex. Civ. App. 612; s. c. 79 S. W. Rep. 340. The fact that a person was riding on the bumper, which was a dangerous place, cannot preclude his recovery, where he was not injured because he was riding on the bumper, but because he was compelled to jump from the bumper to avoid a collision. The only risk he assumed in riding on the bumper was that of being thrown off: *Paquin v. St. Louis &c. R. Co.*, 90 Mo.

"discovered peril,"⁹² the carrier will be liable for injuries to a passenger, though he negligently placed himself in danger, if the trainmen saw his danger, and, by the exercise of ordinary care, could have avoided injuring him.⁹³

§ 2927. Passenger Acting Erroneously under Impulse of Fear Produced by Negligence of the Carrier.—Here it is sufficient that the passenger acted upon a reasonable apprehension of impending danger; it is not required that imminent danger of losing his life or receiving great bodily injury should actually exist.⁹⁴ Whether a passenger acted with ordinary prudence at the time, under the apprehension of a danger which did not exist, is generally a question of fact for the determination of the jury.⁹⁵

§ 2930. How Far Passenger Entitled to Presume that Carrier has Done his Duty.—It is the rule that a passenger at a station may lawfully use the platform for any proper purpose connected with his journey, but this use must be limited to the purposes for which it was manifestly adapted, and it is one application of the rule that a passenger must keep such a distance from the edge of the platform next to the rail that he will not be struck by such projections as usually attach to ordinary trains.⁹⁶

§ 2931. Following Directions of Carrier's Servants.⁹⁷

App. 118. The negligence of a street car driver in driving onto a railroad crossing without stopping to look and listen was the proximate cause of injuries to a passenger by a fall in attempting to leave the car when a collision with a train seemed inevitable: *Selma &c. R. Co. v. Owen*, 132 Ala. 420; s. c. 31 South. Rep. 598.

⁹² See *ante*, § 226, *et seq.*

⁹³ *Lake Shore &c. R. Co. v. Hotchkiss*, 24 Ohio Cir. Ct. R. 431.

⁹⁴ *Chretien v. New Orleans Rys. Co.*, 113 La. 761; s. c. 37 South. Rep. 716; *Indiana R. Co. v. Maurer*, 160 Ind. 25; s. c. 66 N. E. Rep. 156; *Williams v. Galveston &c. R. Co.*, 34 Tex. Civ. App. 145; s. c. 78 S. W. Rep. 45. Where the defendant's negligence placed deceased in a state of peril, and he had at that time reasonable grounds for supposing he would be injured by remaining on the train, his representative may recover, though the fact that deceased jumped from the train increased the peril and caused his death, and he would have probably sustained little

or no injury had he remained in the car: *Western Maryland R. Co. v. State*, 95 Md. 637; s. c. 53 Atl. Rep. 969.

⁹⁵ *Mannon v. Camden Interstate R. Co.*, 56 W. Va. 554; s. c. 49 S. E. Rep. 450.

⁹⁶ *Dotson v. Erie R. Co.*, 64 N. J. L. 679; s. c. 54 Atl. Rep. 827. See also *Lehigh Valley R. Co. v. Dupont*, 128 Fed. Rep. 840.

⁹⁷ That the passenger may act on the advice of the carrier's servant unless the act is one obviously dangerous to a prudent man, see: *Lehigh Valley R. Co. v. Dupont*, 128 Fed. Rep. 840; *Chicago &c. R. Co. v. Gore*, 202 Ill. 188; s. c. 66 N. E. Rep. 1063. A passenger was notified that the car he was on was to be cut from the train. On receiving this announcement he started forward, and as he was crossing to the next car the separation took place, and as he took hold of the doorknob of this car the brakeman called out, "Look out! Look out!" whereupon he, acting on a sudden impulse that there was danger in front, stepped

§ 2934. Contributory Negligence of Passengers under Disabilities.

—A child of tender years, unable to appreciate the dangers incident to railroad or street railroad transportation, cannot be imputed with contributory negligence;⁹⁸ but not so with children over the age of fourteen who are presumed to possess capacity to be sensible of these dangers.⁹⁹ A woman in a delicate condition, injured by the negligence of the carrier, is not precluded from recovering damages for injuries the result of the carrier's negligence on the ground of her contributory negligence in undertaking the journey while in this condition, unless such a journey, under the circumstances, would be dangerous.¹⁰⁰ The fact that a passenger was old, crippled, and deaf, and was travelling alone, and had not arranged for any one to meet him, does not, as a matter of law, constitute contributory negligence, defeating a recovery by such a passenger for injuries the result of the negligence of a carrier in failing to furnish a reasonably safe place for passengers to alight from the train.¹⁰¹

§ 2935. Contributory Negligence of Intoxicated Passengers.¹⁰²

§ 2942. Riding in Improper Place, Position or Manner—General

Propositions.—It is plainly the duty of a passenger to place himself in a safe position in the car if he is able to do so.¹⁰³ The fact that a white passenger was injured while riding in a coach set apart for colored people in a State requiring separate coaches for the races, will not, as a matter of law, impute him with contributory negligence. The sep-

back, and fell between the cars. It was held that neither want of time to get to the forward car nor the giving of the signal to "look out" was the proximate cause of the accident, but plaintiff's own act in stepping back from a position of safety; and hence he could not recover: *Butts v. Cleveland & C. R. Co.*, 110 Fed. Rep. 329; s. c. 49 C. C. A. 69.

⁹⁸ *Denison & C. R. Co. v. Carter*, 98 Tex. 196; s. c. 82 S. W. Rep. 782; rev'g s. c. 79 S. W. Rep. 320.

⁹⁹ *Kirchner v. Oil City St. R. Co.*, 210 Pa. 45; s. c. 59 Atl. Rep. 270.

¹⁰⁰ *St. Louis & C. R. Co. v. Ferguson*, 26 Tex. Civ. App. 460; s. c. 64 S. W. Rep. 797.

¹⁰¹ *Texas & C. R. Co. v. Reid* (Tex. Civ. App.), 74 S. W. Rep. 99.

¹⁰² Whether a passenger's intoxication so affected him as to render him incapable of appreciating his

danger or caring for himself, though he is able to sing, talk, and dance in the car, is a question of fact and not of law: *Wheeler v. Grand Trunk R. Co.*, 70 N. H. 607; s. c. 50 Atl. Rep. 103; 54 L. R. A. 955. It is the duty of the carrier to warn an intoxicated passenger of the danger incident to his going onto the platform of the car while the train is in motion, if the servants of the carrier have knowledge of his condition and his intention in this respect, and where the carrier omits this duty, it cannot defend an action for injuries sustained by such a passenger falling from the platform on the ground of contributory negligence: *Fox v. Michigan Cent. R. Co.*, 138 Mich. 433; s. c. 101 N. W. Rep. 624; 11 Det. Leg. N. 648.

¹⁰³ *Chicago City R. Co. v. Albrecht*, 114 Ill. App. 474.

arate coach acts require equal accommodations for both races; they were not enacted for the protection of passengers from the dangers of travel.¹⁰⁴

§ 2943. **Riding upon the Engine.**¹⁰⁵

§ 2945. **Leaving Seat and Going to a More Dangerous Place.**—All that the law requires in this situation is that the passenger should exercise ordinary care for his own safety.¹⁰⁶ It is not generally regarded as negligence *per se* for a passenger to leave his seat and go to the door of the coach as the train is slowing up to stop at his station,¹⁰⁷ but he cannot recover for injuries from a fall caused by bringing the train to a standstill in the ordinary method.¹⁰⁸ A passenger in a crowded car, who temporarily leaves his seat for a legitimate purpose, is not thereby charged with contributory negligence, though when he returns the seat is occupied and he is compelled to stand in the aisle, and while so standing is injured by a sudden jar.¹⁰⁹

§ 2946. **Leaving Train While it is at a Halt and Incurring Danger.**—Generally speaking, a passenger may leave the car or boat on which he is travelling to transact his private business at any intermediate station or landing where a stop is made for any reasonable time to receive or discharge passengers, and if he is injured without his fault, in consequence of the carrier's negligence on any part of the premises set apart by it for the use of the public, or so used with its consent, he may recover the damages sustained.¹¹⁰

§ 2947. **Riding on Platform or Steps of Steam Railway Car.**¹¹¹—A passenger cannot excuse his negligence in riding on the platform on the ground that there are no seats in the car, if he can find standing room inside by the exercise of a reasonable effort.¹¹² This species of

¹⁰⁴ Florida &c. R. Co. v. Sullivan, 120 Fed. Rep. 799; s. c. 57 C. C. A. 167; 61 L. R. A. 410.

¹⁰⁵ A passenger will be imputed with contributory negligence in riding on an engine though he is invited in the cab by the engineer: Radley v. Columbia Southern R. Co., 44 Ore. 332; s. c. 75 Pac. Rep. 212.

¹⁰⁶ Illinois Cent. R. Co. v. Jolly, 117 Ky. 632; s. c. 78 S. W. Rep. 476; 25 Ky. L. Rep. 1735.

¹⁰⁷ Chesapeake &c. R. Co. v. Topping, 78 S. W. Rep. 135; s. c. 25 Ky. L. Rep. 1390.

¹⁰⁸ Illinois Cent. R. Co. v. Jolly, 117 Ky. 632; s. c. 78 S. W. Rep. 476; 25 Ky. L. Rep. 1735.

¹⁰⁹ Holland v. St. Louis &c. R. Co., 105 Mo. App. 117; s. c. 79 S. W. Rep. 508.

¹¹⁰ Abbott v. Oregon R. Co., — Ore. —; s. c. 80 Pac. Rep. 1012.

¹¹¹ That the passenger is guilty of contributory negligence in riding on platform, see: St. Louis &c. R. Co. v. Leftwich, 117 Fed. Rep. 127; s. c. 54 C. C. A. 1; Meyere v. Nashville &c. R., 110 Tenn. 166; s. c. 72 S. W. Rep. 114; Houston &c. R. Co. v. Bryant, 31 Tex. Civ. App. 483; s. c. 72 S. W. Rep. 885 (intoxicated passenger). This form of negligence is less excusable where it is contrary to the rules of the company (Kerr v. Chicago &c. R. Co., 100 Ill. App. 148); or against the command of the conductor (Rolette v. Great Northern R. Co., 91 Minn. 16; s. c. 97 N. W. Rep. 431).

¹¹² Rolette v. Great Northern R. Co., 91 Minn. 16; s. c. 97 N. W. Rep. 431; Louisville &c. R. Co. v. Morris

negligence is not generally regarded by the courts as negligence *per se*,¹¹³ but as a question of fact for the jury.¹¹⁴ A case of contributory negligence in this situation is especially clear where a passenger, riding on the platform, is injured while leaning out therefrom by coming in contact with objects at the side of the track.¹¹⁵

§ 2949. **What will Excuse the Passenger in so Riding.**—A passenger will not be charged with negligence in riding on the platform where he is compelled to do so, or not ride at all, because of the overcrowded condition of the cars.¹¹⁶ In a case where all the seats in a coach were occupied and the passenger became faint because of the foul air, and being unable to open the window to relieve his faintness, sought to get fresh air on the platform, it was held that he was not chargeable with contributory negligence as a matter of law in doing this, so as to prevent recovery for injuries by being thrown from the platform by negligent operation of the train.¹¹⁷

§ 2953. **Going to the Platform Preparatory to Alighting before the Train Comes to a Stop.**—A passenger may be imputed with contributory negligence where he goes to the platform of the car after the station is called, and by reason of his position he is injured, either by the movement of the train or by contact with some object at the side of the track.¹¹⁸ In such a case evidence is admissible for the plaintiff that he went to the platform in obedience to the direction of the brakeman.¹¹⁹

§ 2958. **Riding in Express or Baggage Car.**—A passenger may be compelled to ride in a baggage car by reason of some special exigency,—as, for example, where he is accompanying a person compelled to occupy an invalid chair, which cannot be placed in the regular pas-

(Ky.), 62 S. W. Rep. 1012; s. c. 23 Ky. L. Rep. 448.

¹¹³ *Pennsylvania Co. v. Paul*, 126 Fed. Rep. 157; *Augusta Southern R. Co. v. Snider*, 118 Ga. 146; s. c. 44 S. E. Rep. 1005; *Doolittle v. Southern R. Co.*, 62 S. C. 130; s. c. 40 S. E. Rep. 133; *St. Louis & C. R. Co. v. Ball*, 25 Tex. Civ. App. 287; s. c. 66 S. W. Rep. 879.

¹¹⁴ *Holloway v. Pasadena & C. R. Co.*, 130 Cal. 177; s. c. 62 Pac. Rep. 478; *Chicago & C. R. Co. v. Newell*, 212 Ill. 332; s. c. 72 N. E. Rep. 416; *Chicago & C. R. Co. v. Newell*, 113 Ill. App. 263; *Augusta Southern R. Co. v. Snider*, 118 Ga. 146; s. c. 44 S. E. Rep. 1005; *Olson v. Chicago & C. R. Co.*, 94 Minn. 241; s. c. 102 N. W. Rep. 449.

¹¹⁵ *Benedict v. Minneapolis & C. R.*

Co., 86 Minn. 224; s. c. 90 N. W. Rep. 360; 57 L. R. A. 639.

¹¹⁶ *Jackson v. Natchez & C. R. Co.*, 114 La. 981; s. c. 38 South. Rep. 701; *Trumbull v. Donahue*, 18 Colo. App. 460; s. c. 72 Pac. Rep. 684.

¹¹⁷ *Morgan v. Lake Shore & C. R. Co.*, 138 Mich. 626; s. c. 101 N. W. Rep. 836; 11 Det. Leg. N. 713.

¹¹⁸ *Fletcher v. Boston & C. R. R.*, 187 Mass. 463; s. c. 73 N. E. Rep. 552; *Denny v. North Carolina R. Co.*, 132 N. C. 340; s. c. 43 S. E. Rep. 847; *Payne v. Nashville & C. R. Co.*, 106 Tenn. 167; s. c. 61 S. W. Rep. 86. But see *Pim v. St. Louis Transit Co.*, 103 Mo. App. 713; s. c. 84 S. W. Rep. 155 (not negligence *per se*).

¹¹⁹ *Louisville & C. R. Co. v. Bowlds* (Ky.), 64 S. W. Rep. 957; s. c. 23 Ky. L. Rep. 1202.

senger coach—and in such a case the fact of his riding in the baggage car will not be imputed to him as negligence.¹²⁰

§ 2963. **Contributory Negligence of Stockmen.**^{120a}

§ 2964. **Riding in Caboose Car of Freight Train.**—It is a rule of general acceptance that one who travels on a freight train assumes the risks incident thereto from jerks accompanying the movement of the train, and is required to exercise greater care than when travelling on a passenger train.¹²¹ A passenger is plainly not in the exercise of reasonable care where he enters the caboose of a freight train with knowledge that the train is not made up, and seats himself in a chair instead of fixed seats provided for the passengers, and is thrown from his seat and injured by the bumping of cars against the caboose in the process of making up the train.¹²²

§ 2965. **Riding on Top of Cars.**—There seems hardly any contingency that would justify a passenger on a freight train in taking a position on the top of cars making up the train,¹²³ and the fact that injuries were received while the passenger was thus situated will ordinarily defeat a recovery for his injuries,¹²⁴ unless they were occasioned by the reckless and willful misconduct of the operatives of the train.¹²⁵

§ 2969. **Passing from One Car to Another while Train in Motion.**—A passenger may be imputed with contributory negligence where he voluntarily and unnecessarily attempts to pass from one car to another while the train is running at a high rate of speed around a curve, and he is thrown from the train and is injured.¹²⁶ But it is not contributory negligence, as a matter of law, for an experienced passenger to pass through cars and over platforms where this process is necessary to reach the dining car at the rear of the train,¹²⁷ or is undertaken in the search for a seat in a less crowded car.¹²⁸

¹²⁰ *Chesapeake &c. R. Co. v. Jordan*, 76 S. W. Rep. 145; s. c. 25 Ky. L. Rep. 574.

^{120a} A caretaker, riding in a cattle car, instead of in the caboose, has the burden of showing that he was justified in riding where he did: *Lake Shore &c. R. Co. v. Teeters*, — Ind. App. —; s. c. 74 N. E. Rep. 1014.

¹²¹ *Young v. Missouri Pac. R. Co.* (Mo. App.), 84 S. W. Rep. 175.

¹²² *Freeman v. Pere Marquette R. Co.*, 131 Mich. 544; s. c. 91 N. W. Rep. 1021; 9 Det. Leg. N. 436.

¹²³ *Chaney v. Louisiana &c. R. Co.*, 176 Mo. 598; s. c. 75 S. W. Rep. 595.

¹²⁴ *Neville v. St. Louis &c. R. Co.*, 158 Mo. 293; s. c. 59 S. W. Rep. 123; *Illinois Cent. R. Co. v. Brown*, 77 Miss. 338; s. c. 28 South. Rep. 949.

¹²⁵ *Illinois Cent. R. Co. v. Brown*, 77 Miss. 338; s. c. 28 South. Rep. 949.

¹²⁶ *Dougherty v. Yazoo &c. R. Co.*, 84 Miss. 502; s. c. 36 South. Rep. 699.

¹²⁷ *Northern Pac. R. Co. v. Adams*, 116 Fed. Rep. 324.

¹²⁸ *Galveston &c. R. Co. v. Morris* (Tex. Civ. App.), 60 S. W. Rep. 813; s. c. aff'd, 94 Tex. 505; s. c. 61 S. W. Rep. 709.

§ 2970. **Riding Standing Up.**—The failure of a passenger to occupy a seat will not charge him with negligence contributing to injuries received while standing in a crowded coach in a train in which all but a few seats are occupied and the location of these is unknown to him.¹²⁹

§ 2971. **Sitting by an Open Window.**¹³⁰

§ 2972. **Riding with Arm, or Head, or Body out of Window.**¹³¹

§ 2978. **Passenger's Hand Crushed in the Jamb of a Door.**¹³²—An English case holds that it is not evidence of negligence on the part of servants of a railway company that they close railway carriage doors, left open by passengers who have quitted the train, without warning other passengers still seated in the carriages that they are about to do so. It follows that a passenger, so left seated, who places his finger in the hinge of the open door of the carriage as it is being closed by the company's servant, cannot recover damages for personal injuries.¹³³

§ 2982. **Assuming other Dangerous Positions.**—There is a holding that a workman carried to and from his work under an agreement with a railway company is not chargeable with contributory negligence in riding on a car which is being pushed in front of the engine.¹³⁴

§ 2987. **Right of Passenger to Assume that the Approach is Safe.**—Where the railroad track is the usual and only practicable route by which a passenger may go from a station to his train, the railroad com-

¹²⁹ *Farnon v. Boston &c. R. Co.*, 180 Mass. 212; s. c. 62 N. E. Rep. 254.

¹³⁰ That a passenger is not guilty of contributory negligence in riding in a smoking car in front of an open window, see: *Missouri &c. R. Co. v. Flood*, 35 Tex. Civ. App. 197; s. c. 79 S. W. Rep. 1106.

¹³¹ That a passenger extending his person through the window of a rapidly-moving train in which he is riding is chargeable with negligence preventing a recovery for an injury to which such act contributed, see: *Knauss v. Lake Erie &c. R. Co.*, 29 Ind. App. 216; s. c. 64 N. E. Rep. 95; *Union Pac. R. Co. v. Roeser*, 69 Neb. 62; s. c. 95 N. W. Rep. 68. That the question of contributory negligence in this situation is one of fact for the jury, see: *Clerc v. Morgan's &c. R. Co.*, 107 La. 370; s. c. 31 South. Rep. 886; *Kird v. New Orleans &c. R. Co.*, 105 La. 226; s. c. 29 South. Rep. 729; *Gulf &c. R. Co.*

v. Phillips, 32 Tex. Civ. App. 238; s. c. 74 S. W. Rep. 793.

¹³² A passenger left his compartment in the front end of defendant's railroad coach on approaching a station, passed through the baggage compartment to the one in the rear, and stood in the door opening thereto, with his hand against the door casing. While he was in such position a brakeman, who had his back toward him and was stooping over to light a lantern, called out, "Shut the door," which some one near the door did, thereby injuring plaintiff's hand. It was held that plaintiff was guilty of such contributory negligence as to preclude his recovery: *Brinegar v. Louisville &c. R. Co. (Ky.)*, 72 S. W. Rep. 783; s. c. 24 Ky. L. Rep. 1973.

¹³³ *Drury v. North-Eastern R. Co.*, [1901] 2 K. B. 322; s. c. 70 Law J. K. B. 830; 84 L. T. 658.

¹³⁴ *Trinity Val. R. Co. v. Stewart* (Tex. Civ. App.), 62 S. W. Rep. 1085.

pany will not be heard to say that a passenger by taking such route was to be charged with contributory negligence defeating a recovery for injuries occasioned by defects in the path.¹³⁵

§ 2989. Care Required in Crossing Intervening Tracks to Board the Train.¹³⁶—The failure of a passenger crossing intervening tracks to look and listen for trains thereon is not negligence *per se* when he proceeds in obedience to the call "All aboard," of the conductor of his train, but the question of contributory negligence should be submitted to the jury.¹³⁷

§ 2990. Attempting to Reach Train by a Dangerous Way where a Safe Way has been Provided.¹³⁸

§ 2992. Boarding Train before it is Ready.—The doctrine of the main section is not to be construed as requiring a passenger to wait for an express invitation before entering the car.¹³⁹

§ 2993. Boarding Train at Improper Place.—It has been held a question for the jury whether the carrier has induced the public to believe that passengers are generally invited to board trains at places where no platforms or other fixtures have been provided—in this case at the crossing of another railroad—though persons were in the habit of boarding trains without objection, and in fact the railroad employes had sometimes assisted them aboard and had always collected fares from them.¹⁴⁰

§ 2994. Boarding Cars by Improper Methods.—Where the carrier provides an unusual method of embarking passengers,—as, for example, a plank is laid between the station platform and the baggage car of the train—it should acquaint passengers with that fact, and failing to do so, cannot urge that a passenger who was injured by starting the train without warning, would not have been hurt had he boarded the train in the manner provided instead of attempting to board it from the ground at another point.¹⁴¹

§ 2995. Not Negligence *per se* to Attempt to Board a Train in Motion.¹⁴²—Generally speaking, a passenger will not be imputed with con-

¹³⁵ Chicago &c. R. Co. v. Lagerkrans, 65 Neb. 566; s. c. 91 N. W. Rep. 358; 95 N. W. Rep. 2.

¹³⁶ Redding v. Central R. Co., 68 N. J. L. 641; s. c. 54 Atl. Rep. 431 (whether a passenger exercised due care in this situation a question for the jury).

¹³⁷ Gulf &c. R. Co. v. Morgan, 26 Tex. Civ. App. 378; s. c. 64 S. W. Rep. 688.

¹³⁸ O'Donnell v. Chicago &c. R. Co., 106 Ill. App. 287 (a safe platform

and place to enter cars having been provided, persons attempting to board the car elsewhere are not passengers).

¹³⁹ Texas Midland R. R. v. Brown (Tex. Civ. App.), 58 S. W. Rep. 44.

¹⁴⁰ Chicago &c. R. Co. v. Doan, 195 Ill. 168; s. c. 62 N. E. Rep. 826; aff'g s. c. 93 Ill. App. 247.

¹⁴¹ Atlantic &c. R. Co. v. Anderson, 118 Ga. 288; s. c. 45 S. E. Rep. 271.

¹⁴² That it is not negligence *per se*

tributory negligence as a matter of law where he boards a moving train at the direction of the trainmen unless the peril is so obvious that only a reckless man would make the attempt.¹⁴³

§ 2998. **Doctrine that to Attempt to Board a Moving Train is Negligence.**—Other decisions charge the passenger with contributory negligence as a matter of law, in voluntarily and unnecessarily exposing himself to danger by attempting to board a moving car,¹⁴⁴ particularly where the act shows recklessness,¹⁴⁵ or is in violation of law.¹⁴⁶

§ 2999. **Attempting to Board a Rapidly Moving Train is Negligence.**¹⁴⁷

§ 3010. **Degree of Care Required of the Passenger in Alighting.**—A passenger fulfills his whole duty only where he prudently uses the means which the carrier affords him for alighting,¹⁴⁸ and this requires that he should look to see whether the steps or alighting place may be safely used.¹⁴⁹ Thus, where a passenger in alighting from the car did not ask for assistance, though having an opportunity, nor inform the servants in charge of train of the weakness of her ankle, nor look to see whether there was a portable step and what was the distance from the step to the platform, it was held that she was so wanting in care for her own safety as to preclude a recovery for an injury to her ankle received in alighting.¹⁵⁰

§ 3011. **When Negligence to Leap from a Train in Motion.**¹⁵¹—Generally speaking, an adult who knowingly and unnecessarily steps

for a passenger to attempt to board a moving train, see: *Chicago & C. R. Co. v. Flaharty*, 96 Ill. App. 563; *Atchison & C. R. Co. v. Holloway*, — Kan. —; s. c. 80 Pac. Rep. 31 (train moving at rate of four miles an hour); *Creech v. Charleston & C. R. Co.*, 66 S. C. 528; s. c. 45 S. E. Rep. 86; *Mills v. Missouri & C. R. Co.*, 94 Tex. 242; s. c. 59 S. W. Rep. 874; rev'g s. c. 57 S. W. Rep. 291. That it is a question for the jury, see: *Newcomb v. New York & C. R. Co.*, 182 Mo. 687; s. c. 81 S. W. Rep. 1069; *Wooten v. Mobile & C. R. Co.*, 79 Miss. 26; s. c. 29 South. Rep. 61. Whether it was contributory negligence for a man with only one arm to attempt to board a moving train without assistance was a question for the jury: *Talbert v. Charleston & C. R. Co.*, 72 S. C. 137; s. c. 51 S. E. Rep. 564.

¹⁴³ *Chicago & C. R. Co. v. Gore*, 202 Ill. 188; s. c. 66 N. E. Rep. 1063;

Pence v. Wabash R. Co., 116 Iowa 279; s. c. 90 N. W. Rep. 59.

¹⁴⁴ *Lauterer v. Manhattan R. Co.*, 128 Fed. Rep. 540; s. c. 63 C. C. A. 38; *Ricks v. Georgia & C. R. Co.*, 118 Ga. 259; s. c. 45 S. E. Rep. 268; *Texas Midland R. Co. v. Ellison* — Tex. Civ. App. —; s. c. 87 S. W. Rep. 213.

¹⁴⁵ *Atchison & C. R. Co. v. Holloway*, — Kan. —; s. c. 80 Pac. Rep. 31.

¹⁴⁶ *Powell v. Erie R. Co.*, 70 N. J. L. 290; s. c. 58 Atl. Rep. 930.

¹⁴⁷ *Southern R. Co. v. Williams* (Miss.), 36 South. Rep. 394.

¹⁴⁸ *Southern R. Co. v. Bandy*, 120 Ga. 463; s. c. 47 S. E. Rep. 923.

¹⁴⁹ *Coburn v. Philadelphia & C. R. Co.*, 198 Pa. 436; s. c. 48 Atl. Rep. 265.

¹⁵⁰ *Young v. Missouri Pac. R. Co.*, 93 Mo. App. 267.

¹⁵¹ *Brown v. New York & C. R. Co.*, 181 Mass. 365; s. c. 63 N. E. Rep.

from a railroad train in motion is guilty of contributory negligence as a matter of law.¹⁵² A passenger injured while attempting, without the knowledge of the operatives of the train, to alight therefrom at a point where the railroad crosses another track, when the train is in motion, will not be heard to complain of the failure of the engineer to bring the train to a full stop before reaching the crossing, as required by law, since it was not the purpose of the statute to provide an additional alighting place on railroads, but to prevent collisions between trains at crossings.¹⁵³

§ 3014. Is Prima Facie Evidence of Negligence Taking Question to Jury.¹⁵⁴

§ 3015. When not Negligence to Leap from a Railway Train in Motion.¹⁵⁵—On the question whether a passenger exercised due care for his own safety in leaping from a slowly moving train, it has been held not erroneous to admit evidence that other persons assisting passengers aboard had jumped off just before the plaintiff and in his

941 (passenger had alighted from train every day for thirty-five years and on the day in question jumped from car onto wet and slippery platform); *Newcomb v. New York Cent. & C. R. Co.*, 169 Mo. 409; s. c. 69 S. W. Rep. 348 (passenger injured by jumping from car onto greasy platform); *Gress v. Missouri Pac. R. Co.*, 109 Mo. App. 716; s. c. 84 S. W. Rep. 122 (car moving five miles an hour); *Young v. Missouri Pac. R. Co.* (Mo. App.), 84 S. W. Rep. 175 (passenger jumped from car before reaching station). In these cases a person assisting passenger to board train was injured while alighting after train was under way: *Berry v. Louisville & C. R. Co.*, 109 Ky. 727; s. c. 60 S. W. Rep. 699; 22 Ky. L. Rep. 1410; *Morrow v. Atlanta & C. Air Line R. Co.*, 134 N. C. 92; s. c. 46 S. E. Rep. 12; *Oxsher v. Houston & C. R. Co.*, 29 Tex. Civ. App. 420; s. c. 67 S. W. Rep. 550.

¹⁵² *Walters v. Chicago & C. R. Co.*, 113 Wis. 367; s. c. 89 N. W. Rep. 140; *Illinois Cent. R. Co. v. Cunningham*, 102 Ill. App. 206; *St. Louis & C. R. Co. v. Highnote*, — Tex. —; s. c. 86 S. W. Rep. 923; rev'g s. c. 84 S. W. Rep. 365 (fact that carrier was violating speed ordinance immaterial).

¹⁵³ *Mercher v. Texas Midland R. Co.*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 468.

¹⁵⁴ *St. Louis & C. R. Co. v. Ratley*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 407.

¹⁵⁵ That it is not under all circumstances contributory negligence as a matter of law for a passenger to leap from a train in motion, see: *Harris v. Pittsburgh & C. R. Co.*, 32 Ind. App. 600; s. c. 70 N. E. Rep. 407; *Pittsburgh & C. R. Co. v. Gray*, 28 Ind. App. 588; s. c. 64 N. E. Rep. 39; *Gress v. Missouri Pac. R. Co.*, 109 Mo. App. 716; s. c. 84 S. W. Rep. 122; *Hecker v. Chicago & C. R. Co.*, 110 Mo. App. 162; s. c. 84 S. W. Rep. 126; *Chicago & C. R. Co. v. Winfrey*, 67 Neb. 13; s. c. 93 N. W. Rep. 526; *Keith v. Ottawa & C. R. Co.* (C. A.), 5 Ont. L. Rep. 116; aff'g s. c. 3 Ont. L. Rep. 265. That the question is one of fact for the determination of the jury, see: *Bloomington & C. R. v. Zimmerman*, 101 Ill. App. 184; *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1; *Coursey v. Southern R. Co.*, 113 Ga. 297; s. c. 38 S. E. Rep. 866; *Gress v. Missouri Pac. R. Co.*, 109 Mo. App. 716; s. c. 84 S. W. Rep. 122; *St. Louis & C. R. Co. v. Highnote*, — Tex. —; s. c. 86 S. W. Rep. 923; rev'g s. c. 84 S. W. Rep. 365; *San Antonio & C. R. Co. v. Jackson*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 445.

presence, and that they were not injured, as this fact would have had some tendency to cause the plaintiff to think that he, too, might jump with safety.¹⁵⁶

§ 3016. **How in the Case of Women.**—It may be said, generally, that a woman encumbered with parcels, takes the risk of injury from attempting to alight from a moving train.¹⁵⁷ On the ground of contributory negligence a recovery was refused, in a case where a woman sixty-three years of age, weighing two hundred pounds, was injured while attempting to leave a train at a time when it had attained a speed of from five to six miles an hour.¹⁵⁸

§ 3018. **Alighting from Moving Train where Passenger is Carried beyond His Station.**—The cases generally hold that a passenger, injured while attempting to get off a rapidly moving train after it has passed his station, and not being induced thereto by the operatives of the train, but merely to avoid being carried to the next station, will be imputed with such negligence as to prevent a recovery for injuries sustained by him as the result of his reckless act.¹⁵⁹

§ 3023. **Where the Train Begins to Move While the Passenger is Alighting.**¹⁶⁰—Where, however, the passenger, without notice to any of the employes of the train, attempts to alight on the momentary stopping of the train to allow a switch to be set before the station is reached, and is injured by the sudden starting of the train, the injury will be regarded as the result of the passenger's own negligent act.¹⁶¹

§ 3025. **Leaping from Train in Order to Avoid an Impending Peril, Real or Apparent.**¹⁶²

§ 3027. **Leaping from the Train under Advice or Command of Carrier's Servants.**—It is the doctrine of this section that passengers

¹⁵⁶ Texas &c. R. Co. v. Crockett, 27 Tex. Civ. App. 463; s. c. 66 S. W. Rep. 114.

¹⁵⁷ McMichael v. Illinois Cent. R. Co., 110 La. 18; s. c. 34 South. Rep. 110; La Pointe v. Boston &c. R. R., 179 Mass. 535; s. c. 61 N. E. Rep. 142.

¹⁵⁸ Hecker v. Chicago &c. R. Co., 110 Mo. App. 162; s. c. 84 S. W. Rep. 126.

¹⁵⁹ Gulf &c. R. Co. v. Cleveland (Tex. Civ. App.), 61 S. W. Rep. 951; Chicago &c. R. Co. v. Martelle, 65 Neb. 540; s. c. 91 N. W. Rep. 364.

¹⁶⁰ That a passenger, injured by the starting of the train while he is in the act of alighting, may recover, see: Chicago &c. R. Co. v.

Stormont, 190 Ill. 42; s. c. 60 N. E. Rep. 104; aff'g s. c. 90 Ill. App. 505.

¹⁶¹ Georgia &c. R. Co. v. Murray, 113 Ga. 1021; s. c. 39 S. E. Rep. 427.

¹⁶² That contributory negligence will not, as a matter of law, be imputed to a passenger injured while attempting to leave a moving train which apparently is about to collide with another car, see: Selma &c. R. Co. v. Owen, 132 Ala. 420; s. c. 31 South. Rep. 598; Howell v. Lansing &c. R. Co., 136 Mich. 432; s. c. 99 N. W. Rep. 406; 11 Det. Leg. N. 82. That the principle applies, though the danger is only apparent and not real: Selma &c. R. Co. v. Owen, 132 Ala. 420; s. c. 31 South. Rep. 598.

alighting from trains on the invitation, express or implied, of the operatives of the train, are justified in assuming that the operatives have taken proper precautions to secure their safety,¹⁶³ unless the act advised or commanded is obviously dangerous and such as an ordinarily prudent person would not undertake.¹⁶⁴ A porter or brakeman is regarded by the authorities as acting in the scope of his agency in directing passengers to alight from moving trains.¹⁶⁵ A person riding on a train under a special agreement that the train would slack up enough for him to alight with safety at a certain place must wait until the speed has been thus slackened, and cannot hold the company responsible for injuries sustained in alighting while the train is moving too fast to permit this to be done in safety, though the place has been reached.¹⁶⁶

§ 3032. Passenger, Attempting to Alight, Thrown Down by a Sudden Jerk or Increase of Motion.¹⁶⁷

§ 3034. Alighting from Moving Train in Disregard of the Warnings of the Carrier's Servants.—The passenger will generally be imputed with such contributory negligence as to defeat his action for injuries, where he attempts to alight from a moving train in disregard

¹⁶³ *Southern R. Co. v. Bandy*, 120 Ga. 463; s. c. 47 S. E. Rep. 923; *Leveret v. Shreveport Belt R. Co.*, 110 La. 399; s. c. 34 South. Rep. 579; *Doolittle v. Southern R. Co.*, 62 S. C. 130; s. c. 40 S. E. Rep. 133 (a question for the jury); *Texas &c. R. Co. v. Elliott*, 26 Tex. Civ. App. 106; s. c. 61 S. W. Rep. 726; *Gulf &c. R. Co. v. Shelton*, 30 Tex. Civ. App. 72; s. c. 69 S. W. Rep. 653; 70 S. W. Rep. 359. Where a passenger, misled as to a change of cars, was injured in the attempt to alight while the train was in motion, under the direction and command of an employé, the company could not urge as a defense that the conductor made an announcement in the coach as to what change was required, but the passenger could not have heard it because he was asleep: *Gulf &c. R. Co. v. Shelton*, 30 Tex. Civ. App. 72; s. c. 69 S. W. Rep. 653; 70 S. W. Rep. 359.

¹⁶⁴ *Southern R. Co. v. Bandy*, 120 Ga. 463; s. c. 47 S. E. Rep. 923; *Pittsburgh &c. R. Co. v. Gray*, 28 Ind. App. 588; s. c. 64 N. E. Rep. 39; *Pence v. Wabash R. Co.*, 116 Iowa 279; s. c. 90 N. W. Rep. 59;

Peak v. Louisville &c. R. Co., 66 S. W. Rep. 995; s. c. 23 Ky. L. Rep. 2157; *Flaherty v. Boston &c. R. R.*, 186 Mass. 567; s. c. 72 N. E. Rep. 66.

¹⁶⁵ *Newcomb v. New York &c. R. Co.*, 182 Mo. 687; s. c. 81 S. W. Rep. 1069; *Owens v. Wabash R. Co.*, 84 Mo. App. 143; *Gulf &c. R. Co. v. Shelton*, 30 Tex. Civ. App. 72; s. c. 69 S. W. Rep. 653; 70 S. W. Rep. 359.

¹⁶⁶ *Illinois Cent. R. Co. v. Hanberry* (Ky.), 66 S. W. Rep. 417; s. c. 23 Ky. L. Rep. 1867; *St. Louis &c. R. Co. v. Highnote*, — Tex. —; s. c. 86 S. W. Rep. 923; rev'g s. c. 84 S. W. Rep. 365.

¹⁶⁷ It has been held that a woman injured in leaving a train by reason of its sudden starting could not be regarded as negligent merely because she carried with her a satchel weighing perhaps sixty pounds, especially where there was no evidence that she was not in good health and of sufficient strength to carry it as far as the platform: *Chicago &c. R. Co. v. Armes*, 32 Tex. Civ. App. 32; s. c. 74 S. W. Rep. 77.

of warnings given him by the servants of the carrier;¹⁶⁸ neither can a passenger, injured in this wise, complain because the trainmen failed to admonish him not to get off while the train was in motion.¹⁶⁹

§ 3036. Negligence of Passenger must have been the Proximate Cause of the Injury.¹⁷⁰

§ 3038. Other Questions Growing out of Injuries to Passengers in Alighting.—Where the employés of the carrier knew nothing of the passenger's peril in attempting to alight from the moving train, no duty was imposed on them to use every means consistent with the safety of other passengers to avoid his injury, though his perilous position might have been discovered by the exercise of ordinary care.¹⁷¹ It is held that the issue of contributory negligence is raised by allegations in an answer that, if the passenger was injured in attempting to alight from the defendant's train, such injuries were received in consequence of his own negligent act in leaving the train while in motion, and that his negligence was the proximate cause of his injuries, for which the defendant was not responsible.¹⁷²

§ 3039. Instructions in Cases of Injuries Caused by Alighting from Railway Trains while in Motion.¹⁷³

§ 3041. Alighting from Railway Train at Improper or Dangerous Place.—It has been held that a passenger, attempting to alight from a train at a railroad crossing without notifying those in charge of the train of his intention to do so, and injured by the sudden jerk of the train in starting, will not be relieved from the effects of his contribu-

¹⁶⁸ *McMichael v. Illinois Cent. R. Co.*, 110 La. 18; s. c. 34 South. Rep. 110.

¹⁶⁹ *Berry v. Louisville & C. R. Co.*, 109 Ky. 727; s. c. 60 S. W. Rep. 699; 22 Ky. L. Rep. 1410.

¹⁷⁰ *Chicago & C. R. Co. v. Armes*, 32 Tex. Civ. App. 32; s. c. 74 S. W. Rep. 77.

¹⁷¹ *Harris v. Gulf & C. R. Co.*, 36 Tex. Civ. App. 94; s. c. 80 S. W. Rep. 1023.

¹⁷² *Galveston & C. R. Co. v. De Castillo*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 25.

¹⁷³ The law of contributory negligence has been held correctly stated in an instruction that, if the passenger left, or attempted to leave, the defendant's train before it reached the accustomed place for stopping and while it was still in motion,

and in so doing failed to exercise that degree of care which an ordinarily prudent man would have exercised under the same circumstances, and if such failure contributed to his injuries, there could be no recovery therefor even though the defendant negligently failed to stop the train at the station: *Galveston & C. R. Co. v. De Castillo*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 25. In the case of a person injured while leaping from a train apparently about to collide with another car, it was held proper to instruct that, if the plaintiff acted contrary to the way an ordinarily prudent person would have acted, and this conduct contributed to the injury, he could not recover: *Selma St. & C. R. Co. v. Owen*, 132 Ala. 420; s. c. 31 South. Rep. 598.

tory negligence by the fact that it was a known custom for passengers to alight at the crossing.¹⁷⁴

§ 3043. **Alighting at a Place where there is no Platform.**—A passenger carried beyond a railroad station platform has a right to require the conductor to back the train to the usual stopping place, and if he fails to do so he will ordinarily be held to have assumed the risk of danger in alighting at another place.¹⁷⁵

§ 3045. **Leaving the Train by a Way not Provided by the Company.**—A passenger will not be imputed with contributory negligence in alighting at any exit provided by the carrier¹⁷⁶ unless the carrier has forbidden the use of particular exits to the knowledge of the passenger.¹⁷⁷

§ 3046. **Alighting on the Wrong Side of Train.**¹⁷⁸—Generally where a passenger with knowledge of the location of a platform alights on the opposite side for his own convenience, it is a question for the jury whether, under all the attending circumstances, he is chargeable with contributory negligence.¹⁷⁹

§ 3047. **Alighting after Station is Called, but before Train Stops.**—It is not generally regarded as negligence *per se* for a passenger to leave his seat after his station is announced and take a position on the platform steps preparatory to alighting while the car is still in motion.¹⁸⁰

§ 3048. **Alighting where the Station is Called, but the Train Stops before Reaching it.**—“When the name of the station is called, and the train soon thereafter is stopped, the passenger may reasonably conclude that the train has stopped at the station, and may endeavor to

¹⁷⁴ *Mercher v. Texas Midland R. R.*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 468.

¹⁷⁵ *Louisville &c. R. Co. v. Keith* (Ky.), 58 S. W. Rep. 468; s. c. 22 Ky. L. Rep. 593.

¹⁷⁶ *Chicago Terminal Transfer R. Co. v. Schmelling*, 99 Ill. App. 577; s. c. aff'd, 197 Ill. 619; 64 N. E. Rep. 714. A passenger is not negligent in attempting to alight from the rear end of a car where the uncontradicted evidence shows that it was the proper place: *Olson v. Chicago &c. R. Co.*, 94 Minn. 241; s. c. 102 N. W. Rep. 449.

¹⁷⁷ *Pittsburgh &c. R. Co. v. Aldridge*, 27 Ind. App. 498; s. c. 61 N. E. Rep. 741

¹⁷⁸ Where plaintiff, who was ignorant of the surroundings, was directed to get off a train and go to the depot, and people were getting off on both sides of the train, evidence that he stated he did not get off on the other side of the train because there was such a rush, and he never followed a crowd in a rush, does not show a want of due care: *Chesapeake &c. R. Co. v. Harris*, 103 Va. 635; s. c. 49 S. E. Rep. 997.

¹⁷⁹ *Owen v. Washington &c. R. Co.*, 29 Wash. 207; s. c. 69 Pac. Rep. 757.

¹⁸⁰ *Southern R. Co. v. Roebuck*, 132 Ala. 412; s. c. 31 South. Rep. 611.

get off, unless the circumstances and indications make it manifest that the proper and usual stopping place has not been reached."¹⁸¹ This principle does not apply in full force to freight trains. Here an experienced traveller will be charged with knowledge that they do not always stop at the exact point intended, but must often be moved backwards and forwards after having stopped before reaching the point at which the final stop is to be made.¹⁸² Furthermore, a passenger, alighting when the train stops with his car remote from the station platform, has the right to assume that the company has discharged its duty in making the path to the station reasonably safe, and the passenger is not to be charged with contributory negligence because he did not return to the car and pass through the train to a car opposite the platform before alighting.¹⁸³

§ 3050. Passenger in Alighting Struck by Engine or Train on Another Track.—The alighting passenger has a right to assume that his carrier has provided safe means of passage from the train, and he is not required to stop and look and listen to see whether a train is approaching on a parallel track before attempting to cross it.¹⁸⁴ The passenger is not a trespasser on the intervening tracks.¹⁸⁵ A passenger alighting on a platform between different tracks, but of sufficient width to allow him to pass safely by the exercise of reasonable care, should exercise that degree of care for his safety, and cannot recover if he allows himself to become so oblivious to his surroundings that he fails to exercise reasonable care for his personal safety while proceeding along this platform and thereby suffers injuries.¹⁸⁶

§ 3057. Contributory Negligence of the Passenger—His Right to Assume that the Premises are Safe.¹⁸⁷—Generally speaking, a person going to a station to become a passenger has the right to presume that the platforms are reasonable safe, and is not bound to keep a lookout other than that required by ordinary prudence.¹⁸⁸ Thus a

¹⁸¹ Wood, J., in *Davis v. Kansas City Southern R. Co.*, 75 Ark. 165; s. c. 86 S. W. Rep. 995. See also *St. Louis & C. R. Co. v. Farr*, 70 Ark. 264; s. c. 68 S. W. Rep. 243.

¹⁸² *Young v. Missouri Pac. R. Co.* (Mo. App.), 84 S. W. Rep. 175.

¹⁸³ *Chesapeake & C. R. Co. v. Harris*, 103 Va. 635; s. c. 49 S. E. Rep. 997.

¹⁸⁴ *Chicago Terminal Transfer R. Co. v. Schmelling*, 197 Ill. 619; s. c. 64 N. E. Rep. 714; 99 Ill. App. 577.

¹⁸⁵ *Girton v. Lehigh Valley R. Co.*, 199 Pa. 147; s. c. 48 Atl. Rep. 970.

¹⁸⁶ *Chicago & C. R. Co. v. Weir*, 91 Ill. App. 420.

¹⁸⁷ A passenger on a train at a

junction point, where he was to change cars, was not imputed with negligence in failing to leave the cars immediately upon its arrival at point of intersection, which was without a depot building, and remaining in the cars which were warm until the arrival of his train, though just prior to his leaving the car the lights on the platform were extinguished, and in walking over the platform to reach his train he fell and was injured: *St. Louis & C. R. Co. v. Battle*, 69 Ark. 369; s. c. 63 S. W. Rep. 805.

¹⁸⁸ *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 414; s. c. 61 N. E.

court refused to impute contributory negligence to a passenger who stepped backward and fell into a hole in a platform and suffered injuries, though he might easily have seen the hole had he faced about.¹⁸⁹ Another court has announced the rule that a passenger, going down steps leading to a railroad station which are covered with snow and ice, is not to be imputed with contributory negligence as a matter of law because he failed to take hold of the railing at the side of the steps.¹⁹⁰

§ 3059. **Passenger Getting Hurt on Carrier's Grounds.**¹⁸¹

§ 3073. **Carrier Responsible for Injury to Passenger through Concurring Negligence of Carrier and a Stranger.**—Thus a passenger in a cab injured in a collision the result of the concurrent negligence of the cab driver and the street car company will not be imputed with the negligence of the driver so as to prevent a recovery in an action against the employer of the cab driver and the street car company as joint tort-feasors.¹⁹²

§ 3084. **Carrier not Bound to Guard Passengers against Injury at all Events.**—Again the liability of the carrier may depend on the extent of the control the carrier has over the person responsible for the injury. The carrier is charged with the highest degree of care and foresight consistent with the orderly conduct of its business with respect to the protection of its passengers from injuries resulting from its own acts or omissions, from the acts or omissions of its servants and from the acts of strangers who are under its control or direction; but it is charged with ordinary or reasonable care and prudence only to guard against the lawless acts of third persons not under its direction or control.¹⁹³ Thus a railroad company was held not liable to one

Rep. 936; *McGuire v. Interborough Rapid Transit Co.*, 104 App. Div. (N. Y.) 105; s. c. 93 N. Y. Supp. 316; *Barker v. Ohio River R. Co.*, 51 W. Va. 423; s. c. 41 S. E. Rep. 148.

¹⁸⁹ *Barker v. Ohio River R. Co.*, 51 W. Va. 423; s. c. 41 S. E. Rep. 148.

¹⁹⁰ *Illinois Cent. R. Co. v. Keegan*, 112 Ill. App. 28; s. c. aff'd, 210 Ill. 150; 71 N. E. Rep. 321.

¹⁹¹ *Mathieson v. Burlington & C. R. Co.*, 125 Iowa 90; s. c. 100 N. W. Rep. 51 (passenger injured by falling over iron left on station platform).

¹⁹² *Frank Bird Transfer Co. v. Krug*, 30 Ind. App. 602; s. c. 65 N. E. Rep. 309.

¹⁹³ *Fewings v. Mendenhall*, 88 Minn. 336; s. c. 93 N. W. Rep. 127.

On the question of the duty of the carrier to protect the passenger from insults and wanton interference of strangers, etc., see: *Savannah & C. R. Co. v. Boyle*, 115 Ga. 836; s. c. 42 S. E. Rep. 242; *Illinois Cent. R. Co. v. Winslow*, — Ky. —; s. c. 84 S. W. Rep. 1175; 27 Ky. L. Rep. 320; *Louisville & C. Mail Co. v. Barnes*, 117 Ky. 860; s. c. 79 S. W. Rep. 261; 25 Ky. L. Rep. 2036; 64 L. R. A. 574; *Clerc v. Morgan's & C. R. Co.*, 107 La. 370; s. c. 31 South. Rep. 886; *Partridge v. Woodland Steamboat Co.*, 66 N. J. L. 290; s. c. 49 Atl. Rep. 726; *Dufur v. Boston & C. R. Co.*, 75 Vt. 165; s. c. 53 Atl. Rep. 1068. A carrier is not liable unless it appears that, knowing of the assault, the crew, in the exercise of reason-

of its passengers for an injury received while waiting for his train by the carelessness of an employé of another company using the same station.¹⁹⁴ In the case of licensees on its premises a less degree of care is exacted. A railroad company is under no obligation to protect persons at its stations to aid the departure of friends who are to become passengers on its cars from assaults by persons lounging about the station, although this duty would exist as to the intending passenger.¹⁹⁵

§ 3086. **Duty to Protect Female Passengers from Insult, Obscenity, Wanton Approach, etc.**—The law does not demand that the watchfulness of the carrier over female passengers shall be continuous and unrelaxed. Hence, the carrier will not be liable for assaults upon female passengers while the trainmen are absent from the train in the performance of their duties,¹⁹⁶ or to eat their meals at eating stations.¹⁹⁷ It has been held that damages for humiliation caused by the use of profane language in the presence of female passengers cannot be recovered unless it is shown that this misconduct was known to the trainmen.¹⁹⁸ In an action for indignity and insult by the use of offensive language it is sufficient to allege that the language used was profane, vulgar, obscene and indecent without setting out the specific language used,¹⁹⁹ but the language must be proven as near as possible on the trial.²⁰⁰

§ 3087. **Duty to Control or Expel Drunken, Dangerous or Disorderly Passengers.**—The carrier has the undoubted right to eject drunken passengers from its trains.¹ Where such a passenger has been ejected for disorderly conduct and assault on unoffending passengers, the carrier will be charged with negligence where it permits such a passenger to re-enter the train after his ejection and a renewal of his offensive conduct ensues.² It is the sound conclusion of a Canadian court that a railroad conductor does not, as a matter of law, exercise

able care, could have prevented it, or that they were called on, and refused help and protection, to which he was entitled: *Lake Erie &c. R. Co. v. Arnold*, 26 Ind. App. 190; s. c. 59 N. E. Rep. 394.

¹⁹⁴ *Miller v. West Jersey &c. R. Co.*, 71 N. J. L. 363; s. c. 59 Atl. Rep. 13.

¹⁹⁵ *Houston &c. R. Co. v. Phillio*, 96 Tex. 18; s. c. 69 S. W. Rep. 994; rev'g s. c. 67 S. W. Rep. 915.

¹⁹⁶ *Segal v. St. Louis &c. R. Co.*, 35 Tex. Civ. App. 517; s. c. 80 S. W. Rep. 233.

¹⁹⁷ *Thweatt v. Houston &c. R. Co.*, 31 Tex. Civ. App. 227; s. c. 71 S. W. Rep. 976.

¹⁹⁸ *Missouri &c. R. Co. v. Ball*, 25 Tex. Civ. App. 500; s. c. 61 S. W. Rep. 327.

¹⁹⁹ *St. Louis &c. R. Co. v. Wright*, 33 Tex. Civ. App. 80; s. c. 75 S. W. Rep. 565.

²⁰⁰ *St. Louis &c. R. Co. v. Wright*, 33 Tex. Civ. App. 80; s. c. 75 S. W. Rep. 565. See also *St. Louis &c. R. Co. v. Wilson*, 70 Ark. 136; s. c. 66 S. W. Rep. 661.

¹ *Chesapeake &c. R. Co. v. Saulsberry*, 112 Ky. 915; s. c. 66 S. W. Rep. 1051.

² *United Railways &c. Co. v. State*, 93 Md. 619; s. c. 49 Atl. Rep. 923.

proper diligence in protecting a passenger, where, after being informed that another passenger, who is intoxicated, has assaulted the former and threatens to repeat the assault, he does not take steps to prevent further assaults.³

§ 3088. Caution Required in the Ejection of a Drunken Passenger.⁴

§ 3093. Carrier not Responsible for Sudden and Unanticipated Acts of Misconduct by One Passenger against Another.—It is to be understood that a carrier is not a guarantor of the safety of its passengers under all circumstances, but is required only to exercise requisite care, and it cannot be held responsible for an assault by one passenger on another which its servants had no reason to anticipate.⁵ Thus, a carrier was held not liable to a passenger for injuries caused by his voluntary interference in an altercation between strangers and the servant of the carrier.⁶ So a carrier was absolved from liability for injuries to a passenger resulting from the uncoupling of his car by a drunken fellow passenger while the train was in motion.⁷ So there was no liability for injuries to a passenger from an explosion of a bomb brought into the car by a fellow passenger, where there was nothing in its appearance to indicate its dangerous character to the trainmen;⁸ and the conclusion was the same in a case where negro tramps, caught stealing a ride, were arrested and placed in a coach, and while attempting to escape therefrom made a murderous assault on a passenger in the coach.⁹ In all these instances the acts complained of were not such as the carrier could have been expected to anticipate.

§ 3095. Responsibility of Carrier for Injuries Caused by the Surging of Crowds, etc.—The fact that a crowd on a platform awaiting a car pushed a passenger into a defective place in the platform will not shift the responsibility for the injury, as the carrier is bound to know that crowds will congregate on its platforms.¹⁰

³ *Blain v. Canadian Pacific R. Co.* (C. A.), 5 Ont. L. Rep. 334.

⁴ It has been held that a carrier is not liable to a passenger for injuries received by reason of being tripped by a drunken passenger, who was being ejected from the car by the conductor in the exercise of due care: *Cobb v. Boston Elevated R.*, 179 Mass. 212; s. c. 60 N. E. Rep. 476.

⁵ *Stutsky v. Brooklyn Heights R. Co.*, 88 N. Y. Supp. 358.

⁶ *Gardner v. Interborough Rapid*

Transit Co., 45 Misc. (N. Y.) 424; s. c. 90 N. Y. Supp. 373.

⁷ *Texas & C. R. Co. v. Storey*, 29 Tex. Civ. App. 483; s. c. 68 S. W. Rep. 534.

⁸ *East Indian R. v. Kalidas Mukerjee*, [1901] App. Cas. 396; 70 L. J. P. C. 63; 84 L. T. 210.

⁹ *Savannah & C. R. Co. v. Boyle*, 115 Ga. 836; s. c. 42 S. E. Rep. 242.

¹⁰ *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 414; s. c. 61 N. E. Rep. 936.

§ 3098. **Duty to Protect Colored Passengers.**—A street railroad company owning and conducting a public park was held liable to colored patrons assaulted by lawless white persons, where it appeared that the company had knowledge of a conspiracy on the part of these persons to commit the assaults, and did not warn the colored people of the danger, and its employés in charge of the park put forth no efforts to protect them.¹¹

§ 3100. **Extent of this Duty at Railway Stations.**¹²

§ 3103. **Protection of Passengers from Strikers.**—Generally a carrier is not, as to its passengers, charged with negligence in attempting to operate its cars during a strike of its employés, unless the conditions are such that it ought to know, or ought reasonably to anticipate that it cannot do so and at the same time guard its passengers from violence by the exercise of the utmost care on its part.¹³ The fact that troops had been ordered out to restrain violence in connection with a strike and that the governor had issued a proclamation commanding riotously disposed persons to disperse, have been held insufficient to charge a carrier with notice that it was dangerous to operate its cars, but rather to amount to an invitation to operate the road under the protection of the troops.¹⁴

§ 3104. **Carrier may Establish Reasonable Regulations.**¹⁵

§ 3106. **Such Regulations must be Reasonable.**—A rule of a street railroad company that no employé when off duty in uniform shall sit on the front seat of an open car in operation has been sustained as a reasonable regulation even when applied to a uniformed employé paying fare as a passenger, as the rule tends to promote the safety of passengers by preventing the attention of the motorman from being di-

¹¹ Indianapolis St. R. Co. v. Dawson, 31 Ind. App. 605; s. c. 68 N. E. Rep. 909.

¹² It is the duty of the carrier to exercise the strictest diligence to protect passengers from misconduct and assaults not only while such passengers remain on the train but while they are on the carrier's premises: Spangler v. St. Joseph & C. R. Co., 68 Kan. 46; s. c. 74 Pac. Rep. 607; 63 L. R. A. 634. A carrier may be negligent where he allows a passenger to alight at his destination without warning him of the danger from drunken and armed rowdies collected there: Penny v. Atlantic Coast Line R. Co., 133 N. C. 221; s. c. 45 S. E. Rep. 563; 63 L. R. A.

497. The carrier will be liable where he knew or might have known of the threatened injury and could have prevented or lessened it: Tate v. Illinois Cent. R. Co., 81 S. W. Rep. 256; s. c. 26 Ky. L. Rep. 309, 341; St. Louis & C. R. Co. v. Wilson, 70 Ark. 136; s. c. 66 S. W. Rep. 661.

¹³ Fewings v. Mendenhall, 83 Minn. 237; s. c. 86 N. W. Rep. 96. See also Bosworth v. Union R. Co., 25 R. I. 202; s. c. 55 Atl. Rep. 490.

¹⁴ Bosworth v. Union R. Co., 26 R. I. 309; s. c. 58 Atl. Rep. 982.

¹⁵ That the carrier may establish reasonable regulations see: Coyle v. Southern R. Co., 112 Ga. 121; s. c. 37 S. E. Rep. 163.

verted by the opportunity for conversation with a fellow servant.¹⁶ An ordinance, providing that conductors shall not allow ladies or children to leave or enter cars while in motion, has been upheld against a contention that it imposes on the carrier the duty of controlling the acts of passengers.¹⁷

§ 3107. Reasonableness of such Regulations a Question of Law.¹⁸

§ 3115. Effect of the Habitual Violation of its Rules by the Carrier.¹⁹—A passenger cannot rely on the customary violation of a rule as an excuse for its disobedience by him, where the carrier's employes sought to enforce the particular rule in his case, since it is plain that the custom did not influence his action.²⁰

§ 3121. Classification of Passengers According to Color.²¹

§ 3132. Prohibiting Passengers from Riding on the Platform of the Cars.²²

§ 3136. Validity of Various Regulations of Steam Railway Carriers.—Rules fixing the route by which passengers should enter and leave trains,²³ against the carriage of animals by passengers,²⁴ and forbidding passengers to sleep in the waiting-rooms or lie down on the benches therein, have been sustained as reasonable regulations.²⁵

¹⁶ *Rowe v. Brooklyn Heights R. Co.*, 71 App. Div. (N. Y.) 474; s. c. 75 N. Y. Supp. 893.

¹⁷ *McHugh v. St. Louis Transit Co.*, 190 Mo. 85; s. c. 88 S. W. Rep. 853.

¹⁸ See generally in support: *Central of Georgia R. Co. v. Motes*, 117 Ga. 923; s. c. 43 S. E. Rep. 990; *O'Gorman v. New York & C. R. Co.*, 96 App. Div. (N. Y.) 594; s. c. 89 N. Y. Supp. 589; *Weber v. Southern R. Co.*, 65 S. C. 356; s. c. 43 S. E. Rep. 888.

¹⁹ A carrier may waive a rule by long-continued acquiescence in its disregard: *Greenfield v. Detroit & C. R. Co.*, 133 Mich. 557; s. c. 95 N. W. Rep. 546; 10 Det. Leg. N. 256. Whether the rule has been waived in this manner is properly a question of fact for the jury: *Sweetland v. Lynn & C. R. Co.*, 177 Mass. 574; s. c. 59 N. E. Rep. 443; 51 L. R. A. 783; *Burns v. Boston Elevated R. Co.*, 183 Mass. 96; s. c. 66 N. E. Rep. 418.

²⁰ *Houston & C. R. Co. v. Bryant*, 31 Tex. Civ. App. 483; s. c. 72 S. W. Rep. 885.

²¹ A complaint in an action to recover damages for requiring plain-

tiff to occupy a seat in a coach set apart for negroes is insufficient which fails to allege that the plaintiff was a white person, or entitled to ride in the coach for white passengers: *Southern R. Co. v. Thurman*, 76 S. W. Rep. 499; s. c. 25 Ky. L. Rep. 804.

²² That a rule forbidding passengers from riding on the platform unless at their own risk is a reasonable regulation, and its violation will preclude a recovery for injuries received while so riding, see: *Montgomery v. Buffalo R. Co.*, 165 N. Y. 139; s. c. 58 N. E. Rep. 770; aff'g s. c. 48 N. Y. Supp. 849; *Burns v. Boston Elevated R. Co.*, 183 Mass. 96; s. c. 66 N. E. Rep. 418; *Sweetland v. Lynn & C. R. Co.*, 177 Mass. 574; s. c. 59 N. E. Rep. 443; 51 L. R. A. 783; *Augusta R. & C. Co. v. Smith*, 121 Ga. 29; s. c. 48 S. E. Rep. 681.

²³ *Chicago & C. R. Co. v. Harrison*, 100 Ill. App. 211.

²⁴ *O'Gorman v. New York & C. R. Co.*, 96 App. Div. (N. Y.) 594; s. c. 89 N. Y. Supp. 589 (dogs); *Daniel v. North Jersey St. R. Co.*, 64 N. J. L. 603; s. c. 46 Atl. Rep. 625 (goats).

²⁵ *Central of Georgia R. Co. v.*

§ 3149. **Regulations as to Mileage Books.**—There is a general recognition of the right of the carrier to issue a mileage ticket conditioned on its use by the purchaser and its forfeiture if presented by another.²⁶ Under the New York statute it is held that the carrier may not exact as a condition to the use of a mileage ticket that the passenger's entire journey shall be performed within the State; such a condition will be construed to mean that the ticket will be accepted for only so much of the journey as lies within the State where the ticket is tendered for a point without the State.²⁷ There is a holding that a mileage book, at the death of the person to whom it is issued, goes to his personal representatives and cannot be used by a surviving husband or wife to transport the corpse of the purchaser.²⁸

§ 3154a. **Regulations Peculiar to Carriage of Passengers on Freight and Stock Trains.**²⁹

§ 3156. **Such as Requiring Passengers to Purchase Tickets before Boarding the Train.**—These regulations cannot be set aside by station agents. Thus, where a railroad company's rules required a passenger wishing to ride on a freight train to sign a special permit to be obtained from its ticket agent or conductor, it was held that the act of an agent in selling a ticket to a person to travel on a freight train without mentioning the permit did not create an unconditional contract to carry the purchaser, as the rule was a reasonable one, and the purchaser was bound to know that the company could make reasonable rules regarding transportation of passengers on freight trains.³⁰

§ 3162. **General Doctrine as to Liability of Master for Malicious Torts of his Servant.**³¹

§ 3169. **Carrier Obligated to Transport Passenger in Safety, and Defend him from the Unauthorized Trespasses of his Own Servants.**³²

Motes, 117 Ga. 923; s. c. 43 S. E. Rep. 990.

²⁶ Delaware &c. R. Co. v. Frank, 110 Fed. Rep. 689; Eastman v. Maine Cent. R., 70 N. H. 240; s. c. 46 Atl. Rep. 54.

²⁷ Horton v. Erie R. Co., 65 App. Div. (N. Y.) 587; s. c. 72 N. Y. Supp. 1018.

²⁸ Minish v. Southern R. Co., 135 N. C. 342; s. c. 47 S. E. Rep. 432.

²⁹ That a railroad carrier has a right to prescribe the conditions on which passengers may ride on its freight trains, see: Greenfield v. Detroit &c. R. Co., 133 Mich. 557; s. c. 95 N. W. Rep. 546; 10 Det. Leg. N. 256.

³⁰ Ellis v. Houston &c. R. Co., 30 Tex. Civ. App. 172; s. c. 70 S. W. Rep. 114.

³¹ That a corporation is liable for the malicious torts of its servants within the scope of their employment to the same extent as individual employers, see: Grayson v. St. Louis Transit Co., 100 Mo. App. 60; s. c. 71 S. W. Rep. 730; O'Donnell v. St. Louis Transit Co., 107 Mo. App. 34; s. c. 80 S. W. Rep. 315.

³² There is an implied condition in the agreement of the carrier with each passenger that he shall not be put in jeopardy by even the slightest fault of the carrier: Clerc v. Morgan's &c. R. Co., 107 La. 370;

§ 3171. **Decisions which Exonerate the Carrier where his Servant Steps Outside the Line of his Duty.**—In one case the company was absolved from liability for the misconduct of a motorman in ejecting a boy who was trying to ride on the running board of the car, as this was clearly outside of the scope of the motorman's duties, his business being to give his entire and undivided attention to the movement of the car.³³ In another case a recovery was refused where the misconduct of the conductor consisted merely in questioning the accuracy of the answer of a passenger as to the age of a child accompanying him.³⁴ It is essential, of course, to the operation of all these doctrines and principles that the relation of carrier and passenger should exist at the time of the commission of the tort; they are inapplicable after the termination of the relation.³⁵

§ 3172. **Decisions which put the Liability on the Footing of Respondeat Superior.**—The conductor is generally regarded as an agent and representative of the carrier, and his act in committing an assault is regarded as the act of the company.³⁶

§ 3180. **What Will Excuse the Carrier in so Acting.**—Under the following circumstances the carrier was absolved from liability for the

s. c. 31 South. Rep. 886. It follows logically from the doctrine holding the carrier to an extraordinary degree of care in the transportation of a passenger, that he should also defend him from the trespasses of his employés, whether willful and malicious or not, and even though such acts are not done in the course or within the scope of the servant's employment: *Birmingham R. & Co. v. Baird*, 130 Ala. 334; s. c. 30 South. Rep. 456; 54 L. R. A. 752; *Birmingham R. & Co. v. Mason*, 137 Ala. 342; s. c. 34 South. Rep. 207; *Citizens' St. R. Co. v. Clark*, 33 Ind. App. 190; s. c. 71 N. E. Rep. 53; *Missouri Pac. R. Co. v. Divinney*, 66 Kan. 776; s. c. 71 Pac. Rep. 855; *rev'g s. c. 69 Pac. Rep. 351*; *Johnson v. Detroit & C. R.*, 130 Mich. 453; s. c. 90 N. W. Rep. 274; 9 Det. Leg. N. 123; *Taillon v. Mears*, 29 Mont. 161; s. c. 74 Pac. Rep. 421. The doctrine of *res ipsa loquitur* obtains, and negligence is inferred where a passenger is injured by the willful assault of the conductor: *Kohner v. Capital Traction Co.*, 22 App. (D. C.) 181; s. c. 62 L. R. A. 875.

³³ *Drolshagen v. Union Depot R. Co.*, 186 Mo. 258; s. c. 85 S. W. Rep. 344.

³⁴ *Grayson v. St. Louis Transit Co.*, 100 Mo. App. 60; s. c. 71 S. W. Rep. 730.

³⁵ *Chicago & C. R. Co. v. Stratton*, 111 Ill. App. 142; *Reilly v. New York City R. Co.*, 46 Misc. (N. Y.) 72; s. c. 91 N. Y. Supp. 319; *Palmer v. Winston-Salem R. & Co.*, 131 N. C. 250; s. c. 42 S. E. Rep. 604. An instruction that if, at the time assaulted, plaintiff was waiting on the platform to have a fight with the conductor, by mutual agreement previously entered into, and the fight between them at the time and place where it occurred was the result of the mutual agreement to fight at that time and place, the company would not be liable, was not erroneous, as requiring the jury to find that they agreed to have a personal combat at the time and place it occurred: *Houston & C. R. Co. v. Batchler*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 902.

³⁶ *Central of Georgia R. Co. v. Brown*, 113 Ga. 414; s. c. 38 S. E. Rep. 989; *Galveston & C. R. Co. v. La Prelle*, 27 Tex. Civ. App. 496; s. c. 65 S. W. Rep. 488; *St. Louis & C. R. Co. v. Johnson*, 29 Tex. Civ. App. 184; s. c. 68 S. W. Rep. 58.

assault of his servant upon a passenger:—Where a passenger, by his persistent violation of a rule against passengers sleeping on benches in the waiting room, exasperated the attendant to such an extent as to cause him to lose his temper;³⁷ where an assault was provoked by the passenger's violence;³⁸ where it was committed in self-defense by the employé to save himself from bodily harm;³⁹ but this last defense will not avail where there was no occasion for the assault, though the conductor honestly and mistakenly supposed there was.⁴⁰ Another line of cases holds that it is no justification for an assault by a conductor that the passenger applied abusive language and epithets to him,⁴¹ or that he was guilty of provoking conduct,⁴² or that he had on a former occasion assaulted the conductor.⁴³ The conduct of the passenger tending to provoke an assault may, however, be shown in mitigation of exemplary damages, where such damages are demanded.⁴⁴

§ 3182. **Ratification of the Misconduct of Servant.**—Thus, a finding that the servant's act was ratified was upheld where it was shown that the conductor was prosecuted for the assault before a justice of the peace, and that his employer defended him by its attorneys, and that its general manager was present at the trial and paid the conductor's fine, and that he was retained in the company's employ thereafter.⁴⁵

§ 3185. **Liable for Insults as well as for Assaults.**⁴⁶

³⁷ Central of Georgia R. Co. v. Motes, 117 Ga. 923; s. c. 43 S. E. Rep. 990.

³⁸ James v. Metropolitan St. R. Co., 80 App. Div. (N. Y.) 364; s. c. 80 N. Y. Supp. 710.

³⁹ Murphy v. St. Louis Transit Co., 96 Mo. App. 272; s. c. 70 S. W. Rep. 159; Birmingham R. & Co. v. Mullen, 138 Ala. 614; s. c. 35 South. Rep. 701.

⁴⁰ Birmingham R. & Co. v. Mullen, 138 Ala. 614; s. c. 35 South. Rep. 701.

⁴¹ Birmingham R. & Co. v. Baird, 130 Ala. 334; s. c. 30 South. Rep. 456; 54 L. R. A. 752; Birmingham R. & Co. v. Mullen, 138 Ala. 614; s. c. 35 South. Rep. 701. Where the issue was whether the assault was committed under the influence of passion aroused by insulting words, an instruction was proper which required the jury to find both that sufficient time elapsed between the use of insulting words by plaintiff and the time of the assault for cool reflection, and that the assault was

the result of cool deliberation of the conductor, before they could ignore the mitigating effect of the insulting words by plaintiff to the conductor: Houston & C. R. Co. v. Batchler, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 902.

⁴² Galveston & C. R. Co. v. La Prelle, 27 Tex. Civ. App. 496; s. c. 65 S. W. Rep. 488.

⁴³ Galveston & C. R. Co. v. La Prelle, 27 Tex. Civ. App. 496; s. c. 65 S. W. Rep. 488.

⁴⁴ Galveston & C. R. Co. v. La Prelle, 27 Tex. Civ. App. 496; s. c. 65 S. W. Rep. 488.

⁴⁵ Denison & C. R. Co. v. Randell, 29 Tex. Civ. App. 460; s. c. 69 S. W. Rep. 1013.

⁴⁶ Passengers are entitled to courteous treatment at the hands of trainmen and may recover damages for injuries to the feelings occasioned by insulting language addressed to them by the conductor or other operatives of the train: Birmingham R. & Co. v. Baird, 130 Ala. 334; s. c. 30 South. Rep. 456;

§ 3195. **Unlawful Ejection Actionable per se.**—Likewise the carrier will be responsible for the malicious and wanton conduct of his servant in ejecting a passenger, whether in the line of his particular service or not, if it is done while he is engaged in the discharge of his duty to his employer in a matter relating to the passenger's transportation.⁴⁷

§ 3200. **What Amounts to an Expulsion such as Gives this Right of Action.**⁴⁸

§ 3201. **Doctrine that Passenger must Submit to the Illegal Demand to Avoid Expulsion.**⁴⁹

§ 3202. **Doctrine that the Passenger cannot Recover for the Tort of Expelling him, but only for the Breach of the Contract.**—It has been held in Maryland that a passenger ejected from a train because of a defect in his ticket—as for example, the failure to describe the passenger's personal appearance, due to negligence in punching the ticket—must bring his action for breach of the contract and not in tort.⁵⁰

§ 3203. **Doctrine that the Passenger may Rightfully Resist Expulsion, and then Recover Damages for the Injuries Visited upon him in Overcoming his Resistance.**—It may not be unprofitable to again say that a passenger, rightfully on a train and refused transportation for some groundless reason, has the right to refuse to be ejected there-

54 L. R. A. 752; *Murphy v. St. Louis Transit Co.*, 96 Mo. App. 272; s. c. 70 S. W. Rep. 159; *Shaefer v. Missouri Pac. R. Co.*, 98 Mo. App. 445; s. c. 72 S. W. Rep. 154; *Gillespie v. Brooklyn Heights R. Co.*, 178 N. Y. 347; s. c. 70 N. E. Rep. 857; rev'g s. c. 81 N. Y. Supp. 1127. A railroad conductor, in a loud and insulting manner, addressed a passenger, in the hearing of her children and other passengers: "The idea of a woman trying to board a train with her child without a ticket! You can go on this time, but don't undertake such a thing again." It was held, that a charge of dishonesty, in that she was attempting to have her child transported without paying fare, could reasonably be inferred and his language was actionable: *Texas & C. R. Co. v. Tarkington*, 27 Tex. Civ. App. 353; s. c. 66 S. W. Rep. 137. A recovery of damages by a passenger was sustained where the passenger was carried past her destination against her

will, and thereafter the motorman addressed her in an insulting manner, and shook his fingers and an iron bar in her face: *San Antonio Traction Co. v. Crawford* (Tex. Civ. App.), 71 S. W. Rep. 306.

⁴⁷ *Tanger v. Southwest Missouri & C. R. Co.*, 85 Mo. App. 28.

⁴⁸ The leaving of a train by a passenger whose ticket the conductor has refused to accept, in obedience to the conductor's command to the porter to see that the passenger got off at the next station, is an ejection: *Boling v. St. Louis & C. R. Co.*, 189 Mo. 219; s. c. 88 S. W. Rep. 35.

⁴⁹ These cases hold that it was not necessary for the passenger to pay fare to avoid wrongful expulsion: *Texas & C. R. Co. v. Lynch* (Tex. Civ. App.), 73 S. W. Rep. 65; *Texas & C. R. Co. v. Payne*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 330.

⁵⁰ *Western Maryland R. Co. v. Schaun*, 97 Md. 563; s. c. 55 Atl. Rep. 701.

from, and to make sufficient resistance to show that he is being removed by compulsion and against his will.⁵¹

§ 3204. Circumstances which Bar Right of Action for the Expulsion.⁵²

§ 3208. Résumé of Circumstances Justifying Ejection of Passenger.—Recent decisions justify the expulsion of the passenger where he boards a train made up exclusively of Pullmans without first purchasing a berth ticket;⁵³ or offers a coupon not entitling him to passage on the particular train, and this, though the proper coupon had been taken up by a preceding conductor;⁵⁴ or, holding an excursion ticket entitling him to ride on a particular train, he attempts to ride on another train;⁵⁵ or boards a train without the return ticket which his contract entitles him to, but which had been refused him by the agent at the return point.⁵⁶

§ 3209. Ejection for Refusing to Pay Fare.—A conductor is not required to accept a passenger's jewelry or other personal property as a pledge for his fare, especially where the rules of the carrier require a ticket or fare in money.⁵⁷

§ 3210. Circumstances under which Passenger Rightly Expelled on this Ground.—Ejections have been held rightful under these circumstances:—Where a street railroad passenger refused a transfer to another line, instead of leaving the car, continued thereon to the end of the line and on the return trip refused to pay any fare;⁵⁸ where a passenger having purchased a ticket was unable to produce it because he had placed it in the custody of another passenger who had missed the train, and he refused to pay fare;⁵⁹ where a passenger with a coupon ticket torn from a coupon book in violation of its conditions, was un-

⁵¹ *Erie R. Co. v. Littell*, 128 Fed. Rep. 546; s. c. 63 C. C. A. 44; *Breen v. St. Louis Transit Co.*, 108 Mo. App. 443; s. c. 83 S. W. Rep. 998.

⁵² It was held that there was not an ejection where a passenger whose ticket the conductor refused to accept, voluntarily left the train against his advice that she remain and allow him to hold her baggage check as security for passage, to be paid if the company agreed with him that the ticket was not good: *Boling v. St. Louis & C. R. Co.*, 189 Mo. 219; s. c. 88 S. W. Rep. 35.

⁵³ *Ames v. Southern Pac. Co.*, 141 Cal. 728; s. c. 75 Pac. Rep. 310.

⁵⁴ *Brown v. Rapid R. Co.*, 134 Mich. 591; s. c. 96 N. W. Rep. 925; 10 Det. Leg. N. 579.

⁵⁵ *England v. International & C. R. Co.*, 32 Tex. Civ. App. 86; s. c. 73 S. W. Rep. 24.

⁵⁶ *Wilt v. Wabash R. Co.*, 21 Ohio Cir. Ct. R. 579; s. c. 11 O. C. D. 589.

⁵⁷ *Texas & C. R. Co. v. Smith*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 852.

⁵⁸ *Hoelljes v. Interurban St. R. Co.*, 43 Misc. (N. Y.) 350; s. c. 87 N. Y. Supp. 133.

⁵⁹ *Nutter v. Southern R.*, 78 S. W. Rep. 470; s. c. 25 Ky. L. Rep. 1700.

able to produce the book by reason of having left it at home and then refused to pay the proper fare.⁶⁰

§ 3211. Circumstances where Passenger Wrongfully Expelled on this Ground.—The ejection was held unlawful and actionable where the passenger claimed that he gave his ticket to the conductor and that his ejection was caused by his refusal to pay a second fare, and his claim was sustained by the testimony of eye-witnesses.⁶¹ In a case where a street railway inspector, in ejecting an employé from a seat in a car, acted under a mistaken impression that the rules forbade the employé to occupy the seat, it was held that his act would not be justified on the ground that he had authority to make rules which the employé was bound to obey.⁶²

§ 3213. Passenger Presenting a Ticket having a Time Limit which has Expired.—A conductor is justified in refusing to honor a ticket⁶³ or transfer⁶⁴ on which the time limit has expired and may expel the passenger if he refuses to pay the proper fare. He is not required to return the void ticket to the passenger.⁶⁵ If, however, the carrier does not run its trains on time and the ticket holder boards the first available train on the date of expiration, he is entitled to transportation and the conductor has no right to eject him on the ground that the limit of his ticket has expired.⁶⁶ A ticket which correctly states the date of its issuance is not rendered invalid by reason of the date having been incorrectly punched.⁶⁷

§ 3215. Where Another Passenger Tenders the Proper Fare.—It is believed to be the general rule that the carrier must receive money tendered by other passengers to pay the fare of a passenger who refuses to pay except by a ticket claimed by the conductor to be invalid.⁶⁸

§ 3216. Refusing Either to Exhibit Ticket or Pay Fare.—As between the conductor and the passenger, the passenger's right to travel depends upon the production of a ticket or the payment of a cash fare;⁶⁹ and the conductor is not required to give heed to explanations

⁶⁰ *United Railways &c. Co. v. Hardesty*, 94 Md. 661; s. c. 51 Atl. Rep. 406.

⁶¹ *Alabama &c. R. Co. v. Bell* (Miss.), 29 South. Rep. 818.

⁶² *Rowe v. Brooklyn Heights R. Co.*, 80 App. Div. (N. Y.) 477; s. c. 81 N. Y. Supp. 106.

⁶³ *Louisville &c. R. Co. v. Klyman*, 108 Tenn. 304; s. c. 67 S. W. Rep. 472; 56 L. R. A. 769.

⁶⁴ *Garrison v. United Railways &c. Co.*, 97 Md. 347; s. c. 55 Atl. Rep. 371.

⁶⁵ *Elliott v. Southern Pac. Co.*, 145 Cal. 441; s. c. 79 Pac. Rep. 420.

⁶⁶ *Marx v. Louisiana Western R. Co.*, 112 La. 1085; s. c. 36 South. Rep. 862.

⁶⁷ *Jevons v. Union Pac. R. Co.*, 70 Kan. 491; s. c. 78 Pac. Rep. 817.

⁶⁸ *Randell v. Chicago &c. R. Co.*, 102 Mo. App. 342; s. c. 76 S. W. Rep. 493.

⁶⁹ *McGraw v. Southern R. Co.*, 135 N. C. 264; s. c. 47 S. E. Rep. 758; *Harp v. Southern R. Co.*, 119 Ga. 927; s. c. 47 S. E. Rep. 206; *Bray-*

offered by a passenger unprovided with either.⁷⁰ It has been righteously observed by one court that the act of a person in permitting his wife to take passage on a train without a ticket and without money to pay her fare, knowing that her attempt so to ride would result in her ejection, is such contributory negligence on his part as to preclude him from recovering damages caused by her ejection, irrespective of whether a fellow passenger, accompanying her, had money to pay her fare if the same was demanded by the conductor.⁷¹

§ 3217. Exception where the Passenger has Lost his Ticket.—Generally speaking, a passenger has no right to be carried on offer to prove that he has lost his ticket. These tickets are generally unlimited as to the person entitled to use them, and the effect of allowing a person to travel on proof of loss of his ticket would amount to allowing two persons to ride on one fare, since the finder of such a ticket could also present it and ride thereon;⁷² neither does the possession of a baggage check to a certain point conclusively show that its holder had a ticket for such a point.⁷³ But a carrier will be responsible for the negligence of its baggage agent in losing or misplacing a passenger's ticket.⁷⁴

§ 3218. Ejection for Refusing to Pay Extra Fare on Train for not Purchasing Ticket.—The right of the carrier to enforce a rule requiring a passenger unprovided with a ticket to pay an extra fare,⁷⁵ unless the carrier has failed to furnish an opportunity for the purchase of these tickets, is generally⁷⁶ but not universally⁷⁷ sustained by the courts.

§ 3221. Tendering Fare after Train Stopped.⁷⁸

mer v. Seattle &c. R. Co., 35 Wash. 346; s. c. 77 Pac. Rep. 495.

⁷⁰ Pittsburgh &c. R. Co. v. Daniels, 90 Ill. App. 154.

⁷¹ Galveston &c. R. Co. v. Scott, 34 Tex. Civ. App. 501; s. c. 79 S. W. Rep. 642.

⁷² Harp v. Southern R. Co., 119 Ga. 927; s. c. 47 S. E. Rep. 206.

⁷³ Texas &c. R. Co. v. Smith, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 852.

⁷⁴ Galveston &c. R. Co. v. Scott, 34 Tex. Civ. App. 501; s. c. 79 S. W. Rep. 642.

⁷⁵ Chicago &c. R. Co. v. Stratton, 111 Ill. App. 142; Houston &c. R. Co. v. Faulkner (Tex. Civ. App.), 63 S. W. Rep. 655; Ammons v. Southern R. Co., 138 N. C. 555; s. c. 51 S. E. Rep. 127.

⁷⁶ Phillips v. Southern R. Co., 114 Ga. 284; s. c. 40 S. E. Rep. 268;

Bowsher v. Chicago &c. R. Co., 113 Iowa 16; s. c. 84 N. W. Rep. 958; Rivers v. Kansas City &c. R. Co., 86 Miss. 571; s. c. 38 South. Rep. 508; Monnier v. New York &c. R. Co., 70 App. Div. (N. Y.) 405; s. c. 75 N. Y. Supp. 521; Ammons v. Southern R. Co., 138 N. C. 555; s. c. 51 S. E. Rep. 127; Ammons v. Southern R. Co., 138 N. C. 555; s. c. 51 S. E. Rep. 127.

⁷⁷ Kennedy v. Birmingham R. &c. Co., 138 Ala. 225; s. c. 35 South. Rep. 108; Ford v. East Louisiana R. Co., 110 La. 414; s. c. 34 South. Rep. 585.

⁷⁸ It is the general rule that when the conductor has given a passenger a reasonable time and opportunity to pay his fare, and the passenger has refused, and the conductor has commenced the process of ejecting the passenger, the ejection may be

§ 3222. Ejection for Failure to have Return-Trip Ticket Stamped.

—At least one court has soundly concluded that a passenger having used due diligence to have his return ticket stamped and failed, is entitled to return on the ticket unstamped and that his ejection from the train on this ground is unlawful and actionable, and that such a passenger does not lose his right of action for the tort by reason of returning to the point where he boarded the train and having the ticket signed and stamped as required by its conditions.⁷⁹

§ 3223. Rule where One Conductor Gives the Passenger an Erroneous Transfer Ticket which the Next Conductor Refuses to Honor.

—It is a reasonable requirement of a street railroad carrier that a passenger, intending to complete his journey over a connecting line by the payment of a single fare, should obtain and present to the conductor of the connecting line a transfer giving him this right.⁸⁰ It is not a sufficient excuse for abrogating the rule that the conductor on the initial car could and did shout to the conductor of the connecting car that a transferring passenger should be passed.⁸¹ The passenger has performed his duty where he asks for the proper transfer and is not charged with notice of errors and defects in the transfer given him. The law does not require the passenger critically to examine his transfer to see that it is properly punched. It is the duty of the conductor of the connecting line to listen to the explanation of the passenger and the carrier will be liable for the ejection of a passenger who solicited a proper transfer and was expelled from the car on which he was to continue his journey because of the mistake of the conductor issuing the transfer.⁸²

§ 3224. Ejecting Passenger for Refusing to Pay Fare where Ticket has been Wrongfully Taken Up.⁸³

completed, even though a fare is tendered: *Garrison v. United Railways &c. Co.*, 97 Md. 347; s. c. 55 Atl. Rep. 371; *Behr v. Erie R. Co.*, 69 App. Div. (N. Y.) 416; s. c. 74 N. Y. Supp. 1007. But see *Holt v. Hannibal &c. R. Co.*, 174 Mo. 524; s. c. 74 S. W. Rep. 631; aff'g 87 Mo. App. 203.

⁷⁹ *Southern R. Co. v. Wood*, 114 Ga. 140; s. c. 39 S. E. Rep. 894; 55 L. R. A. 536.

⁸⁰ *Hornesby v. Georgia R. &c. Co.*, 120 Ga. 913; s. c. 48 S. E. Rep. 339.

⁸¹ *Crowley v. Fitchburg &c. R. Co.*, 185 Mass. 279; s. c. 70 N. E. Rep. 56.

⁸² *Kiley v. Chicago City R. Co.*, 90 Ill. App. 275; s. c. aff'd, 189 Ill. 384;

59 N. E. Rep. 794; *Indianapolis St. R. Co. v. Wilson*, 161 Ind. 153; s. c. 66 N. E. Rep. 950; 67 N. E. Rep. 993; *Citizens' St. R. Co. v. Clark*, 33 Ind. App. 190; s. c. 71 N. E. Rep. 53; *Hayter v. Brunswick Traction Co.*, 68 N. J. L. 575; s. c. 49 Atl. Rep. 714; *Jacobs v. Third Ave. R. Co.*, 71 App. Div. (N. Y.) 199; s. c. 10 N. Y. Ann. Cas. 462; 75 N. Y. Supp. 679; rev'g s. c. 34 Misc. (N. Y.) 512; 69 N. Y. Supp. 981; *Moon v. Interurban St. R. Co.*, 85 N. Y. Supp. 363; *Memphis St. R. Co. v. Graves*, 110 Tenn. 232; s. c. 75 S. W. Rep. 729; *Lawshe v. Tacoma R. &c. Co.*, 29 Wash. 681; s. c. 70 Pac. Rep. 118; 59 L. R. A. 350.

⁸³ Where a conductor takes up a ticket containing a stop-over privi-

§ 3225. **Ejection Caused by Mistake of Ticket Agent.**—A carrier has no right to expose a passenger to the indignity of a public ejection from the train because of the mistake or negligence of its agent in issuing his ticket, and will be liable in damages for injuries resulting from an ejection for this cause.⁸⁴ In a case where the ticket agent informed the holder of an interchangeable mileage ticket, which required him to procure exchange transportation tickets at stations, that he could not furnish such tickets because his supply was exhausted, but that the passenger could ride on his mileage, it was held that this statement was binding on the carrier, and it was liable for damages caused by the passenger's ejection on the refusal of the conductor to accept the mileage for transportation.⁸⁵ So it has been held that a passenger purchasing a ticket for a certain station could rely on the representation of the ticket agent that the train would stop at such station unless he knew or had reason to believe that the information was incorrect, and could recover damages for expulsion by the conductor solely on the ground that the train did not stop at the station in question.⁸⁶

§ 3227. **Ejection of Persons from Freight Trains.**⁸⁷

§ 3230. **Ejection because Train does not Stop at the Place Called For by the Passenger's Ticket.**—It is the generally accepted rule that

lege over the objection of the passenger, the passenger may stop over and resume his journey, and he will not be held guilty of contributory negligence, as a matter of law, in attempting to finish the ride without a ticket: *Scofield v. Pennsylvania R. Co.*, 112 Fed. Rep. 855; s. c. 50 C. C. A. 553.

⁸⁴ *Erie R. Co. v. Littell*, 128 Fed. Rep. 546; s. c. 63 C. C. A. 44; *Southern R. Co. v. Bunnell*, 138 Ala. 247; s. c. 36 South. Rep. 380; *Kiley v. Chicago City R. Co.*, 90 Ill. App. 275; s. c. aff'd, 189 Ill. 384; 59 N. E. Rep. 794; *Illinois Cent. R. v. Jackson*, 117 Ky. 900; s. c. 79 S. W. Rep. 1187; 25 Ky. L. Rep. 2087.

⁸⁵ *Pittsburgh & C. R. Co. v. Street*, 26 Ind. App. 224; s. c. 59 N. E. Rep. 404. But see *contra*, *Robb v. Pittsburgh & C. R. Co.*, 14 Pa. Super. Ct. 282.

⁸⁶ *Atkinson v. Southern R. Co.*, 114 Ga. 146; s. c. 39 S. E. Rep. 888; 55 L. R. A. 223.

⁸⁷ On railroads requiring the possession of a permit issued by the station agent as a condition to riding on a freight train, a passenger may be expelled where he attempts

to travel on a freight train without such a permit: *Houston & C. R. Co. v. Stell*, 28 Tex. Civ. App. 280; s. c. 67 S. W. Rep. 537. Where a passenger requests a permit to ride on a certain train when he purchases a ticket, and is told by the agent that the conductor will give him one, the company is liable for his ejection by the conductor for the failure to have such permit, since the duty to furnish the permit is a part of the contract of carriage: *Houston & C. R. Co. v. White* (Tex. Civ. App.), 61 S. W. Rep. 436. Where a person in good faith enters a freight train as a passenger, and in possession of a ticket good on the train when accompanied by a permit, the fact that he is informed by the brakeman, prior to demand by the conductor for his ticket and permit, that the rules require a permit in connection with the ticket, does not make it the duty of the passenger to leave the train at a station at which a stop was made after receiving the information, and before the conductor's demand: *Houston & C. R. Co. v. Berry*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 258.

a passenger, purchasing a ticket for transportation to a station, contracts to travel on a train scheduled to stop at that station, and that he cannot, on boarding a train not scheduled to stop there, compel the conductor to accept his ticket or recover damages from the carrier for his expulsion from the train.⁸⁸ Such a passenger may be ejected at any reasonably safe place; the carrier is not required to carry him to a place where it will be convenient for him to get off the train.⁸⁹

§ 3234. **Expulsion of Drunken, Sick or Insane Passengers.**—In another case a carrier was held liable for the ejection of a drunken passenger in the night, for a failure to hand the conductor his ticket when commanded, the passenger having the ticket to the knowledge of the conductor, and the failure to heed the conductor's request being due to the passenger's condition and not to a desire to withhold the ticket.⁹⁰ It has been held that a conductor may eject a passenger who acts in such a manner as to justify the inference that he is intoxicated, and he falls into a sleep or stupor which the conductor is unable to break by shaking him.⁹¹

§ 3236. **Expulsion of Disorderly Passengers.**—The carrier has the undoubted right to eject disorderly and vicious passengers.⁹² The reply of a passenger who had tendered a folded transfer to a conductor, who commanded him to unfold it, "Damned if I am going to unfold it; unfold it yourself," has been held neither profane, nor obscene, and hence not sufficient to justify his ejection.⁹³

§ 3239. **Ejection for Refusing to Obey Reasonable Rules of Carrier.**—The rule of a street railway company forbidding the carrying of unwieldy packages is a reasonable regulation, and the decision of a conductor that a package is within the rule will be sustained unless the decision is unreasonable and willful.⁹⁴ A carrier may properly eject from an excursion train a person thereon engaged in traffic in the return portions of the tickets held by the passengers.⁹⁵ A rule

⁸⁸ *Hancock v. Louisville & C. R. Co.*, 85 S. W. Rep. 210; s. c. 27 Ky. L. Rep. 434; *Flood v. Chesapeake & C. R. Co.*, 80 S. W. Rep. 184; s. c. 25 Ky. L. Rep. 2135.

⁸⁹ *New York & C. R. Co. v. Willing*, 24 Ohio Cir. Ct. R. 474.

⁹⁰ *Clark v. Harrisburg Traction Co.*, 20 Pa. Super. Ct. 76.

⁹¹ *Hudson v. Lynn & C. R. Co.*, 178 Mass. 64; s. c. 59 N. E. Rep. 647.

⁹² *Atchison & C. R. Co. v. Wood* (Tex. Civ. App.), 77 S. W. Rep. 964; *Gallegly v. Kansas City & C. R. Co.*, 83 Miss. 171; s. c. 35 South. Rep. 420 (quarrelsome passenger pro-

cured a pistol and threatened to kill the conductor, and throughout altercation used profane and abusive language within earshot of an open coach occupied by women passengers).

⁹³ *El Paso Electric R. Co. v. Alderete*, 36 Tex. Civ. App. 142; s. c. 81 S. W. Rep. 1246.

⁹⁴ *Ray v. United Traction Co.*, 96 App. Div. (N. Y.) 48; s. c. 89 N. Y. Supp. 49.

⁹⁵ *Ford v. East Louisiana R. Co.*, 110 La. 414; s. c. 34 South. Rep. 535.

of a street railroad company forbidding its employes while riding free on its cars to occupy front seats in open cars applies only to employes riding free, and will not justify an assault and an ejection of an employe riding in such a seat in uniform, but paying his fare.⁹⁶

§ 3244. Places at which Persons may be Ejected from Railway Trains.—A passenger, given time to alight at his destination and failing to do so, may be put off at the place where the discovery is made that he has passed his station; the carrier is not required to return him to his station.⁹⁷ In a case where the passenger, after being lawfully ejected, was injured by his own wrongful conduct in running beside the moving train with the intention of getting on again, it was held that the carrier was under no legal obligation to stop the train for the purpose of finding out the extent of his injuries.⁹⁸

§ 3245. Ejection at an Improper or Dangerous Place.—In case a passenger is carried beyond his station, through no fault of his own, the carrier may not arbitrarily and violently put him off at a place where there is no dwelling house and remote from any station, and if he is put off under such circumstances he is entitled to recover substantial damages.⁹⁹ It is the duty of the conductor to listen to the explanation of a passenger as to how she came to take the wrong train. In a case where the passenger told the conductor that the ticket agent who sold her the ticket she tendered and the conductor on the previous train had both told her that her ticket entitled her to travel over that route, it was held a willful wrong warranting exemplary damages for the conductor to put her off the train unattended and in the nighttime, although he acted in a gentlemanly manner in doing so.¹⁰⁰

§ 3246. Expulsion of Drunken Passenger at Dangerous Place.¹⁰¹

§ 3247. Times, Places and Circumstances where the Expulsion of Drunken Passengers is not Unlawful.—The carrier will be held to have performed its duty where it removes the intoxicated passenger to a place sufficiently far from the track to place him out of danger, and

⁹⁶ *Rowe v. Brooklyn Heights R. Co.*, 80 App. Div. (N. Y.) 477; s. c. 81 N. Y. Supp. 106.

⁹⁷ *St. Louis & C. R. Co. v. Lewis*, 69 Ark. 584; s. c. 61 S. W. Rep. 163.

⁹⁸ *Chesapeake & C. R. Co. v. Saulsberry*, 112 Ky. 915; s. c. 66 S. W. Rep. 1051; 23 Ky. L. Rep. 2341.

⁹⁹ *Book v. Chicago & C. R. Co.*, 85 Mo. App. 76.

¹⁰⁰ *Illinois Cent. R. Co. v. Harper*, 83 Miss. 560; s. c. 35 South. Rep. 764.

¹⁰¹ Where a drunken passenger voluntarily leaves a train at a dangerous place it cannot be asserted that he was wrongfully ejected at such a place: *Bohannon v. Southern R. Co.*, 112 Ky. 106; s. c. 65 S. W. Rep. 169; 23 Ky. L. Rep. 1390.

is not required to anticipate that he will return to the tracks and be run over by later trains.¹⁰²

§ 3249. **Statutes Regulating this Subject.**—An Arkansas statute forbids railroad companies to eject passengers for refusal to pay fare, at places other than usual stopping places.¹⁰³ The word “passenger” in this statute has been held to include a person carelessly entering a train which he should have known did not stop at his destination, but which he hoped would stop there or near there, and he had a ticket for such destination, and such a person was held entitled to damages for ejection at a place other than a usual stopping place.¹⁰⁴ The statute applies only to the ejection of passengers for the nonpayment of fare, and is not available to one carried beyond his designated station because of a failure to alight at such station after an ample stop had been made.¹⁰⁵ Under the Missouri statute, which requires ejection at a usual stopping place or near a dwelling house, a carrier sued for unlawful ejection has the burden of proving that the passenger was ejected at one or the other of these places.¹⁰⁶

§ 3252. **Ejection while Train is in Motion.**—A carrier is liable for the ejection of a person while its train is moving at a rate making such action hazardous to the person ejected.¹⁰⁷ But a trespasser climbing on a rapidly moving train cannot, merely by gaining a foothold on the train, compel the company to permit him to board the train or stop the train for his convenient removal. The carrier may resist with reasonable force his efforts to board the train, though the train is moving at a considerable speed.¹⁰⁸

§ 3253. **Carrier Liable for Using Excessive Force in Effecting the Expulsion.**—A carrier is clearly liable if he uses more force in the ejection of the passenger than is reasonably necessary to effect that object.¹⁰⁹ Again, a carrier may be liable for a forcible ejection,

¹⁰² *Nash v. Southern R. Co.*, 136 Ala. 177; s. c. 33 South. Rep. 932; *Tuttle v. Cincinnati & C. R. Co.*, 80 S. W. Rep. 802; s. c. 26 Ky. L. Rep. 152; *Gaukler v. Detroit & C. R. Co.*, 130 Mich. 666; s. c. 90 N. W. Rep. 660; 9 Det. Leg. N. 215.

¹⁰³ *Sand. & H. Dig.*, § 6172.

¹⁰⁴ *St. Louis & C. R. Co. v. Harper*, 69 Ark. 186; s. c. 61 S. W. Rep. 911; 53 L. R. A. 220.

¹⁰⁵ *St. Louis & C. R. Co. v. Lewis*, 69 Ark. 81; s. c. 61 S. W. Rep. 163.

¹⁰⁶ *Holt v. Hannibal & C. R. Co.*, 87 Mo. App. 203.

¹⁰⁷ *Chicago & C. R. Co. v. Stratton*, 111 Ill. App. 142; *Indiana & C. R. Co.*

v. Ditto, 158 Ind. 669; s. c. 64 N. E. Rep. 222; *Cleveland City R. Co. v. Roebuck*, 22 Ohio Cir. Ct. R. 99; s. c. 12 O. C. D. 262; *International & C. R. Co. v. Bohannon* (Tex. Civ. App.), 71 S. W. Rep. 776.

¹⁰⁸ *Powell v. Erie R. Co.*, 70 N. J. L. 290; s. c. 58 Atl. Rep. 930.

¹⁰⁹ *Central R. Co. v. Mackey*, 103 Ill. App. 15; *McGarry v. Holyoke St. R. Co.*, 182 Mass. 123; s. c. 65 N. E. Rep. 45; *Tanger v. Southwest Missouri Electric R. Co.*, 85 Mo. App. 28; *Pledger v. Chicago & C. R. Co.*, 69 Neb. 456; s. c. 95 N. W. Rep. 1057; *Hart v. Metropolitan St. R. Co.*, 34 Misc. (N. Y.) 521; s. c. 69 N. Y.

though his servants did not touch the passenger, as, for example, where a railroad conductor told a passenger that if he did not get off he would throw him off, and followed him onto the platform and, standing over him, threatened to throw him off if he did not alight voluntarily, and, thus coerced, the passenger jumped off and was injured.¹¹⁰ Whether excessive force has been used in effecting an expulsion in a particular case is a question of fact for the jury.¹¹¹

§ 3254. Force Employed by Carrier's Servants in Self-Defense or in Overcoming Resistance.—It may be stated generally that a passenger, resisting the enforcement of a reasonable regulation of a carrier, and inviting a personal collision with the conductor, cannot sue the railroad company or the conductor for assault and battery.¹¹² The jury may consider the question whether the passenger's resistance to a reasonable demand of the carrier until an assault was made was for the purpose of enhancing his damages.¹¹³

§ 3255. Expelling Passengers in a Rude, Insolent and Insulting Manner.—But a carrier is not liable in damages to a passenger for mere rudeness of language used by a conductor toward a passenger where the language complained of is not abusive.¹¹⁴

§ 3262. Action not Restricted to Breach of Contract, but Recovery may be Had as for a Tort.¹¹⁵

§ 3265. Other Questions of Pleading in Such Actions.—An approved complaint in an action for damages for ejection alleged that the defendant was operating a railroad upon which passenger trains were run; that the plaintiff purchased from the defendant, for a reward, a ticket which entitled him to be carried as a passenger on one of the defendant's trains, and that after having purchased said ticket he boarded the train, to be carried to a station on the defendant's road, and, although the plaintiff tendered to the conductor on said train the ticket so purchased, the said conductor, in breach of the duty owing the plaintiff as a passenger, wrongfully and forcibly ejected him from

Supp. 906; St. Louis & C. R. Co. v. Johnson, 29 Tex. Civ. App. 184; s. c. 68 S. W. Rep. 58.

¹¹⁰ Indiana & C. R. Co. v. Ditto, 158 Ind. 669; s. c. 64 N. E. Rep. 222.

¹¹¹ Randell v. Chicago & C. R. Co., 102 Mo. App. 342; s. c. 76 S. W. Rep. 493.

¹¹² Monnier v. New York & C. R. Co., 175 N. Y. 281; s. c. 67 N. E. Rep. 569; rev'g s. c. 70 App. Div. (N. Y.) 405; 75 N. Y. Supp. 521.

¹¹³ Patterson v. Southern Pac. Co.,

28 Tex. Civ. App. 67; s. c. 66 S. W. Rep. 308.

¹¹⁴ Daniels v. Florida & C. R. Co., 62 S. C. 1; s. c. 39 S. E. Rep. 762.

¹¹⁵ These cases support the doctrine indicated: Southern R. Co. v. Bunnell, 138 Ala. 247; s. c. 36 South. Rep. 380; Pittsburgh & C. R. Co. v. Street, 26 Ind. App. 224; s. c. 59 N. E. Rep. 404; Perrine v. North Jersey St. R. Co., 69 N. J. L. 230; s. c. 54 Atl. Rep. 799.

the train.¹¹⁶ Other holdings relating to the subject of pleading are set out in the margin.¹¹⁷

§ 3266. **Evidence in Actions for the Ejection of Passengers.**—A presumption of malice will arise from the expulsion by the conductor of a street car, without explanation or excuse, of a passenger who presents a proper transfer but refuses to pay a cash fare.¹¹⁸ And there is a presumption, in the absence of evidence to the contrary, that the transfer tendered was in proper form and entitled the passenger to passage on the car from which he was ejected.¹¹⁹ The burden of proof is on the plaintiff to establish by a preponderance of evidence the truth

¹¹⁶ *McGhee v. Cashin*, 130 Ala. 561; s. c. 30 South. Rep. 367.

¹¹⁷ In Alabama, where the strict rules of the common law relating to pleadings obtain, a plea of the general issue imposes on the plaintiff the obligation to sustain by evidence an allegation of the complaint that the defendants were receivers of and operated the carrier's railroad: *McGhee v. Cashin*, 130 Ala. 561; s. c. 30 South. Rep. 367. The condition of the coin tendered in payment of fare is put in issue by a plea that the plaintiff tendered to the conductor a coin as a fare so worn that the conductor could not tell whether it had originally been a coin of the United States government or not, and that when the conductor declined to receive the coin the plaintiff declined to pay his fare with any other money and was ejected: *Mobile St. R. Co. v. Watters*, 135 Ala. 227; s. c. 33 South. Rep. 42. There can be no recovery based on the negligence of the conductor in leaving the passenger on a platform after ejecting him from the car with knowledge that he was so drunk as to be unable to take care of himself, unless this element is counted on in the complaint: *Moore v. Nashville & C. R. Co.*, 137 Ala. 495; s. c. 34 South. Rep. 617. A complaint stating that at the time the plaintiff was injured by the locomotive, it was in charge of, and under the management and control of, the defendant's servants, who were respectively firemen and engineer thereon, alleged by implication that the firemen had authority to eject trespassers: *Chicago & C. R. Co. v. Troup*, — Kan. —; s. c. 80 Pac. Rep. 30. Where the ejection follows a re-

fusal to carry the passenger on a connecting line without payment of fare, the complaint should set out specifically the manner in which the transfer to the second car was effected and the facts under which the passenger claimed to be lawfully on the car: *Ruebsam v. St. Louis Transit Co.*, 108 Mo. App. 437; s. c. 83 S. W. Rep. 984. Where the essence of the complaint is the excessive force and violence used in the expulsion, a variance, if any, between an allegation that the plaintiff was a passenger and proof that he was an intruder only is not material: *Randell v. Chicago & C. R. Co.*, 102 Mo. App. 342; s. c. 76 S. W. Rep. 493. An allegation that the conductor unlawfully threatened to eject the plaintiff from the car and did wrongfully, unlawfully beat and assault her, by reason whereof she was injured and greatly bruised, etc., but did not allege that she was actually put off the car, was held to state a cause of action for assault and battery only and not for ejection: *Ray v. United Traction Co.*, 96 App. Div. (N. Y.) 48; s. c. 89 N. Y. Supp. 49. An answer simply denying an allegation of a wrongful ejection and for failure to pay the proper fare does not put in issue the conduct of the passenger so as to allow evidence that he was drunk at the time of his removal: *Raynor v. Wilmington & C. R. Co.*, 129 N. C. 195; s. c. 39 S. E. Rep. 821.

¹¹⁸ *Summerfield v. St. Louis Transit Co.*, 108 Mo. App. 718; s. c. 84 S. W. Rep. 172.

¹¹⁹ *Summerfield v. St. Louis Transit Co.*, 108 Mo. App. 718; s. c. 84 S. W. Rep. 172.

of the facts alleged in his complaint.¹²⁰ The defendant on his part has the burden of proving justification for the ejection on the ground of the passenger's failure to comply with the conditions of his ticket,¹²¹ or his refusal to pay fare.¹²² The general character and disposition of either the conductor¹²³ or the passenger¹²⁴ cannot be shown in these cases unless that question is in issue. Evidence of the improper conduct of the passenger at the time is admissible in mitigation of damages.¹²⁵ It has been held proper to show that a third person offered to pay the delinquent passenger's fare, under an allegation that on a friend's offering to pay the plaintiff's fare the conductor cursed violently and said that he should not ride.¹²⁶ Evidence of negotiations between the parties for a settlement is not admissible to show a ratification by the carrier of the conductor's act.¹²⁷ Where ratification by retaining the conductor in the carrier's employment is relied on by the plaintiff, evidence is admissible for the defendant that the conductor was prosecuted criminally for his assault on the plaintiff and was acquitted of the charge.¹²⁸ The purchaser of a ticket for transportation on a freight train, and ejected because of a failure to present a permit allowing him to ride on the train required by the rules of the company, may testify that he did not know what a permit was, and did not understand that he was to be given a permit in addition to the ticket sold him.¹²⁹ Where the allegation that the plaintiff was ejected without any misconduct on his part is denied by the answer, evidence is admissible that other passengers complained of the language used by the plaintiff before his ejection.¹³⁰ Where a passenger was ejected for refusal to pay his fare, and he insisted on transportation on a scalper's ticket, evidence that the carrier had waived the nontransferable conditions in like tickets in other instances, and had encouraged the sale of the same through brokers, was not admissible as

¹²⁰ *El Paso Electric R. Co. v. Alderete*, 36 Tex. Civ. App. 142; s. c. 81 S. W. Rep. 1246.

¹²¹ *Daniels v. Florida Cent. & C. R. Co.*, 62 S. C. 1; s. c. 39 S. E. Rep. 762.

¹²² *Holt v. Hannibal & C. R. Co.*, 174 Mo. 524; s. c. 74 S. W. Rep. 631.

¹²³ *Berger v. Chicago & C. R. Co.*, 97 Mo. App. 127; s. c. 71 S. W. Rep. 102; *Braymer v. Seattle & C. R. Co.*, 35 Wash. 346; s. c. 77 Pac. Rep. 495.

¹²⁴ *Breen v. St. Louis Transit Co.*, 102 Mo. App. 479; s. c. 77 S. W. Rep. 78.

¹²⁵ *Bough v. Metropolitan St. R.*

Co., 82 App. Div. (N. Y.) 215; s. c. 81 N. Y. Supp. 771; 13 N. Y. Ann. Cas. 56.

¹²⁶ *Weber v. Southern R. Co.*, 65 S. C. 356; s. c. 43 S. E. Rep. 888.

¹²⁷ *Pennsylvania Co. v. Lenhart*, 120 Fed. Rep. 61.

¹²⁸ *Peterson v. Middlesex & Somerset Traction Co.*, 71 N. J. L. 296; s. c. 59 Atl. Rep. 456.

¹²⁹ *Houston & C. R. Co. v. Berry*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 258.

¹³⁰ *Bough v. Metropolitan St. R. Co.*, 82 App. Div. (N. Y.) 215; s. c. 13 N. Y. Ann. Cas. 56; 81 N. Y. Supp. 771.

showing the plaintiff's good faith in going on the train, as his good faith at that time was not an issue.¹³¹

§ 3267. Instructions which have been Held Erroneous.¹³²

§ 3268. Instructions which were Properly Refused.¹³³

§ 3274. Arrests Made by Officers of the Law and Railway Agents Possessing Constabulary Powers.—A carrier is not bound to see that a public officer arresting a passenger on its train does not use unreasonable force in making the arrest.¹³⁴ Nor is the carrier bound to inquire into the legality of the process under which the arrest is made, and hence is not liable for stopping a train to allow an officer to remove a prisoner he has arrested on the train.¹³⁵

§ 3276. American Decisions which Hold the Carrier Liable for False Arrests of Passengers Made by his Servants whether Before or

¹³¹ *Clark v. Great Northern R. Co.*, 31 Wash. 658; s. c. 72 Pac. Rep. 477. Where a passenger presents a ticket on which he is entitled to ride, and is ejected, the carrier cannot show a custom to issue such tickets for certain days only, in the absence of any proof of knowledge of such limitation by the passenger or the purchaser of the ticket: *Carvey v. Detroit & C. R. Co.*, 133 Mich. 659; s. c. 95 N. W. Rep. 716; 10 Det. Leg. N. 350.

¹³² Where the complaint alleged that the conductor assaulted the plaintiff and ejected him from the car and abused him—calling him profane names in a loud voice—an instruction authorizing a verdict for the plaintiff if the conductor cursed him and called him vile names was held erroneous, as authorizing a recovery for the use of the language unaccompanied by physical violence, and this was not counted on in the complaint as an independent cause of action: *Osteryoung v. St. Louis Transit Co.*, 108 Mo. App. 703; s. c. 84 S. W. Rep. 179. An instruction that the plaintiff could recover only the cost of procuring transportation from the place where he was ejected to the place indicated by his ticket has been condemned as too general, and not showing whether it referred to transportation by rail or by some other means: *Miller v. King*, 166 N. Y. 394; s. c. 59 N. E. Rep. 1114; aff'g 58 N. Y. Supp. 1145. Where the complaint alleged that the plaintiff

was unlawfully ejected by violence, but did not aver that unnecessary violence was used, an instruction that the company had no right to use unnecessary violence in removing the plaintiff was held erroneous, as allowing a recovery on the ground that he was lawfully ejected but that unnecessary force was used: *Huba v. Schenectady R. Co.*, 85 App. Div. (N. Y.) 199; s. c. 83 N. Y. Supp. 157. The use of the word "humane" in an instruction that it was the duty of the conductor to exercise such care to avoid unnecessary injuries to the plaintiff's feelings and person as a "humane" person of ordinary prudence would use has been condemned as suggesting a new, and probably, higher standard of liability than that recognized by the law in this class of injuries: *Ft. Worth & C. R. Co. v. Peterson*, 24 Tex. Civ. App. 548; s. c. 60 S. W. Rep. 275.

¹³³ Since the matter of allowance of exemplary damages is discretionary with the jury, a charge is properly refused which instructs the jury that the plaintiff in an action against a carrier for his wrongful ejection would, under given circumstances, be entitled to recover such damages: *Louisville & C. R. Co. v. Bizzell*, 131 Ala. 429; s. c. 30 South. Rep. 777.

¹³⁴ *Brunswick & C. R. Co. v. Ponder*, 117 Ga. 63; s. c. 43 S. E. Rep. 430.

¹³⁵ *Brunswick & C. R. Co. v. Ponder*, 117 Ga. 63; s. c. 43 S. E. Rep. 430.

After Transit Commences.^{135a}—Where the rules of the carrier authorize the conductor to call a policeman to make an arrest, it is clearly within the scope of his authority to call an officer to arrest a passenger, and if the arrest is wrongful the company is liable therefor;¹³⁶ and one lawfully aboard a car as a passenger does not lose his character as such under this rule by the mere fact that he has been pushed from the car by the conductor at the time the policeman is called.¹³⁷

§ 3286. **Instances where the Damages were Held not Too Remote.**—It has been held that a passenger wrongfully ejected short of his destination in the night-time may recover for injuries from falling into a cattle-guard while walking along the track to reach his destination.¹³⁸ Another case holds that a passenger, suffering from blood poisoning in his hand, of which condition he had informed the conductor previous to his wrongful ejection, may recover for the enhanced pain in the poisoned hand caused by his forcible expulsion.¹³⁹

§ 3288. **Damages for Humiliation, Mortification, Mental Suffering, Nervous Shock, Paroxysms, etc.**¹⁴⁰—The clear weight of authority justifies recoveries for this species of injury though the passenger may not have suffered any physical injury from his expulsion.¹⁴¹ A great array of witnesses to the humiliation of the passenger is not required. In one

^{135a} Texas Midland R. Co. v. Dean, — Tex. —; s. c. 85 S. W. Rep. 1135; rev'g s. c. 82 S. W. Rep. 524 (carrier liable for act of baggage-master assisting officer to make an illegal arrest, though he was not at the time actively doing anything in furtherance of the carrier's business).

¹³⁶ Grayson v. St. Louis Transit Co., 100 Mo. App. 60; s. c. 71 S. W. Rep. 730.

¹³⁷ Grayson v. St. Louis Transit Co., 100 Mo. App. 60; s. c. 71 S. W. Rep. 730.

¹³⁸ New York & C. R. Co. v. Willing, 24 Ohio Cir. Ct. R. 474.

¹³⁹ Texas & C. R. Co. v. Lynch (Tex. Civ. App.), 73 S. W. Rep. 65.

¹⁴⁰ That this species of damages may be recovered, see: Houston & C. R. Co. v. McNeel, 33 Tex. Civ. App. 153; s. c. 76 S. W. Rep. 206; Osteryoung v. St. Louis Transit Co., 108 Mo. App. 703; s. c. 84 S. W. Rep. 179; Choctaw, O. & G. R. Co. v. Hill, 110 Tenn. 396; s. c. 75 S. W. Rep. 963. That it is not necessary that the conductor should have been actuated by malice or willfulness in expelling the passenger, see: Coine v. Chicago & C. R. Co., 123 Iowa 453;

s. c. 99 N. W. Rep. 134. *Contra*: Malott v. Woods, 109 Ill. App. 512. Where the temperament of the plaintiff is not put in issue by the pleadings or evidence, the jury may not be instructed that if the language was not reasonably calculated to cause a person of ordinary prudence and temper to be so humiliated under like circumstances, she could not recover: Texas & C. R. Co. v. Tarkington, 27 Tex. Civ. App. 353; s. c. 66 S. W. Rep. 137.

¹⁴¹ Georgia R. & Electric Co. v. Baker, 120 Ga. 991; s. c. 48 S. E. Rep. 355; Mabry v. City Electric R. Co., 116 Ga. 624; s. c. 42 S. E. Rep. 1025; 59 L. R. A. 590; Cleveland & C. R. Co. v. Kinsley, 27 Ind. App. 135; s. c. 60 N. E. Rep. 169; Boling v. St. Louis & C. R. Co., 189 Mo. 219; s. c. 88 S. W. Rep. 35; Breen v. St. Louis Transit Co., 108 Mo. App. 443; s. c. 83 S. W. Rep. 998; Missouri & C. R. Co. v. Ball, 25 Tex. Civ. App. 500; s. c. 61 S. W. Rep. 327; Missouri & C. R. Co. v. Tarwater, 33 Tex. Civ. App. 116; s. c. 75 S. W. Rep. 937; International & C. R. Co. v. Henderson (Tex. Civ. App.), 82 S. W. Rep. 1065.

case a recovery was sustained where the only persons present at the ejection were the conductor, brakeman and passenger.¹⁴² This element of damages does not include injuries to the good name or business reputation of the passenger;¹⁴³ neither can the passenger recover for indignities willfully brought upon himself, as, for example, where a passenger with knowledge that a bridge fee was exacted from all passengers on the train, refused to pay the fee and defied the conductor to remove him from the train, and then paid the fee when the conductor merely placed his hand upon him.¹⁴⁴ The mere honest expression of an opinion by the conductor that the money offered to him for fare is counterfeit, and his refusal to accept it on that ground, does not amount to a charge that the passenger knew the coin was counterfeit, and is not an element for damages for the wrongful ejection of the passenger.¹⁴⁵

§ 3289. Other Elements of Damage for Unlawful Ejections.¹⁴⁶

§ 3290. When the Carrier Liable to Exemplary Damages for such Misconduct on the Part of his Servants.—Exemplary damages may be allowed, in the discretion of the jury, for the wrongful ejection of a passenger from a car or train without justification or excuse, in willful and wanton disregard of the passenger's rights.¹⁴⁷ These damages

¹⁴² *Kansas City &c. R. Co. v. Little*, 66 Kan. 378; s. c. 71 Pac. Rep. 820; 61 L. R. A. 122.

¹⁴³ *Procter v. Southern California R. Co.*, 130 Cal. 20; s. c. 62 Pac. Rep. 306.

¹⁴⁴ *Patterson v. Southern Pac. Co.*, 28 Tex. Civ. App. 67; s. c. 66 S. W. Rep. 308.

¹⁴⁵ *Breen v. St. Louis Transit Co.*, 102 Mo. App. 479; s. c. 77 S. W. Rep. 78.

¹⁴⁶ A woman wrongfully ejected from a train, in which she was a passenger, while her trunk was carried to her destination, several thousand miles distant, leaving her without a change of clothing, by reason of which she was compelled to buy others, is entitled to have the inconvenience and discomfort caused her taken into consideration in estimating her damages, as well as her pecuniary loss, but the cost of the clothing purchased is not a proper element of damages: *Procter v. Southern California R. Co.*, 130 Cal. 20; s. c. 62 Pac. Rep. 306. A passenger put off at the wrong station and being invited by people to remain with them over night, cannot recover

for injury from immediately proceeding, in bad weather, to walk to her station, if a prudent person under the circumstances would have accepted the invitation to remain: *Cain v. Louisville &c. R. Co.*, 84 S. W. Rep. 583; s. c. 27 Ky. L. Rep. 201.

¹⁴⁷ *Kansas City &c. R. Co. v. Little*, 66 Kan. 378; s. c. 71 Pac. Rep. 820; 61 L. R. A. 122; *Lexington Ry. Co. v. O'Brien*, 84 S. W. Rep. 1170; s. c. 27 Ky. L. Rep. 336; *Berger v. Chicago &c. R. Co.*, 97 Mo. App. 127; s. c. 71 S. W. Rep. 102 (conductor used harsh language to a female passenger and wantonly pushed her off the car); *Summerfield v. St. Louis Transit Co.*, 108 Mo. App. 718; s. c. 84 S. W. Rep. 172; *Southern Light &c. Co. v. Compton*, 86 Miss. 269; s. c. 38 South. Rep. 629 (ejection of female passenger for refusal to comply with an unwarranted demand of the conductor that she change her seat); *Richardson v. Atlantic Coast Line R. Co.*, 71 S. C. 444; s. c. 51 S. E. Rep. 261; *Choctaw &c. R. Co. v. Hill*, 110 Tenn. 396; s. c. 75 S. W. Rep. 963. Thus where it appeared the conductor was noti-

may be waived. Thus, where it appeared that the plaintiff, after ejection, had returned to the car and paid his fare, and his counsel on the trial stated that he limited his claim to damages for breach of the contract, it was held that exemplary damages could not be recovered.¹⁴⁸ In New Jersey the right to recover these damages depends upon whether the carrier ratified the wrongful act of the conductor by authorizing it in the first instance or approving it afterwards.¹⁴⁹

§ 3294. Cases of this Kind where Exemplary Damages are not Given.¹⁵⁰

§ 3296. An Instruction as to Damages Which Passed Judicial Scrutiny.—An instruction that whenever the element of malice or oppression, or a reckless disregard of the rights of others enters into a transaction, and when the act is done in the strict line of duty of the conductor, but done under a state of facts not justifying the act done, and in a wrongful or perhaps careless manner, the law authorizes exemplary damages, is not objectionable because of the use of the phrase, “and when the act is done in the strict line of duty of the conductor.”¹⁵¹

§ 3297. Quantum of Damages Awarded in Cases of Expulsion of Passengers.¹⁵²—In a case where a passenger who boarded a freight

fied by plaintiff and his companion that he had paid his fare, but the conductor nevertheless assaulted plaintiff, striking him several times in the face, and causing blood to flow from his nose, and bruising and scratching his face, and that the railroad company ratified these acts, it was held that the evidence justified the submission of plaintiff's right to recover exemplary damages to the jury: *Denison &c. R. Co. v. Randall*, 29 Tex. Civ. App. 460; s. c. 69 S. W. Rep. 1013.

¹⁴⁸ *Moon v. Interurban St. R. Co.*, 85 N. Y. Supp. 363.

¹⁴⁹ *Peterson v. Middlesex & Somerset Traction Co.*, 71 N. J. L. 296; s. c. 59 Atl. Rep. 456.

¹⁵⁰ Where a street railway conductor improperly refused to accept the plaintiff's transfer on the ground that it had expired, and required him to pay another fare or leave the car, but the conductor throughout acted in obedience to the rules of the company as he understood them, and was not unnecessarily rude, exemplary damages were refused: *Little Rock Traction &c. Co. v. Winn*, 75 Ark. 529; s. c. 87 S. W. Rep. 1025.

¹⁵¹ The charge was not erroneous because of the use of the expression “careless manner,” the word “careless” being used in the sense of “reckless.” *Choctaw &c. R. Co. v. Hill*, 110 Tenn. 396; s. c. 75 S. W. Rep. 963.

¹⁵² In these cases the damages were held not excessive:—\$250 (news agent forcibly jerked from train and stock in trade lost or destroyed), *Choctaw &c. R. Co. v. Hill*, 110 Tenn. 396; s. c. 75 S. W. Rep. 963; \$250 (passenger who had paid his fare was told that he had not by the conductor and he was called a liar in the presence of other passengers and ejected at a town without hotel accommodations), *Houston &c. R. Co. v. McNeel*, 33 Tex. Civ. App. 153; s. c. 76 S. W. Rep. 206; \$250 (wrongful expulsion of passenger on ground that time limit on ticket had expired), *Marx v. Louisiana Western R. Co.*, 112 La. 1085; s. c. 36 South. Rep. 862; \$350 (passenger insultingly removed and as a result lost contract to labor during crop season), *Illinois Cent. R. Co. v. Jackson*, 117 Ky. 900; s. c. 79 S. W. Rep. 1187; 25 Ky. L. Rep. 2087; \$500

train without a permit, as required by the rules of the carrier, was carried back to the place where he embarked, and put off the train without force, and it was not shown that he demanded the return of the money paid for his ticket, or that he was prevented from making the desired journey on that day, it was held that no damage was suffered.¹⁵³

§ 3302. **Extent of Carrier's Duty to Trespassers on his Vehicle.**¹⁵⁴

§ 3304. **Care Required in Expelling Trespasser from Carrier's Vehicle.**—The carrier in the expulsion of a trespasser must exercise reasonable care to avoid unnecessary injury to him;¹⁵⁵ that is, such

(passenger jerked from seat and suffered injuries requiring attendance of physician), *El Paso Electric R. Co. v. Alderete*, 36 Tex. Civ. App. 142; s. c. 81 S. W. Rep. 1246; \$1000 (negro passenger in car set apart for such passengers was set upon by white men who invaded the car and subjected him to many indignities in the presence of his wife and other passengers, and after compelling him to march through other coaches at the point of a pistol, put him off the train, and all this without remonstrance on part of carrier's employés), *International & R. Co. v. Henderson* (Tex. Civ. App.), 82 S. W. Rep. 1065; \$1000 (infirm passenger wrongfully ejected on cold, wet day, by reason of which rheumatism was contracted, and earning power was impaired), *Pennsylvania R. Co. v. Palmer*, 127 Fed. Rep. 956; s. c. 62 C. C. A. 588; \$1500 (passenger while suffering from blood poisoning in hand forcibly ejected in the night at a strange town and increased pain in hand resulted from violence used in ejecting him), *Texas & R. Co. v. Lynch* (Tex. Civ. App.), 73 S. W. Rep. 65. In these cases the damages were held excessive:—\$400 reduced to \$200 (passenger ejected in polite manner early in the morning and compelled to walk a mile and a half to station—expenses incurred by reason of act did not exceed \$2.00), *Gulf & R. Co. v. Russell*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 299; \$300 (where amount was largely based on an assault by the conductor on passenger after ejection, invited by use of opprobrious language by passenger), *Chicago & R. Co. v. Stratton*, 111 Ill. App. 142.

¹⁵³ *Ellis v. Houston & R. Co.*, 30 Tex. Civ. App. 172; s. c. 70 S. W. Rep. 114.

¹⁵⁴ That the carrier owes no duty to trespassers on its trains except that its servants shall not willfully or wantonly injure them, and that such trespassers cannot recover for mere negligence, see: *Singleton v. Felton*, 101 Fed. Rep. 526; s. c. 42 C. C. A. 57; *Chicago & R. Co. v. McDonough*, 112 Ill. App. 315; *Johnson v. Chicago & R. Co.*, 123 Iowa 224; s. c. 98 N. W. Rep. 642; *Cook v. Louisville & R. Co.*, 72 S. W. Rep. 729; s. c. 24 Ky. L. Rep. 1967; *Bjornquist v. Boston & R. Co.*, 185 Mass. 130; s. c. 70 N. E. Rep. 53; *Feeback v. Missouri Pac. R. Co.*, 167 Mo. 206; s. c. 66 S. W. Rep. 965; *Myers v. Boston & R. Co.*, 72 N. H. 175; s. c. 55 Atl. Rep. 892; *Johnson v. New York Cent. & R. Co.*, 173 N. Y. 79; s. c. 65 N. E. Rep. 946; rev'g s. c. 73 N. Y. Supp. 1137; *Carter v. Charleston & R. Co.*, 64 S. C. 316; s. c. 42 S. E. Rep. 161; *Atchison & R. Co. v. Mendoza*, (Tex. Civ. App.), 60 S. W. Rep. 327; 62 S. W. Rep. 418; *Crawleigh v. Galveston & R. Co.*, 28 Tex. Civ. App. 260; s. c. 67 S. W. Rep. 140; *Missouri & R. Co. v. Mills*, 27 Tex. Civ. App. 245; s. c. 65 S. W. Rep. 74; *Morgan v. Oregon Short Line R. Co.*, 27 Utah 92; s. c. 74 Pac. Rep. 523.

¹⁵⁵ *Indiana & R. Co. v. Hendrian*, 92 Ill. App. 462; s. c. aff'd, 190 Ill. 501; 60 N. E. Rep. 902; *Citizens' St. R. Co. v. Clark*, 33 Ind. App. 190; s. c. 71 N. E. Rep. 53; *Fagg v. Louisville & R. Co.*, 111 Ky. 30; s. c. 63 S. W. Rep. 580; 23 Ky. L. Rep. 383; *Hill v. Baltimore & R. Co.*, 75 App. Div. (N. Y.) 325; s. c. 78 N. Y. Supp.

care as a person of ordinary prudence and skill would usually exercise under the same or similar circumstances.¹⁵⁶ Under this rule the carrier will be liable for injury to a trespasser compelled by its servants to leap from a train running at such speed as to make the act hazardous.¹⁵⁷ But it is not necessary that the train should be brought to a stop in order to effect the ejection. The trespasser may be removed from a moving train where its speed is sufficiently slackened to allow the passenger to alight safely by using ordinary care.¹⁵⁸ The trainmen may use such force as appears reasonably necessary to effect the removal.¹⁵⁹ It is clear that the carrier will be liable for the wrongful acts of its conductor in effecting the ejection of the trespasser, as this employé, being entrusted with the control of the entire train, has implied authority, as a matter of law, to eject trespassers therefrom.¹⁶⁰ The rule is not so clear with reference to the conductor of a Pullman car forming a part of the carrier's train. While such a conductor is, in dealings with the passengers of the train, to be regarded as the servant of the carrier, and it will be responsible for his acts as though he were directly employed by the carrier, this is not everywhere so as respects his dealings with a trespasser on the train and car.¹⁶¹ Where threats of the use of excessive force are made by the carrier's employés, and the force is not exerted, but the trespasser voluntarily releases his hold on the car and falls to the ground and is injured, he cannot recover for these injuries unless he shows either that he lost his hold in an attempt to avoid physical injury, or that he was so overcome with fear as to lose his presence of mind.¹⁶²

§ 3305. Expulsion of Trespassers by Brakemen—Authority of Brakemen to Expel.¹⁶³—The carrier will be liable for the act of a

134; 11 N. Y. Ann. Cas. 418; Klenck v. Oregon Short Line R. Co., 27 Utah 428; s. c. 76 Pac. Rep. 214; Morgan v. Oregon Short Line R. Co., 27 Utah 92; s. c. 74 Pac. Rep. 523.

¹⁵⁶ Cook v. Southern R. Co., 128 N. C. 333; s. c. 38 S. E. Rep. 925.

¹⁵⁷ Indianapolis St. R. Co. v. Hockett, 159 Ind. 677; s. c. 66 N. E. Rep. 39; aff'g s. c. 64 N. E. Rep. 633; Johnson v. Chicago & E. R. Co., 116 Iowa 639; s. c. 88 N. W. Rep. 811; Krueger v. Chicago & E. R. Co., 84 Mo. App. 358.

¹⁵⁸ Bolin v. Chicago & E. R. Co., 108 Wis. 333; s. c. 84 N. W. Rep. 446; Illinois Cent. R. Co. v. McManus, 67 S. W. Rep. 1000; s. c. 24 Ky. L. Rep. 81; Bolin v. Chicago & E. R. Co., 108 Wis. 333; s. c. 84 N. W. Rep. 446.

¹⁵⁹ Clark v. Great Northern R. Co., 37 Wash. 537; s. c. 79 Pac. Rep. 1108.

¹⁶⁰ Sanders v. Illinois Cent. R. Co., 90 Ill. App. 582; Hamilton v. Chicago & E. R. Co., 119 Iowa 650; s. c. 93 N. W. Rep. 594; Bjornquist v. Boston & E. R. Co., 185 Mass. 130; s. c. 70 N. E. Rep. 53; Alabama & E. R. Co. v. Livingston, 84 Miss. 1; s. c. 36 South. Rep. 256.

¹⁶¹ Blake v. Kansas City & E. R. Co., — Tex. Civ. App. —; s. c. 85 S. W. Rep. 430.

¹⁶² Powell v. Erie R. Co., 70 N. J. L. 290; s. c. 58 Atl. Rep. 930.

¹⁶³ That the act of ejecting a trespasser is within the scope of the brakeman's implied authority, see: O'Banion v. Missouri Pac. R. Co., 65 Kan. 352; s. c. 69 Pac. Rep. 353; Illinois Cent. R. Co. v. McManus, 67 S. W. Rep. 1000; s. c. 24 Ky. L. Rep. 81; McKeon v. New York & E. R. Co., 183 Mass. 271; s. c. 67 N.

brakeman where brakemen have commonly exercised the right to eject trespassers with the approval of its officers,¹⁶⁴ though the carrier has a rule forbidding brakemen to eject trespassers and giving the right to the conductor alone,¹⁶⁵ and hence it is proper to show that such a rule is a mere pretext, and that in practice brakemen were empowered by the carrier to exercise this authority.¹⁶⁶ In one case a carrier was held liable for the death of a trespasser shot by a brakeman in ejecting him from a train, but not for mutilation of his body due to the act of the brakeman in throwing the body on the track to conceal his crime.¹⁶⁷

§ 3308. **Liability for Willful or Wanton Injuries to Trespassers.**¹⁶⁸—Under the doctrine of the main section carriers have been held liable for injuries inflicted by trainmen in striking trespassers with such missiles as lanterns,¹⁶⁹ stones,¹⁷⁰ and lumps of coal,¹⁷¹ to compel them to alight from moving trains. Recklessness or wantonness is not to be conclusively inferred from the mere use of language of the carrier's employes intended to influence the trespasser's voluntary action, though the language used is not necessary or proper. Language will have this effect only where it is so unreasonable or improper in reference to its probable effect on the safety of the trespasser as to indicate a wanton and reckless disregard of probable dangerous consequences.¹⁷² Willfulness was imputed to the act of a carrier in ejecting

E. Rep. 329; *Cook v. Southern R. Co.*, 128 N. C. 333; s. c. 38 S. E. Rep. 925; *Dixon v. Northern Pac. R. Co.*, 37 Wash. 310; s. c. 79 Pac. Rep. 943. That the right of the brakeman to remove trespassers is not presumed but must be proved, see: *Chicago &c. R. Co. v. Ketchum*, 99 Ill. App. 660; *Krueger v. Chicago &c. R. Co.*, 84 Mo. App. 358.

¹⁶⁴ *Krueger v. Chicago &c. R. Co.*, 94 Mo. App. 458; s. c. 68 S. W. Rep. 220. See also *Houston &c. R. Co. v. Rutherford*, 94 Tex. 518; s. c. 62 S. W. Rep. 1056; aff'g s. c. 62 S. W. Rep. 1069.

¹⁶⁵ *Illinois Cent. R. Co. v. West*, 60 S. W. Rep. 290; s. c. 22 Ky. L. Rep. 1387; *Curtis v. Chicago &c. R. Co.*, 99 Mo. App. 508; s. c. 73 S. W. Rep. 1103; *Houston &c. R. Co. v. Rutherford* (Tex. Civ. App.), 62 S. W. Rep. 1069; s. c. aff'd, 94 Tex. 518; 62 S. W. Rep. 1056.

¹⁶⁶ *Houston &c. R. Co. v. Rutherford*, 94 Tex. 518; s. c. 62 S. W. Rep. 1056; aff'g s. c. 62 S. W. Rep. 1069.

¹⁶⁷ *Houston &c. R. Co. v. Bowen*, 36 Tex. Civ. App. 165; s. c. 81 S. W. Rep. 80.

¹⁶⁸ That the carrier is liable for wanton or willful injuries to a trespasser, see: *Illinois Cent. R. Co. v. Leiner*, 202 Ill. 624; s. c. 67 N. E. Rep. 398; aff'g s. c. 103 Ill. App. 438; *Schwartzman v. Brooklyn Heights R. Co.*, 84 App. Div. (N. Y.) 608; s. c. 82 N. Y. Supp. 890; *Galveston &c. R. Co. v. Lester*, 24 Tex. Civ. App. 467; s. c. 59 S. W. Rep. 946. In Iowa it is not required that the act should be characterized as willful in the complaint, it is sufficient if the facts show willfulness, though the act is alleged as negligent: *Johnson v. Chicago &c. R. Co.*, 116 Iowa 639; s. c. 88 N. W. Rep. 811.

¹⁶⁹ *Krueger v. Chicago &c. R. Co.*, 84 Mo. App. 358.

¹⁷⁰ *Cook v. Southern R. Co.*, 128 N. C. 333; s. c. 38 S. E. Rep. 925; *Dorsey v. Kansas City &c. R. Co.*, 104 La. 478; s. c. 29 South. Rep. 177; 52 L. R. A. 92.

¹⁷¹ *Polatty v. Charleston &c. R. Co.*, 67 S. C. 391; s. c. 45 S. E. Rep. 932.

¹⁷² *Bjornquist v. Boston &c. R. Co.*, 185 Mass. 130; s. c. 70 N. E. Rep. 53.

a trespasser in a drunken and helpless condition in a deep cut on a dark night, and he was run over and killed by a later train, as the condition of the trespasser was such as to charge the servants with knowledge of the probable consequences of ejecting him in this condition at such a place.¹⁷³ The plaintiff has the burden of proving reckless or wanton conduct in effecting his ejection.¹⁷⁴

§ 3309. **What Rule in the Case of Bare Licensees.**—The carrier is under an obligation to use ordinary care in cases where the injured person is not a trespasser, but occupies rather the relation of licensee on the vehicle or premises of the carrier under his express or implied invitation.¹⁷⁵

§ 3310. **What Rule as to Trespassing Children.**¹⁷⁶

§ 3311. **Injuries to Children from Climbing upon Cars.**¹⁷⁷

§ 3312. **Ejecting Boys Stealing Rides.**¹⁷⁸—In a case where a child between eight and nine years of age was injured in jumping off a slowly moving freight car, and the immediate cause of his jumping was the order of the brakeman to get off “or I’ll break your neck,” it was held that the language of the brakeman was in the nature of a reproof and did not evidence a wanton and reckless disregard for harmful consequences to the child.¹⁷⁹ The question of negligence under

¹⁷³ Fagg v. Louisvile &c. R. Co., 111 Ky. 30; s. c. 63 S. W. Rep. 580; 23 Ky. L. Rep. 383.

¹⁷⁴ Bjornquist v. Boston &c. R. Co., 185 Mass. 130; s. c. 70 N. E. Rep. 53.

¹⁷⁵ Fremont &c. R. Co. v. Hagblad, — Neb. —; s. c. 101 N. W. Rep. 1033; Lovett v. Gulf &c. R. Co., 97 Tex. 436; s. c. 79 S. W. Rep. 514; aff’g s. c. 74 S. W. Rep. 570.

¹⁷⁶ That the rule of care with regard to adult trespassers applies where the trespasser is a child *sui juris*, see: Wilson v. Atchison &c. R. Co., 66 Kan. 183; s. c. 71 Pac. Rep. 282 (boy of twelve); Harris v. Southern R. Co., 76 S. W. Rep. 151; s. c. 25 Ky. L. Rep. 559; Wickenburg v. Minneapolis &c. R. Co., 94 Minn. 276; s. c. 102 N. W. Rep. 713; Elkins v. South Carolina &c. R. Co., 64 S. C. 553; s. c. 43 S. E. Rep. 19 (boy fourteen years old); Cockrell v. Texas &c. R. Co. 36 Tex. Civ. App. 559; s. c. 82 S. W. Rep. 529 (boy sixteen years old).

¹⁷⁷ Ashworth v. Southern R. Co., 116 Ga. 635; s. c. 43 S. E. Rep. 36;

59 L. R. A. 592; Burke v. Ellis, 105 Tenn. 702; s. c. 58 S. W. Rep. 855. The carrier may render himself liable for injuries to children from climbing upon cars where it has knowledge of a practice of this kind of long standing at a particular point on its line, and notwithstanding this knowledge, operated the cars so negligently as to cause the injuries: St. Louis &c. R. Co. v. Abernathy, 28 Tex. Civ. App. 613; s. c. 68 S. W. Rep. 539.

¹⁷⁸ That the carrier in the ejection of a child trespasser must effect the ejection in such a manner as not to endanger such child, see: Indianapolis St. R. Co. v. Hockett, 161 Ind. 196; s. c. 67 N. E. Rep. 106; Enright v. Pittsburg Junction R. Co., 198 Pa. St. 166; s. c. 47 Atl. Rep. 938; Bucci v. Waterman, 25 R. I. 125; s. c. 54 Atl. Rep. 1059; Richmond Traction Co. v. Wilkinson, 101 Va. 394; s. c. 43 S. E. Rep. 622.

¹⁷⁹ Bjornquist v. Boston &c. R. Co., 185 Mass. 130; s. c. 70 N. E. Rep. 53.

this head is one peculiarly within the province of the jury for their determination from the evidence adduced.¹⁸⁰

§ 3316. **Contributory Negligence of the Trespasser no Justification for Injuring him Willfully or Wantonly.**¹⁸¹—The mere fact that a trespasser boarded the train while it was in motion, in violation of a statute making this act a misdemeanor, cannot be invoked as a matter of defense to the trespasser's claim of damages for injuries occasioned by a forcible ejection from a rapidly moving train.¹⁸²

§ 3319. **Who Deemed a Trespasser within the Foregoing Rule.**—The category of trespassers includes persons stealing rides on trains,¹⁸³ persons seeking transportation on freight trains without the permit required by the rules of the carrier,¹⁸⁴ and employés riding on trains when off duty.¹⁸⁵ It will not include a passenger rightfully on the train though in the wrong coach;¹⁸⁶ an employé of an independent contractor going to and from work on the carrier's vehicle with permission of the operatives and acquiescence of the carrier's general manager;¹⁸⁷ or a passenger on the train after his destination has been reached though a reasonable opportunity to alight had been given him.^{187a} A person injured while riding on a train contrary to the carrier's regulation is none the less a trespasser by reason of the existence of a custom of the carrier's employés to allow such persons to ride, and evidence of the custom and the habitual disregard of the rule is not admissible in the absence of proof that the carrier had knowledge of this disregard of its rules and acquiesced therein.¹⁸⁸ Where, however,

¹⁸⁰ *Chicago City R. Co. v. O'Donnell*, 109 Ill. App. 616; s. c. aff'd, 207 Ill. 478; 69 N. E. Rep. 882; *O'Donnell v. Chicago R. Co.*, 65 Neb. 612; s. c. 91 N. W. Rep. 566; *Barry v. Union R. Co.*, 105 App. Div. (N. Y.) 520; s. c. 94 N. Y. Supp. 449.

¹⁸¹ That the trespasser may recover for willful and wanton injuries though guilty of contributory negligence, see: *Johnson v. Chicago & C. R. Co.*, 123 Iowa 224; s. c. 98 N. W. Rep. 642; *Johnson v. Chicago & C. R. Co.*, 116 Iowa 639; s. c. 88 N. W. Rep. 811; *Dorsey v. Kansas City & C. R. Co.*, 104 La. 478; s. c. 29 South. Rep. 177; 52 L. R. A. 92; *Missouri & C. R. Co. v. Haltom* (Tex. Civ. App.), 62 S. W. Rep. 800.

¹⁸² *Johnson v. Chicago & C. R. Co.*, 116 Iowa 639; s. c. 88 N. W. Rep. 811.

¹⁸³ *Pledger v. Chicago & C. R. Co.*, 69 Neb. 456; s. c. 95 N. W. Rep. 1057;

Gulf & C. R. Co. v. Hall, 34 Tex. Civ. App. 535; s. c. 80 S. W. Rep. 133; *St. Louis & C. R. Co. v. Mayfield*, 35 Tex. Civ. App. 82; s. c. 79 S. W. Rep. 365.

¹⁸⁴ *Dyche v. Vicksburg & C. R. Co.*, 79 Miss. 361; s. c. 30 South. Rep. 711.

¹⁸⁵ *Lemasters v. Southern Pac. Co.*, 131 Cal. 105; s. c. 63 Pac. Rep. 128.

¹⁸⁶ *Gulf & C. R. Co. v. Shelton*, 30 Tex. Civ. App. 72; s. c. 69 S. W. Rep. 653; 70 S. W. Rep. 359.

¹⁸⁷ *Gulf & C. R. Co. v. Lovett* (Tex. Civ. App.), 74 S. W. Rep. 570.

^{187a} *Fanning v. St. Louis & C. R. Co.*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 354.

¹⁸⁸ *Pennsylvania Co. v. Coyer*, 163 Ind. 631; s. c. 72 N. E. Rep. 875; *Feeback v. Missouri Pac. R. Co.*, 167 Mo. 206; s. c. 66 S. W. Rep. 965; *Sands v. Southern R. Co.*, 108 Tenn. 1; s. c. 64 S. W. Rep. 478.

according to a general custom known to the carrier, newsboys are allowed to sell papers on street railway cars, they will not be regarded as trespassers while thus employed unless their right to remain on the car has been terminated by a reasonable notice;¹⁸⁹ and a command given by a conductor to a newsboy to get off of the car, which he did not hear, would not have this effect.¹⁹⁰

§ 3321. **Persons Riding by Invitation, Courtesy, or Permission of the Conductor, or other Servant of Carrier.**—In the absence of any rule or practice to the contrary, there is no presumption that section foremen,¹⁹¹ track superintendents,¹⁹² locomotive engineers, firemen,¹⁹³ or conductors¹⁹⁴ have authority to permit persons to ride on trains without the payment of fare, and thus transform into a passenger one who would otherwise be regarded as a trespasser. The manager of a railroad has this power. Thus it has been held that an employé of a lumber company, permitted by his foreman, who was also manager of the railroad, to ride on a train to the mill, was rightfully on the train and not a trespasser.¹⁹⁵ In one reported case the order for the transportation of a physician on a freight train was issued by the trainmaster. The trainmaster had authority to direct such transportation only when authorized by the superintendent, and the conductor was required to accept the trainmaster's order without question. In this particular instance neither the conductor nor the passenger knew that the order for transportation had not been sanctioned or directed by the superintendent. In an action for injuries to the passenger, it was held that he was rightfully on the train and was not a trespasser, and hence was entitled to the care due a passenger.¹⁹⁶

§ 3323. **Persons Procuring Passage by Means of Fraud.**¹⁹⁷

¹⁸⁹ Indianapolis St. R. Co. v. Hockett, 161 Ind. 196; s. c. 67 N. E. Rep. 106.

¹⁹⁰ Indianapolis St. R. Co. v. Hockett, 161 Ind. 196; s. c. 67 N. E. Rep. 106.

¹⁹¹ Lake Shore & C. R. Co. v. Duer, 21 Ohio Cir. Ct. R. 512; s. c. 11 Ohio C. D. 761.

¹⁹² Alabama & C. R. Co. v. Livingston, 34 Miss. 1; s. c. 36 South. Rep. 256.

¹⁹³ Louisville & C. R. Co. v. Thornton, 58 S. W. Rep. 796; s. c. 22 Ky. L. Rep. 778; Harris v. Southern R. Co., 76 S. W. Rep. 151; s. c. 25 Ky. L. Rep. 559; Burns v. Southern R. Co., 63 S. C. 46; s. c. 40 S. E. Rep. 1018.

¹⁹⁴ Dysart v. Missouri & C. R. Co.,

122 Fed. Rep. 228; s. c. 58 C. C. A. 592; Menaugh v. Bedford Belt R. Co., 157 Ind. 20; s. c. 60 N. E. Rep. 694; Greenfield v. Detroit & C. R. Co., 133 Mich. 557; s. c. 95 N. W. Rep. 546; 10 Det. Leg. N. 256; Baltimore & C. R. Co. v. Cox, 66 Ohio St. 276; s. c. 64 N. E. Rep. 119; Chicago & C. R. Co. v. Martin, 35 Tex. Civ. App. 186; s. c. 79 S. W. Rep. 1101.

¹⁹⁵ San Jacinto & C. R. Co. v. McLin, 26 Tex. Civ. App. 423; s. c. 64 S. W. Rep. 314.

¹⁹⁶ Dysart v. Missouri & C. R. Co., 122 Fed. Rep. 228; s. c. 58 C. C. A. 592.

¹⁹⁷ That a person paying a consideration to a brakeman for his transportation is a trespasser, see: Smith v. Georgia R. & C. Co., 113 Ga.

§ 3326. **Carrier cannot Stipulate against the Consequences of his own Negligence.**¹⁹⁸—New York alone allows the carrier to stipulate for exemption from liability for the consequences of his negligence. It is required, however, by the courts of that State that this intention shall be clearly and unequivocally expressed in the contract. In one case where the ticket provided that the carrier should be released from "all claims for damages for personal injuries from whatever cause" it was held that the language was not sufficiently unequivocal to operate as a release from liability for injuries resulting to the passenger from the negligence of the carrier.¹⁹⁹

§ 3328. **Whether this Rule Applies to Gratuitous Passengers.**²⁰⁰—The Supreme Court of the United States now holds that a stipulation in a railway pass requiring the user to assume the risk of injury from the carrier's negligence violates no rule of public policy and is binding on a person accepting the pass,¹ although notice of the stipulation may not have been called to his attention,² and this view is accepted by other strong courts.³ Evidence is admissible to show that a ticket endorsed as complimentary was not issued as a mere gratuity to the holder, but as a contract on a mutual consideration.⁵

9; s. c. 38 S. E. Rep. 330; Mendenhall v. Atchison & C. R. Co., 66 Kan. 428; s. c. 71 Pac. Rep. 846; 61 L. R. A. 120; Sands v. Southern R. Co., 108 Tenn. 1; s. c. 64 S. W. Rep. 478; Missouri & C. R. Co. v. Huff, 98 Tex. 110; s. c. 81 S. W. Rep. 525; rev'g s. c. 78 S. W. Rep. 249 (question for the jury).

¹⁹⁸ That the carrier cannot stipulate against the consequences of his own negligence, see: Chicago & C. R. Co. v. Collier, 1 Neb. (unoff.) 278; s. c. 95 N. W. Rep. 472; Chicago & C. R. Co. v. Hambel, 2 Neb. (unoff.) 607; s. c. 89 N. W. Rep. 643; Central of Georgia R. Co. v. Lippman, 110 Ga. 665; s. c. 36 S. E. Rep. 202.

¹⁹⁹ Dow v. Syracuse & C. R., 81 App. Div. (N. Y.) 362; s. c. 80 N. Y. Supp. 941.

²⁰⁰ These cases hold that a condition in a railroad pass that the person using the same released the carrier from liability for injuries the result of negligence, is void as against public policy: Payne v. Terre Haute & C. R. Co., 157 Ind. 616; s. c. 62 N. E. Rep. 472; aff'g s. c. 60 N. E. Rep. 362; Missouri & C. R. Co. v. Flood (Tex. Civ. App.), 70 S. W. Rep. 331; Missouri & C. R.

Co. v. Flood, 35 Tex. Civ. App. 197; s. c. 79 S. W. Rep. 1106; Norfolk & C. R. Co. v. Tanner, 100 Va. 379; s. c. 41 S. E. Rep. 721.

¹ Northern Pac. R. Co. v. Adams, 192 U. S. 440; s. c. 48 L. Ed. 513; 24 Sup. Ct. 408; rev'g s. c. 116 Fed. Rep. 324; s. c. 54 C. C. A. 196; Boering v. Chesapeake Beach R. Co., 193 U. S. 442; 24 Sup. Ct. 515; 48 L. Ed. 742; aff'g s. c. 20 App. (D. C.) 500.

² Boering v. Chesapeake Beach R. Co., 193 U. S. 442; s. c. 24 Sup. Ct. Rep. 515; 48 L. Ed. 742.

³ Duncan v. Maine Cent. R. Co., 113 Fed. Rep. 508; Payne v. Terre Haute & C. R. Co., 157 Ind. 616; s. c. 62 N. E. Rep. 472.

⁵ Boering v. Chesapeake Beach R. Co., 20 App. (D. C.) 500. By agreement between a railroad company and a land-owner, the railroad agreed, in consideration of a grant of right of way, to give the land-owner transportation for life, on the sole condition that her right to transportation should be forfeited if tickets were presented by any one save herself, and the tickets given the land-owner bore a provision exempting the railroad from liability for injuries. It was held that this latter condition was not

§ 3334. **When Stipulation Deemed to have Received Assent of Passenger.**—Generally, stipulations limiting the liability of the carrier will be deemed to have received the assent of the passenger where he has signed,⁶ or accepted and used⁷ the ticket containing the limiting stipulation. A consideration for the stipulation is lacking where the passenger pays full fare for his transportation, and he will not be bound by limiting stipulations in his ticket, especially where his attention has not been called to these conditions. The mere posting of notices in waiting rooms and ticket offices is not sufficient to charge him with such notice.⁸

§ 3335. **Abatement of Fare as a Consideration for such Stipulations.**⁹

§ 3338. **Validity of such Stipulations in the Case of a Person Travelling on a Drover's Pass.**¹⁰

§ 3340. **Validity of such Stipulations with Respect to Express Messengers.**—There is a general acceptance of the doctrine that an agreement by an express messenger to release a railroad company from liability for personal injuries to him while riding on its train in the performance of his duty caused by the ordinary negligence of the employés of the carrier is valid, and not opposed to public policy.¹¹

binding on the land-owner since it was without consideration, and her acceptance of the tickets did not indicate an intention on her part to assent to the terms thereof: *Dow v. Syracuse & C. R. Co.*, 81 App. Div. (N. Y.) 362; s. c. 80 N. Y. Supp. 941.

⁶ *Daniels v. Florida & C. R. Co.*, 62 S. C. 1; s. c. 39 S. E. Rep. 762.

⁷ *Boering v. Chesapeake Beach R. Co.*, 20 App. (D. C.) 500; *St. Clair v. Kansas City & C. R. Co.*, 77 Miss. 789; s. c. 28 South. Rep. 957.

⁸ *Norman v. Southern R. Co.*, 65 S. C. 517; s. c. 44 S. E. Rep. 83.

⁹ In Oregon an agreement by a carrier with a passenger whereby he absolves the carrier from all liability while riding on freight trains in consideration of his securing the ticket at a reduced rate, is condemned as against public policy: *Richmond v. Southern Pac. Co.*, 41 Or. 54; s. c. 67 Pac. Rep. 947.

¹⁰ That a contract limiting the liability of the carrier for personal injuries to an agreed amount is void, see: *Feldschneider v. Chicago & C. R. Co.*, 122 Wis. 423; s. c. 99 N. W. Rep. 1034. See also *Lake Shore & C. R. Co. v. Teeters*, — Ind. App.

—; s. c. 74 N. E. Rep. 1014; *Sprigg v. Rutland R. Co.*, 77 Vt. 347; s. c. 60 Atl. Rep. 143. A person travelling on a freight train on a stock shipper's pass assumes such risks and inconveniences as are incident to the methods employed by the company in the operation of its freight trains, but does not assume the risk of negligence by the carrier: *Chicago & C. R. Co. v. Troyer*, — Neb. —; s. c. 103 N. W. Rep. 680; aff'g s. c. 97 N. W. Rep. 308. A "*bona fide* employé" within the meaning of a stock shipping contract entitling such persons to transportation means persons actually in charge and includes an attendant employed for the occasion though there had been no agreement for his compensation in money by the shipper: *Weaver v. Ann Arbor R. Co.*, 139 Mich. 590; s. c. 102 N. W. Rep. 1037; 12 Det. Leg. N. 4.

¹¹ *Kelly v. Malott*, 135 Fed. Rep. 74; s. c. 67 C. C. A. 548; *Long v. Lehigh Valley R. Co.*, 130 Fed. Rep. 870; *Peterson v. Chicago & C. R. Co.*, 119 Wis. 197; s. c. 96 N. W. Rep. 532.

§ 3343. Validity of such Stipulations with Respect to News Agents.—The constitution and laws of Texas forbidding carriers to limit or restrict their liability by general or special notice is held to prohibit a railroad company from contracting away its liability for injuries to a newsboy employed by another corporation to sell papers and merchandise on its trains by an antecedent release, although the execution of the release by the newsboy is imposed as a condition to granting him transportation.¹²

§ 3344. Right of a Circus Proprietor to Contract Away the Lives of his Employés.—A contract for the hauling of a circus train provided that the carrier should not be liable for injury to any agent or employé of the circus company to an amount greater than fifty dollars, and that if it should be so held liable, the circus company would pay it the excess of such amount. The Supreme Court of North Carolina, construing this contract in an action brought thereon by the railroad company, held that it was not the purpose of the contract to exempt the carrier from liability for negligence, but merely to indemnify it in case it should be liable and that it did not violate the rule that a carrier cannot by contract exempt himself from liability for injuries caused by his negligence.¹³

§ 3352. Carrier not Liable for Losses or Defaults beyond his Own Line in the Absence of Special Contract.¹⁴

§ 3353. Carrier may Stipulate with Passenger against Liability for Defaults of Connecting Lines.—A carrier selling a ticket containing a provision that it acts only as agent and is not responsible beyond its own line, is not liable for injuries the result of negligence on the line of a connecting carrier in the absence of proof of partnership between the initial and connecting carriers.¹⁵ But lines over which the initial carrier enjoys trackage rights are not regarded as connecting lines.¹⁶ A passenger buying a mileage ticket is bound by an express condition

Texas &c. R. Co. v. Fenwick, 34 Tex. Civ. App. 222; s. c. 78 S. W. Rep. 548.

¹² Seaboard Air Line R. Co. v. Main, 132 N. C. 445; s. c. 43 S. E. Rep. 930.

¹⁴ See generally: Missouri &c. R. Co. v. Harrison, 97 Tex. 611; s. c. 80 S. W. Rep. 1139; rev'g s. c. 77 S. W. Rep. 1036; Pennsylvania Co. v. Loftis, 72 Ohio St. 288; s. c. 74 N. E. Rep. 179 (mere sale of through ticket does not import contract for liability for negligence of connecting

carrier). There is a holding that a receipt for baggage given by a carrier which recites, "to be delivered to" a place named, is not a special contract for through transportation: *Soviero v. Wescott Express Co.*, 47 Misc. (N. Y.) 596; s. c. 94 N. Y. Supp. 375.

¹⁵ *St. Clair v. Kansas City &c. R. Co.*, 77 Miss. 789; s. c. 28 South. Rep. 957.

¹⁶ *Oliver v. Columbia &c. R. Co.*, 65 S. C. 1; s. c. 43 S. E. Rep. 307.

in the ticket that the seller assumes no responsibility beyond its own lines.¹⁷

§ 3356. Doctrine that Through Ticket or Contract Makes the Carrier Liable for Defaults of Connecting Lines.—In Missouri¹⁸ and Arkansas¹⁹ the initial carrier selling a through ticket and checking the passenger's baggage through to destination, in the absence of a contract to the contrary, is liable for the loss of the baggage by a connecting carrier. There is a Texas holding to the effect that an initial carrier, though not bound by a contract with a passenger to send him over its own and connecting lines in a car going through without change, yet if it actually does this, it will become liable to a passenger for an injury through the insufficiency of the car, though occurring on the line of a connecting carrier—as in the particular case for suffering from cold caused by defective appliances for heating.²⁰

§ 3363. Necessity of Showing that Passenger's Baggage Came into the Hands of the Carrier who is Sued.—Here it is the generally accepted rule that the terminal carrier will not be held liable for the loss of baggage delivered to the initial carrier unless it is shown that it was received by the terminal carrier, or that a joint contract of shipment or partnership existed between the carriers, or that the contract as made was ratified by such terminal carrier.²¹

§ 3369. Where there is a Partnership or Joint Undertaking between Two or More Carriers.—The connecting and the initial carrier have been held jointly liable where they were operated as a single system,²² or the connecting carrier was controlled by the initial carrier,²³ and where the two roads were members of a passenger association allowing the use of interchangeable mileage.²⁴

§ 3375. Carrier Liable who Uses Another Carrier's Means of Transportation.—It has been held that a passenger in charge of stock transported by an express company on a special train, made up expressly for it, and injured through negligence of the railroad company, may sue either the express company or the railroad company, or both.²⁵

¹⁷ Spiess v. Erie R. Co., 71 N. J. L. 90; s. c. 58 Atl. Rep. 116.

¹⁸ Hubbard v. Mobile &c. R. Co., 112 Mo. App. 459; s. c. 87 S. W. Rep. 52.

¹⁹ Kansas City &c. R. Co. v. Washington, 74 Ark. 9; s. c. 85 S. W. Rep. 406; Little Rock &c. R. Co. v. Record, 74 Ark. 125; s. c. 85 S. W. Rep. 421.

²⁰ Missouri &c. R. Co. v. Harrison, 97 Tex. 611; s. c. 80 S. W. Rep. 1139; rev'g s. c. 77 S. W. Rep. 1036.

²¹ Romero v. McKernan, 88 N. Y.

Supp. 365; Texas &c. R. Co. v. Berry, 31 Tex. Civ. App. 3; s. c. 71 S. W. Rep. 326.

²² Lehigh Valley R. Co. v. Dupont, 128 Fed. Rep. 840.

²³ Lehigh Valley R. Co. v. Dupont, 128 Fed. Rep. 840.

²⁴ Pittsburgh &c. R. Co. v. Street, 26 Ind. App. 224; s. c. 59 N. E. Rep. 404.

²⁵ American Exp. Co. v. Ogles, 36 Tex. Civ. App. 407; s. c. 81 S. W. Rep. 1023.

§ 3380. **Circumstances under which Several Railroad Companies may be Liable to Passengers.**—Generally speaking, a carrier is liable if its negligence concurred with the negligence of another carrier in causing the injuries complained of.²⁶ It has been held that a switching crew employed to do yard work for a railroad, and paid by it, and performing similar services at a connecting point for another company which paid the former a portion of the cost, are equally the servants of both the companies where there is no evidence of the terms of the contract between the two companies concerning their joint business at the point in question, and hence, the latter company is liable for the negligent acts of the crew to the same extent as if it were directly in its employ.²⁷ The Washington Supreme Court has held that a carrier using a union station is liable for injuries occasioned by a negligent failure to keep the approaches to the station in a safe condition, though the premises are under the control of a receiver of the depot company.²⁸ In a case where a passenger was injured by the steps of the car on which he was riding coming in collision with a baggage truck on a track by the side of the car, it was held that he could not recover against the company owning the truck on a declaration alleging merely the breach of duty of the carrier safely to transport him as a passenger.²⁹

§ 3383. **Liability of Company over whose Road the Other Company has Running Powers.**³⁰—Under the foregoing rule, a carrier operating its trains over the track of another railroad company by permission is liable to its passengers for injuries occasioned by the negligence of the servant of the railroad company owning the track.³¹

§ 3394. **Other Illustrations of the Foregoing Doctrines.**³²

²⁶ *Newcomb v. New York & C. R. Co.*, 169 Mo. 409; s. c. 69 S. W. Rep. 348. *Rep.* 416; *aff'g s. c.* 113 Ill. App. 263.

²⁷ *Gulf & C. R. Co. v. Shelton*, 96 Tex. 301; s. c. 72 S. W. Rep. 165; *aff'g s. c.* 70 S. W. Rep. 359. ³¹ *Brady v. Chicago & C. R. Co.*, 114 Fed. Rep. 100; s. c. 52 C. C. A. 48; 57 L. R. A. 712.

²⁸ *Herrman v. Great Northern R. Co.*, 27 Wash. 472; s. c. 68 Pac. Rep. 82; 57 L. R. A. 390. ³² Two electric railroad companies, whose lines connected, entered into a contract for the use of each other's track between their respective terminals. The agreement provided that each company should have full control of the cars while on its tracks, and that the ownership of the tracks should determine their responsibility to the public, etc.; that each company should receive a rental for the use of its cars by the other; and that the fares should belong to the company owning the

²⁹ *Fletcher v. Boston & C. R. Co.*, 187 Mass. 463; s. c. 73 N. E. Rep. 552.

³⁰ That the railroad company owning the track is liable to a passenger injured during transportation by the negligence or wrongful act of the company operating the railroad, see: *Chicago & C. R. Co. v. Newell*, 212 Ill. 332; s. c. 72 N. E.

§ 3398. Contract to Carry Passenger Includes Baggage.³⁵

§ 3399. Measure of Responsibility for Baggage is that of a Common Carrier of Goods.³⁴—Where the carrier negligently exposes baggage to the elements, it cannot escape responsibility for injury thereto by showing that an act of God was the cause of the injury.³⁵ A *prima facie* case of negligence in the transportation of baggage is made by proof that the baggage was checked and its unexplained loss.³⁶

§ 3401. Measure of Responsibility in Respect of Articles not Properly Baggage.—It may be said generally that, in the absence of a special agreement, the carrier's common-law liability for baggage, of the nature of which it is ignorant, embraces only such articles as are strictly baggage.³⁷

§ 3402. Carrier Liable when Notified of the Nature of the Articles, although not Baggage.³⁸—The payment of overweight charges on baggage does not of itself alone charge the carrier with knowledge

tracks over which they were collected. Plaintiff boarded one of defendant's cars, while on the tracks of the other company, and paid her fare to the terminus of the latter's line. She was injured while alighting as the car was about to turn onto defendant's track, and after the switch had been thrown. She was entitled, for the fare paid, to ride at least a block further, and over a portion of defendant's road. It was held that the companies were jointly liable for the injury, each receiving a consideration for her ride—the other company, the fare; and defendant, a rental for its car, with the privilege of through service: *Richard v. Detroit & C. R. Co.*, 129 Mich. 458; s. c. 89 N. W. Rep. 52; 8 Det. Leg. N. 1029.

³³ *Wood v. Maine Cent. R. Co.*, 98 Me. 98; s. c. 56 Atl. Rep. 457.

³⁴ That the carrier as to the passenger's baggage, in the absence of a special restriction of liability, is an insurer against every loss except those due to the act of God or of a public enemy, see: *Hubbard v. Mobile & C. R. Co.*, 112 Mo. App. 459; s. c. 87 S. W. Rep. 52; *Bullard v. Delaware & C. R. Co.*, 21 Pa. Super. Ct. 583.

³⁵ *Henry Sonneborn & Co. v. Southern R. Co.*, 65 S. C. 502; s. c.

44 S. E. Rep. 77; *J. Harzburg & Co. v. Southern R. Co.*, 65 S. C. 539; s. c. 44 S. E. Rep. 75.

³⁶ *Saleeby v. Central R. Co.*, 99 App. Div. (N. Y.) 163; s. c. 90 N. Y. Supp. 1042.

³⁷ *Hubbard v. Mobile & C. R. Co.*, 112 Mo. App. 459; 87 S. W. Rep. 52.

³⁸ These cases support the principle indicated: *Saunders v. Southern R. Co.*, 128 Fed. Rep. 15; s. c. 62 C. C. A. 523; *Saleeby v. Central R. Co.*, 99 App. Div. (N. Y.) 163; s. c. 90 N. Y. Supp. 1042. In a case where a passenger had travelled over the road of the carrier for six years carrying samples of merchandise in trunks different in style from the ordinary trunk, and it was testified that on the last of these trips the baggagemaster stated that the passenger was a dress man and that he had ladies' dresses, but the trunks were received as the passenger's baggage, and some of the contents were stolen, it was concluded that there was evidence before the jury from which they might infer knowledge on the part of the carrier as to the character of the contents and that such a finding would not be disturbed: *Amory v. Wabash R. Co.*, 130 Mich. 404; s. c. 90 N. W. Rep. 22; 9 Det. Leg. N. 79.

that the trunk contains merchandise or other articles than the passenger's ordinary baggage.³⁹

§ 3406. Carrier Liable for Acts of What Agents in Respect of Baggage.⁴⁰

§ 3407. When Carrier Exonerated because his Agent Acts Outside the Line of his Authority.—Here it is the rule that a carrier is not responsible for the loss of a package containing merchandise checked under the guise of baggage when neither the carrier nor its proper agent has actual knowledge of the contents of the package, and the loss is occasioned by ordinary negligence.⁴¹ Under this rule the carrier is not bound to make inquiry of the passenger as to the real contents of the trunk.⁴² And the case is stronger where the trunk is received from a connecting carrier and the baggage agent of such connecting carrier has not been authorized by the carrier sued for the loss of the package, to check merchandise as ordinary baggage.⁴³ It has been held that a passenger with knowledge of a carrier's rule forbidding baggagemen to receive sample cases for transportation as ordinary baggage, without the execution of a bond to release the carrier from liability in case of loss, cannot recover for the loss of such sample cases, though an agent of the carrier induced the baggageman to receive the sample cases without bond. In this case there was no proof of a waiver of the regulation by the carrier.⁴⁴

§ 3408. Responsibility for Baggage not Carried on Same Train or Vessel with Passenger.—Generally speaking, in the absence of special agreement, the carrier does not incur liability as an insurer of baggage unless the person checking the same becomes a passenger, or is prevented from so doing by the fault of the carrier.⁴⁵ So it has been held that where the owner did not intend to accompany his baggage the entire distance and did not do so, the carrier did not incur full responsibility as a common carrier; and where the trunk was rifled

³⁹ *Illinois Cent. R. Co. v. Matthews*, 114 Ky. 973; s. c. 72 S. W. Rep. 302; 24 Ky. L. Rep. 1766.

⁴⁰ That a railroad baggagemaster has authority to accept merchandise from a passenger and contract to carry it without additional compensation, see: *Saleeby v. Central R. Co.*, 99 App. Div. (N. Y.) 163; s. c. 90 N. Y. Supp. 1042.

⁴¹ *Toledo &c. R. Co. v. Bowler &c. Co.*, 63 Ohio St. 274; s. c. 58 N. E. Rep. 813.

⁴² *Toledo &c. R. Co. v. Bowler &c. Co.*, 63 Ohio St. 274; s. c. 58 N. E. Rep. 813.

⁴³ *Toledo &c. R. Co. v. Bowler &c. Co.*, 63 Ohio St. 274; s. c. 58 N. E. Rep. 813.

⁴⁴ *Weber Co. v. Chicago &c. R. Co.*, 113 Iowa 188; s. c. 84 N. W. Rep. 1042.

⁴⁵ *Wood v. Maine Cent. R. Co.*, 98 Me. 98; s. c. 56 Atl. Rep. 457. But see *Adger v. Blue Ridge Co.*, 71 S. C. 213; s. c. 50 S. E. Rep. 783, where it is held that the carrier will be liable where it accepts and checks baggage with the knowledge that the ticket-holder will use other means of transportation.

of its contents after its arrival at destination, the carrier was held to liability as a gratuitous bailee only.⁴⁶

§ 3410. Responsibility for Baggage of a Gratuitous Passenger.⁴⁷

§ 3412. Lien of Carrier upon Baggage for Passenger's Fare.⁴⁸

§ 3414. What is Baggage.—The term baggage in this connection is limited to such articles of personal baggage as are reasonably required for the comfort or convenience of the passenger,⁴⁹ unless the carrier by contract, express or implied, accepts other articles.⁵⁰ In determining the character and amount of the property, regard is to be had of the object and length of the journey.⁵¹ The term does not cover articles perishable in their nature, such as fruit, and the carrier will not be liable for injury to other baggage in the trunk because of its decay owing to delay in transportation.⁵²

§ 3415. A Mixed Question of Law and Fact.⁵³

§ 3416. What Articles have been Regarded as Baggage.—The term baggage has been held to include the clothing of a female traveler and her children, including fancy work and miscellaneous ornaments, a savings bank and contents, and a zither key,⁵⁴ and shotguns carried by a passenger in his valise to hunt with as opportunity presented,⁵⁵ but not heavy winter clothing carried by a passenger in his trunk on a journey undertaken in the summer time.⁵⁶

§ 3417. What not Regarded as Baggage: Articles Used in Trade.—The law does not require the carrier to carry as baggage merchandise

⁴⁶ Wood v. Maine Cent. R. Co., 98 Me. 98; s. c. 56 Atl. Rep. 457; Marshall v. Pontiac & C. R. Co., 126 Mich. 45; s. c. 85 N. W. Rep. 242; 7 Det. Leg. N. 715.

⁴⁷ That a railroad company carrying a passenger and his baggage under a free pass is a gratuitous bailee of the baggage, and is liable for its loss only when caused by its negligence, see: White v. St. Louis & C. R. Co., — Tex. Civ. App. —; s. c. 86 S. W. Rep. 962.

⁴⁸ In a case where a passenger obtained a ticket for transportation upon a prepaid certificate procured for her by her husband from a carrier, the mere fact that without notice to her the carrier refunded the money to the husband without requiring him to deliver up the certificate, will not give the carrier a lien on her baggage for the unpaid passage money. Moszkowitz v. In-

ternational Nav. Co., 84 N. Y. Supp. 297.

⁴⁹ Saunders v. Southern R. Co., 128 Fed. Rep. 15; s. c. 62 C. C. A. 523.

⁵⁰ Illinois Cent. R. Co. v. Matthews, 114 Ky. 973; s. c. 72 S. W. Rep. 302; 24 Ky. L. Rep. 1766; Sherlock v. Chicago & C. R. Co., 85 Mo. App. 46.

⁵¹ Werner v. Evans, 94 Ill. App. 328.

⁵² Georgia R. Co. v. Johnson, 113 Ga. 589; s. c. 38 S. E. Rep. 954.

⁵³ Missouri & C. R. Co. v. Meek, 33 Tex. Civ. App. 47; s. c. 75 S. W. Rep. 317 (whether tools used by mechanic are baggage).

⁵⁴ Yazoo & C. R. Co. v. Baldwin, 113 Tenn. 205; s. c. 81 S. W. Rep. 599.

⁵⁵ Little Rock & C. R. Co. v. Record, 74 Ark. 125; s. c. 85 S. W. Rep. 421.

⁵⁶ Missouri & C. R. Co. v. Meek, 33

or articles intended for business purposes,⁵⁷ such as stage costumes, scenery, etc., making up the paraphernalia of a travelling theatrical company.⁵⁸

§ 3418. **Money.**—The carrier is liable for money necessary for travelling expenses of the passenger,⁵⁹ but not for large sums of money carried by the passenger for his use in a business enterprise, and not for travelling expenses.⁶⁰

§ 3419. **Bullion, Watches, Jewelry, Silverware, etc.**—The term baggage will include articles of jewelry,⁶¹ such as opera glasses, watches, bracelets, pins, and rings carried in a woman's trunk to be worn for her personal use and ornament.⁶²

§ 3420. **Presents, Toys, Pictures, Papers, Bric-a-Brac, etc.**—The term has been held to include a camera and its belongings.⁶³ It does not include household goods carried in a trunk by persons changing their residence to save freight charges.⁶⁴

§ 3424. **Baggage or Property of Persons Other than the Passenger.**⁶⁵

§ 3431. **What Acts Constitute Delivery of Baggage to Carrier.**⁶⁶

Tex. Civ. App. 47; s. c. 75 S. W. Rep. 317.

⁵⁷ Choctaw &c. R. Co. v. Zwirtz, 13 Okl. 411; s. c. 73 Pac. Rep. 941.

⁵⁸ Saunders v. Southern R. Co., 128 Fed. Rep. 15; s. c. 62 C. C. A. 523.

⁵⁹ Battle v. Columbia &c. R. Co., 70 S. C. 329; s. c. 49 S. E. Rep. 849.

⁶⁰ Levins v. New York &c. R. Co., 183 Mass. 175; s. c. 66 N. E. Rep. 803.

⁶¹ Mexican Nat. R. Co. v. Ware (Tex. Civ. App.), 60 S. W. Rep. 343; Galveston &c. R. Co. v. Fales, 33 Tex. Civ. App. 457; s. c. 77 S. W. Rep. 234.

⁶² Hubbard v. Mobile &c. R. Co., 112 Mo. App. 459; s. c. 87 S. W. Rep. 52.

⁶³ Atwood v. Mohler, 108 Ill. App. 416.

⁶⁴ Yazoo &c. R. Co. v. Baldwin, 113 Tenn. 205; s. c. 81 S. W. Rep. 599.

⁶⁵ A married woman is entitled to recover for the loss of her husband's underwear carried in her trunk as a part of her baggage where her husband travels with her (Yazoo &c. R. Co. v. Baldwin, 113 Tenn. 205; s. c. 81 S. W. Rep. 599). In a case where a passenger carried in

her trunk an embroidered table center piece of her own and a dress belonging to her mother and the baggage was lost, it was held that she could not recover for these articles as the first was not properly a part of the passenger's personal baggage under the definition and the last did not belong to her (Bullard v. Delaware &c. R. Co., 21 Pa. Super. Ct. 583). Where the traveller does not own goods checked by him but is liable to the owner for any loss or damage to them, he is to be treated as their owner for the purpose of an action against a carrier for loss or damage to the goods while in the carrier's hands (Illinois Cent. R. Co. v. Matthews, 114 Ky. 973; s. c. 72 S. W. Rep. 302; 24 Ky. L. Rep. 1766). Memoranda and papers in the possession of an agent but relating exclusively to the business of his principal, and carried by the agent solely for business purposes, are not baggage when placed in the trunk by the agent and checked by him as personal baggage. (Yazoo &c. R. Co. v. Georgia Home Ins. Co., 85 Miss. 7; s. c. 37 South. Rep. 500; 67 L. R. A. 646).

⁶⁶ In one case it was correctly held

§ 3433. Duty of Carrier to Afford Facilities for Redelivery and Storage of Baggage at Destination.⁶⁷

§ 3434. What is a Reasonable Time for Removal of Baggage.—A passenger was held to have made a demand for his baggage within a reasonable time where he demanded it on alighting at his station, and was unable to get the trunk or obtain any information as to the time it would arrive.⁶⁸ The failure to deliver baggage on demand places the burden for accounting for such failure on the carrier.⁶⁹ There is a holding that the mere fact that the passenger received the baggage from a terminal association does not, in the absence of evidence showing how the terminal association obtained possession of the baggage, show that the carrier had performed its duty of delivering the baggage, and exempt it from responsibility, both as carrier and as warehouseman, for a loss of a part of the baggage.⁷⁰

§ 3439. Liability of Express Company Soliciting Baggage on Train.—A local express company, whose solicitors meet incoming trains and exchange a passenger's trunk check for its own checks, by this transfer of checks makes the railroad company a bailee, and the express company will be liable for the loss of the baggage, though stolen while in the possession of the railroad company.⁷¹

§ 3441. Responsibility of Baggage under the Personal Control of the Passenger: Principles and Analogies.—A rule of a railroad company forbidding passengers to carry on an express business on its trains does not charge a passenger with notice of the fact that he will not be permitted to carry his own effects and purchases into a passenger car on which he has purchased transportation.⁷²

§ 3442. Not Responsible for Baggage Exclusively in the Custody of the Passenger, but may Become so in Case of Negligence.—A car-

that a delivery of a trunk was sufficiently made to the carrier where an expressman delivered the trunk to the only person in charge of the station, who was at the time engaged at a telegraph instrument, by depositing it at the place indicated by him and giving him at the time directions as to checking and notice that the owner would soon appear and that he would attend to it: *Battle v. Columbia & C. R. Co.*, 70 S. C. 329; s. c. 49 S. E. Rep. 849. Mere unloading of baggage from a dray, in the absence of the station officials, onto a wheeled truck close to the edge of the platform near the track is insufficient: *Lennon v. Illinois Cent.*

R. Co., 127 Iowa 431; s. c. 103 N. W. Rep. 343.

⁶⁷ The carrier may make immediate delivery of baggage to passenger on completion of transportation: *Wood v. Maine Cent. R. Co.*, 98 Me. 98; s. c. 56 Atl. Rep. 457.

⁶⁸ *Felton v. Chicago & C. R. Co.*, 86 Mo. App. 332.

⁶⁹ *Southern R. Co. v. Edmundson*, 123 Ga. 474; s. c. 51 S. E. Rep. 388.

⁷⁰ *Hubbard v. Mobile & C. R. Co.*, 112 Mo. App. 459; s. c. 87 S. W. Rep. 52.

⁷¹ *Springer v. Westcott*, 166 N. Y. 117; s. c. 59 N. E. Rep. 693; aff'g s. c. 46 N. Y. Supp. 589.

⁷² *Runyan v. Central R. Co.*, 65 N. J. L. 228; s. c. 47 Atl. Rep. 422.

rier is not an insurer of baggage and hand luggage taken by passengers into a coach.⁷³ Thus, a passenger on a railroad train, keeping his money in his own possession, cannot hold the carrier responsible for its theft by a porter when left momentarily by him on a window sill of the car.⁷⁴

§ 3446a. **Carriage of Dogs on Electric Cars.**—A rule of a street railroad company that no dogs, large packages or other articles of a bulky nature that may interfere with the accommodation of passengers will be allowed on the cars, is construed to exclude all dogs; and the qualification as to articles interfering with the accommodation of passengers is held to relate only to articles carried by them and not to dogs.⁷⁵

§ 3448. **Where Liable as a Bailee for Hire After End of Transit.**—The relation of carrier ceases and that of warehouseman begins when the passenger has had a reasonable time to remove his baggage after it has reached its destination and been unloaded from the train.⁷⁶ It is to be noted, however, that the liability of a carrier as a bailee for the storage of unclaimed baggage extends only to such articles as properly come within the definition of baggage, and does not include goods improperly checked as such.⁷⁷

§ 3450. **Instances where the Carrier was Held Liable as Carrier.**—With respect to baggage delivered to a carrier by an expressman for transportation the carrier will become charged as an insurer where he delivers a check for the baggage to a passenger, though the baggage has been stolen in the interval between its delivery by the expressman and the demand for the check by the passenger.⁷⁸

§ 3452. **Carrier Holding Baggage as Warehouseman Responsible for its Loss through Negligence.**⁷⁹

⁷³ *Nashville &c. R. Co. v. Lillie*, 112 Tenn. 331; s. c. 78 S. W. Rep. 1055.

⁷⁴ *Levins v. New York &c. R. Co.*, 183 Mass. 175; s. c. 66 N. E. Rep. 803.

⁷⁵ *O'Gorman v. New York &c. R. Co.*, 96 App. Div. (N. Y.) 594; s. c. 89 N. Y. Supp. 589.

⁷⁶ *Blackmore v. Missouri Pac. R. Co.*, 162 Mo. 455; s. c. 62 S. W. Rep. 993; *Hubbard v. Mobile &c. R. Co.*, 112 Mo. App. 459; s. c. 87 S. W. Rep. 52. Where a passenger's trunk is placed on the platform on the arrival of the train at 9 A. M., and, not being called for, is placed in the

baggage room, whence it is stolen during the night—he not calling for it till late the next day—the carrier's liability is not that of a carrier, but only that of a warehouseman: *St. Louis &c. R. Co. v. Terrell* (Tex. Civ. App.), 72 S. W. Rep. 430.

⁷⁷ *Missouri &c. R. Co. v. Meek*, 33 Tex. Civ. App. 47; s. c. 75 S. W. Rep. 317.

⁷⁸ *Williams v. Central R. Co.*, 93 App. Div. (N. Y.) 582; s. c. 88 N. Y. Supp. 434.

⁷⁹ *Hubbard v. Mobile &c. R. Co.*, 112 Mo. App. 459; s. c. 87 S. W. Rep. 52.

§ 3455. **Contracts Limiting Liability of Carrier for Loss of Baggage.**⁸⁰—Stipulations that the liability shall not exceed a fixed amount in value unless a special agreement is made⁸¹ are valid if not unreasonable.⁸² So the carrier may limit its liability to losses occurring on its own line.⁸³ The Texas statute prohibiting carriers from limiting or restricting their common-law liability is held to apply to interstate transportation beginning in that State, and hence vitiates a limitation of the carrier's liability for baggage in a ticket for transportation from a city in that State to the republic of Mexico.⁸⁴ The Iowa provision of similar import is held not to apply to a rule of the carrier forbidding baggagemen to receive jewelers' sample cases for transportation as ordinary baggage unless the owner procures a permit from the company.⁸⁵ The New York statute allowing a carrier to limit its liability to a certain amount per hundred pounds by posting a general notice was held not to apply where a passenger's trunk was stolen from the carrier before the passenger has had an opportunity to check it.⁸⁶ The questions of negligence and the reasonableness of the stipulations are for the jury, but the right of the carrier to limit its liability is a question of law for the court.⁸⁷

§ 3456. **Forms of Contract Deemed to have Received Passenger's Assent.**—These limiting contracts are not valid unless accepted by the passenger with knowledge of their terms, and as a general rule this knowledge will not be implied.⁸⁸ There is a presumption, how-

⁸⁰ That the common-law liability of the carrier may be limited by contract, see: *Holly v. Southern R. Co.*, 119 Ga. 767; s. c. 47 S. E. Rep. 188. That the carrier cannot contract for exemption against loss or injury due to negligence, see: *Saunders v. Southern R. Co.*, 128 Fed. Rep. 15; s. c. 62 C. C. A. 523. Where the complaint does not claim that the damages to baggage were caused by the negligence of the defendant, the question of the validity of a stipulation limiting the liability of the carrier for loss due to its negligence does not arise: *Houston & C. R. Co. v. Seale*, 28 Tex. Civ. App. 364; s. c. 67 S. W. Rep. 437.

⁸¹ *Jacobs v. Central R. Co.*, 208 Pa. 535; s. c. 57 Atl. Rep. 982; aff'g s. c. 19 Pa. Super. Ct. 13; *Galveston & C. R. Co. v. Fales*, 33 Tex. Civ. App. 457; s. c. 77 S. W. Rep. 234.

⁸² *Jacobs v. Central R. Co.*, 208 Pa. 535; s. c. 57 Atl. Rep. 982 (limitation of loss to one hundred fifty

pounds of baggage at \$1 a pound not unreasonable).

⁸³ *Askew v. Gulf & C. R. Co.* (Tex. Civ. App.), 73 S. W. Rep. 846.

⁸⁴ *Mexican Nat. R. Co. v. Ware* (Tex. Civ. App.), 60 S. W. Rep. 343.

⁸⁵ *Weber Co. v. Chicago & C. R. Co.*, 113 Iowa 188; s. c. 84 N. W. Rep. 1042.

⁸⁶ *Williams v. Central R. Co.*, 93 App. Div. (N. Y.) 582; s. c. 88 N. Y. Supp. 434.

⁸⁷ *Houston & C. R. Co. v. Seale*, 28 Tex. Civ. App. 364; s. c. 67 S. W. Rep. 437.

⁸⁸ *Saunders v. Southern R. Co.*, 128 Fed. Rep. 15; s. c. 62 C. C. A. 523; *Little Rock & C. R. Co. v. Record*, 74 Ark. 125; s. c. 85 S. W. Rep. 421; *Malone v. Metropolitan Exp. Co.*, 86 N. Y. Supp. 1039. That carrier must acquaint passenger with conditions printed in fine type, see: *Hutchins v. Pennsylvania R. Co.*, 92 App. Div. (N. Y.) 612; s. c. 86 N. Y. Supp. 1138; s. c. aff'd, 181 N. Y. 186; 73 N. E. Rep. 972.

ever, that the passenger accepted a contract with knowledge of a limitation where the limitation was clearly set forth on the face of the ticket in prominent and legible type.⁸⁹

§ 3459. **What Notice will be Sufficient to Affect the Passenger.**—After the acceptance of the baggage and after transportation has commenced, the assent of the passenger to a limitation cannot be coerced by the carrier.⁹⁰ A California statute declares that a passenger, by accepting a contract with knowledge of its terms assents to any limitation of liability stated therein. Another provision declares that every person who has notice of circumstances sufficient to put a prudent man upon inquiry has constructive notice where, by prosecuting the inquiry, he might have learned them. Hence, it is not improper in that State to charge that if, when a receipt for baggage limiting the carrier's liability was delivered to the passenger, the circumstances were such that a prudent man would have read the limitation, then he had notice thereof and he would not be excused on the ground that he did not read the notice.⁹¹

§ 3464. **Parties to Actions for Loss of Baggage.**—In Tennessee a wife may recover for the loss of her baggage, though her husband joins with her in the action.⁹² The right to maintain the joint action is not affected by the fact that the husband travelled with the wife without a ticket and without paying fare at the time of the loss.⁹³

§ 3465. **Forms of Action for Lost Baggage.**⁹⁴

§ 3466. **Burden of Proof in such Actions.**—There is a presumption that a passenger's baggage was lost or injured through the negligence of the carrier where it has been delivered into the custody of the agent of the carrier and no excuse is given for its disappearance or injury.⁹⁵ But the passenger must prove delivery to the carrier.⁹⁶

⁸⁹ *Mogill v. Central R. Co.*, 25 Pa. Super. Ct. 164; *Jacobs v. Central R. Co.*, 208 Pa. 535; s. c. 57 Atl. Rep. 982.

⁹⁰ *Saunders v. Southern R. Co.*, 128 Fed. Rep. 15; s. c. 62 C. C. A. 523.

⁹¹ *Merrill v. Pacific Transfer Co.*, 131 Cal. 582; s. c. 63 Pac. Rep. 915.

⁹² *Yazoo & C. R. Co. v. Baldwin*, 114 Tenn. 205; s. c. 81 S. W. Rep. 599.

⁹³ *Yazoo & C. R. Co. v. Baldwin*, 114 Tenn. 205; s. c. 81 S. W. Rep. 599.

⁹⁴ A petition against a carrier for the loss of baggage is not converted into a petition for negligence, so as to require proof thereof, by mere allegation that the loss was occa-

sioned by the negligence of the defendant's employes: *Hubbard v. Mobile & C. R. Co.*, 112 Mo. App. 459; s. c. 87 S. W. Rep. 52. Where the baggage of a passenger going from New York to New Jersey is lost and not delivered, the rights of the parties are governed by the laws of New Jersey: *Williams v. Central R. Co.*, 93 App. Div. (N. Y.) 582; s. c. 88 N. Y. Supp. 434.

⁹⁵ *The Priscilla*, 106 Fed. Rep. 739; *Hubbard v. Mobile & C. R. Co.*, 112 Mo. App. 459; s. c. 87 S. W. Rep. 52.

⁹⁶ *Lustig v. International Nav. Co.*, 38 Misc. (N. Y.) 802; s. c. 78 N. Y. Supp. 885.

§ 3467. Competency of Plaintiff as a Witness to Show the Contents of the Lost Baggage.⁹⁷

§ 3469. Measure of Damages in Actions for Loss of Baggage.—The measure of damages for loss or injury to baggage is merely the actual value of the articles destroyed, and the damage to articles partially destroyed; and no account is to be taken of the deprivation of the use of the articles and mental distress occasioned by the loss.⁹⁸ The amount and extent of the damages must be set forth clearly in the complaint. An allegation that “the articles totally destroyed consisted of three dresses, worth three hundred dollars; that the articles injured consisted of shirt-waists, collars, cuffs, and ladies’ undergarments,” was held not sufficiently specific; an itemized list of the clothing destroyed or damaged, with the value of each, and the extent of the damage to each article injured should have been set out.⁹⁹ Damages for breach of contract in the transportation of sample cases cover only those in the contemplation of the parties at the time of making the contract. A passenger’s notice to the baggageman of a carrier that he had a large sample trunk which he wished checked, has been held insufficient to charge the carrier with knowledge that any special reason existed for expediting the delivery of the trunk, so as to render the carrier liable for damages caused by the passenger’s inability to fulfill engagements already made to meet prospective customers to whom no goods could be sold without the samples.¹⁰⁰

§ 3475. Street Railways Bound to the Same Extraordinary Care which the Law Puts upon Other Carriers of Passengers.¹⁰¹

⁹⁷ Where a husband sues a carrier for the loss of his wife’s trunk while a passenger, the husband may testify as to the value after the wife has testified as to the contents: *Battle v. Columbia &c. R. Co.*, 70 S. C. 329; s. c. 49 S. E. Rep. 849.

⁹⁸ *Houston &c. R. Co. v. Seale*, 28 Tex. Civ. App. 364; s. c. 67 S. W. Rep. 437. See also *Wall v. Atlantic Coast Line R. Co.*, 71 S. C. 337; s. c. 51 S. E. Rep. 95.

⁹⁹ *Houston &c. R. Co. v. Seale*, 28 Tex. Civ. App. 364; s. c. 67 S. W. Rep. 437.

¹⁰⁰ *Katz v. Cleveland &c. R. Co.*, 46 Misc. (N. Y.) 259; s. c. 91 N. Y. Supp. 720.

¹⁰¹ *Kight v. Metropolitan R. Co.*, 21 App. (D. C.) 494 (reasonable foresight); *McAllister v. People’s R. Co.*, — Del. —; s. c. 54 Atl. Rep. 743 (degree of care same whether motive power steam or electricity);

Hutcheis v. Cedar Rapids &c. R. Co., 128 Iowa 279; s. c. 103 N. W. Rep. 779 (extraordinary care and precaution to protect passengers from injury); *Metropolitan St. R. Co. v. Hanson*, 67 Kan. 256; s. c. 72 Pac. Rep. 773 (utmost degree of care and skill); *Louisville R. Co. v. Hartleige*, 74 S. W. Rep. 742; s. c. 25 Ky. L. Rep. 152 (highest degree of care to ascertain and remove causes which might result in injury to passengers); *Maggioli v. St. Louis Transit Co.*, 108 Mo. App. 416; s. c. 83 S. W. Rep. 1026 (high degree of care and vigilance); *Snider v. Chicago &c. R. Co.*, 108 Mo. App. 234; s. c. 83 S. W. Rep. 530 (very high degree of care and foresight); *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1; s. c. 84 S. W. Rep. 26 (highest care and skill in preventing injuries to passengers which prudent men would exercise

§ 3477. **Must Exercise this Degree of Care in Respect of their Vehicles.**¹⁰²—It is held that this obligation is satisfied by the purchase of appliances from a reputable manufacturer and their maintenance in the condition received, the appliance being one in general use and accidents similar to the one causing the injury sued upon not having previously occurred.¹⁰³ Screens with large meshes fastened across the lower half of the window of a street car on the side next to the poles supporting the trolley wires are regarded as a sufficient protection against the accidental injury of passengers from such poles, and a sufficient warning of the danger of such injury.¹⁰⁴ There is a holding that a street railway company will not be charged with negligence in failing to maintain a guard rail on the side of a car nearest the trolley post for the protection of passengers where the posts are not dangerously near the track and the danger therefrom is obvious to passengers.¹⁰⁵

§ 3478. **Especially where the Cars are Propelled by Electricity.**—A street railway company is bound to use the very highest degree of care in seeing that the electric appliances in use on the cars do not get out of order and so endanger the safety of passengers, and will be liable

under like circumstances); *Lincoln Traction Co. v. Webb*, — Neb. —; s. c. 102 N. W. Rep. 258 (utmost care and skill for safety of passengers and liable for slightest negligence); *Frank v. Metropolitan St. R. Co.*, 91 App. Div. (N. Y.) 485; s. c. 86 N. Y. Supp. 1018 (reasonable care considering nature of business to prevent accident); *Kohm v. Interborough Rapid Transit Co.*, 104 App. Div. (N. Y.) 237; s. c. 93 N. Y. Supp. 671; *Zvonik v. Interurban St. R. Co.*, 88 N. Y. Supp. 399 (high degree of care); *El Paso Electric R. Co. v. Harry*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 735 (high degree of care such as would be used by very cautious and competent persons under like circumstances); *Foster v. Seattle Electric Co.*, 35 Wash. 177; s. c. 76 Pac. Rep. 995 (instruction not open to objection of reducing degree of care to that of ordinary care).

¹⁰² That a street railroad company is held to a high degree of care and diligence in the maintenance and repair of the necessary appliances used by them in the transportation of passengers, see: *Howell v. Lansing City R. Co.*, 136 Mich. 432; s. c. 99 N. W. Rep. 406; 11 Det. Leg. N.

82; *McCarty v. St. Louis & C. R. Co.*, 105 Mo. App. 596; s. c. 80 S. W. Rep. 7 (carrier under obligation to keep handrail used by passengers in proper repair); *Citizens' Ry. Co. v. Sinclair*, 36 Tex. Civ. App. 266; s. c. 81 S. W. Rep. 329; *Mannon v. Camden Interstate R. Co.*, 56 W. Va. 554; s. c. 49 S. E. Rep. 450. *A prima facie* case of negligence against the carrier is made by proof of the fall of a fire extinguisher fastened to the side of a car over the seats occupied by the passengers: *Allen v. United Traction Co.*, 67 App. Div. (N. Y.) 363; s. c. 73 N. Y. Supp. 737.

¹⁰³ *Smith v. Kingston City R. Co.*, 55 App. Div. (N. Y.) 143; s. c. 67 N. Y. Supp. 185; s. c. *aff'd*, 169 N. Y. 616; 62 N. E. Rep. 1100; *Holt v. Southwest Missouri & C. R. Co.*, 84 Mo. App. 443; *Leyh v. Newburgh & C. R. Co.*, 41 App. Div. (N. Y.) 218; s. c. 58 N. Y. Supp. 479; s. c. *aff'd*, 168 N. Y. 667; 61 N. E. Rep. 1131.

¹⁰⁴ *Christensen v. Metropolitan St. R. Co.*, 137 Fed. Rep. 708.

¹⁰⁵ *Bridges v. Jackson Electric R. & C. Co.*, 86 Miss. 584; s. c. 38 South. Rep. 788.

for injuries the proximate result of a failure to use this high degree of care.¹⁰⁶

§ 3479. **And in Respect of their Roadways.**—In the construction and maintenance of tracks and roadways the street railway company is required to exercise the highest degree of care, skill and diligence for the safety of passengers transported over such roadways.¹⁰⁷ Where the track is laid through a tunnel the company assumes the responsibility of using all the care, diligence and foresight reasonably necessary and practicable in the management of its cars to protect its passengers against being brought in contact with the walls at the side of the track.¹⁰⁸ In case the track is upon a highway, but in a cut not used for travel, the street railway company is bound to the same degree of care in preventing accidents from the fall of material therefrom upon the tracks as it would be if the tracks were upon its own land.¹⁰⁹ An ordinance requiring street railway companies to pave and keep in repair the space between the rails of the tracks and for one foot outside the track, and that on failure to do so the city may cause the work to be done at the cost of the company, has been held not to confer a right of action on a passenger injured through the non-repair of the street. The reason for this conclusion is that the ordinance was not enacted primarily for the safety of users of the street, but to compel the street railway company to bear its proportion of the burden of municipal government.¹¹⁰

§ 3481. **Whether this Extraordinary Care must be Exercised in the Conduct of their Employés.**¹¹¹

§ 3483. **Care due to Passengers who are Permitted to Ride upon Platforms.**—A street railroad company will not be imputed with ac-

¹⁰⁶ Leonard v. Brooklyn Heights R. Co., 57 App. Div. (N. Y.) 125; s. c. 67 N. Y. Supp. 985; Davis v. Paducah R. & Co., 113 Ky. 267; s. c. 68 S. W. Rep. 140; 24 Ky. L. Rep. 135.

¹⁰⁷ Citizens' St. R. Co. v. Jolly, 161 Ind. 80; s. c. 67 N. E. Rep. 935; Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360; s. c. 71 N. E. Rep. 201 (stone on track).

¹⁰⁸ North Chicago St. R. Co. v. Polkey, 106 Ill. App. 98.

¹⁰⁹ Galligan v. Old Colony St. R. Co., 182 Mass. 211; s. c. 65 N. E. Rep. 48.

¹¹⁰ Fielders v. North Jersey St. R. Co., 68 N. J. L. 343; 53 Atl. Rep. 404; 54 Atl. Rep. 822; rev'g s. c. 67 N. J. L. 76; 50 Atl. Rep. 533.

¹¹¹ In New York it is held that the motorman is only required to use care commensurate with the circumstances, either as they appeared or as they would have appeared in the exercise of ordinary prudence, and is not obliged to exercise the very highest degree of care: Regensburg v. Nassau Electric R. Co., 58 App. Div. (N. Y.) 566; s. c. 69 N. Y. Supp. 147. In one case a motorman was absolved from the charge of negligence where he obeyed the signal given him by the conductor, and did not see or know that to obey the signal would result, or be likely to result, in injury to an intending passenger: Foster v. Seattle Electric Co., 35 Wash. 177; s. c. 76 Pac. Rep. 995.

tionable negligence by the mere fact that it allows passengers to occupy its platform,¹¹² or allowing this use of the platform, fails to protect the platform with gates.¹¹³ But the fact that the passenger voluntarily chooses to ride in this position will not lessen the degree of care that the carrier owes to him;¹¹⁴ and this care is the same in degree as that required of railroad companies in the carriage of their passengers.¹¹⁵ Where the passenger is compelled to ride on the platform by reason of the crowded condition of the body of the car and he pays his fare for transportation, there is an assurance on the part of the carrier that it will guard him against accident while standing on the platform so far as the circumstances will permit,¹¹⁶ but it will not be liable for injuries to a passenger thus situated unless the crowded condition was the proximate cause of the accident.¹¹⁷ Where the passenger stands on the running-board it is the duty of the conductor to take notice of his position and warn him of the dangers from fixed structures at the side of the track and in close proximity thereto.¹¹⁸

§ 3484. **Presumption of Negligence from the Happening of a Street Railway Accident.**¹¹⁹—Since the presumption of negligence under this doctrine arises not from the happening of the accident but from a consideration of the cause of the accident¹²⁰ the plaintiff must show the cause of the injury.¹²¹ The ordinary burning out of a fuse used

¹¹² North Chicago St. R. Co. v. Polkey, 203 Ill. 225; s. c. 67 N. E. Rep. 793; Denison & Co. R. Co. v. Carter, 98 Tex. 196; s. c. 82 S. W. Rep. 782; rev'g s. c. 79 S. W. Rep. 320.

¹¹³ Byron v. Lynn & Co. R. Co., 177 Mass. 303; s. c. 53 N. E. Rep. 1015; Halverson v. Seattle Electric Co., 35 Wash. 600; s. c. 77 Pac. Rep. 1058.

¹¹⁴ Birmingham R. & Co. v. Bynum, 139 Ala. 389; s. c. 36 South. Rep. 736; Thompson v. St. Louis & Co. R. Co., 111 Mo. App. 465; s. c. 86 S. W. Rep. 465.

¹¹⁵ South Covington & Co. R. Co. v. Riegler, 82 S. W. Rep. 382; s. c. 26 Ky. L. Rep. 666.

¹¹⁶ McCaw v. Union Traction Co., 205 Pa. 271; s. c. 54 Atl. Rep. 893.

¹¹⁷ Kohm v. Interborough Rapid Transit Co., 104 App. Div. (N. Y.) 237; s. c. 93 N. Y. Supp. 671.

¹¹⁸ Canavan v. Interurban St. R. Co., 87 N. Y. Supp. 491; Hesse v. Meriden & Co. Tramway Co., 75 Conn. 571; s. c. 54 Atl. Rep. 299.

¹¹⁹ These cases apply and illustrate the doctrine of *res ipsa loquitur* in street railway transportation: Osgood v. Los Angeles Traction Co., 137 Cal. 280; s. c. 70 Pac. Rep. 169

(collision with car of another company); Bosqui v. Sutro R. Co., 131 Cal. 390; s. c. 63 Pac. Rep. 682; City & Co. Suburban R. Co. v. Svedborg, 20 App. (D. C.) 543; Chicago City. R. Co. v. Carroll, 102 Ill. App. 202 (injury by fall of trolley pole); Chicago City R. Co. v. Morse, 98 Ill. App. 662; s. c. aff'd, 197 Ill. App. 327; 64 N. E. Rep. 304; Jones v. United R. & Co., 99 Md. 64; s. c. 57 Atl. Rep. 620 (collision with wagon on street); United R. & Co. v. Beidelman, 95 Md. 480; s. c. 52 Atl. Rep. 913 (sudden starting of car injuring alighting passenger); Adams v. Union R. Co., 80 App. Div. (N. Y.) 136; s. c. 80 N. Y. Supp. 264; 12 N. Y. Ann. Cas. 386 (derailment); Dallas & Co. v. Broadhurst, 28 Tex. Civ. App. 630; s. c. 68 S. W. Rep. 315 (boarding passenger shocked by electricity on taking hold of handhold while boarding car); St. John v. Gulf & Co. R. Co. (Tex. Civ. App.), 80 S. W. Rep. 235 (sudden starting of car causing injury to boarding passenger).

¹²⁰ See *ante*, § 2756.

¹²¹ The plaintiff cannot recover by merely proving an act of the defend-

to prevent an excessive amount of electricity from entering the motors of electric street cars has been held not *prima facie* evidence of negligence in an action for injuries to a person alleged to have been caused thereby.¹²² It is the holding of one court that the fact that the passenger injured by the escape of electricity undertook on the trial to show that the accident was due to defective insulation did not remove from the defendant the burden of explaining the occurrence, and showing that it was not due to its negligence.¹²⁴

§ 3485. **Injuries Predicated upon the Speed of Street Railway Cars or Trains.**—A high rate of speed by street railway cars does not of itself show negligence. In the absence of a statute or ordinance on the subject the cars may be run at such a rate of speed as comports with the exercise of care for the safety of passengers, and whether a given rate of speed is unsafe depends upon the circumstances, the condition of the track, the danger to passengers, and all the facts and circumstances in the case under investigation.¹²⁵ The law requires that the operatives of a street car should have in mind the danger to passengers from running cars at high rates of speed around a curve. Here it is the duty of the motorman to reduce the speed to such a rate that the safety of passengers in the car or on the platform is not endangered.¹²⁶ Whether this care has been observed in a particular instance is a question of fact for the determination of the jury.¹²⁷ The running of cars in a city at a speed in excess of that limited by ordinance is negligence *per se*,¹²⁸ warranting a recovery of damages for injuries

ant which was the proximate cause of the injury; but, to authorize a recovery, the plaintiff must also show that such act resulted from culpable negligence by the defendant: *Cleveland City R. Co. v. Osborn*, 66 Ohio St. 45; s. c. 63 N. E. Rep. 604. Evidence that plaintiff, who was standing near the edge of the rear platform without holding onto anything, was pitched off by a sudden jerk in the car, caused by a sudden stop, without showing that there was any defect in the car or rails, or that the apparently sudden stop was not justifiable, fails to show any negligence on the part of defendant: *Timms v. Old Colony St. R.*, 183 Mass. 193; s. c. 66 N. E. Rep. 797.

¹²² *Cassady v. Old Colony St. R. Co.*, 184 Mass. 156; s. c. 68 N. E. Rep. 10.

¹²⁴ *D'Arcy v. Westchester & C. R.*

Co., 82 App. Div. (N. Y.) 263; s. c. 81 N. Y. Supp. 952.

¹²⁵ *Fitch v. Mason City & C. Traction Co.*, 124 Iowa 665; s. c. 100 N. W. Rep. 618.

¹²⁶ *Gatens v. Metropolitan St. R. Co.*, 89 App. Div. (N. Y.) 311; s. c. 85 N. Y. Supp. 967; *Lucas v. Metropolitan St. R. Co.*, 56 App. Div. (N. Y.) 405; s. c. 67 N. Y. Supp. 833; *South Covington & C. R. Co. v. Constans*, 74 S. W. Rep. 705; s. c. 25 Ky. L. Rep. 158; *Chicago City R. Co. v. McCaughna*, 216 Ill. 202; s. c. 74 N. E. Rep. 819; aff'g s. c. 117 Ill. App. 538 (conductor should notify passenger directed to pass to another car, of the approach of cars to curve).

¹²⁷ *Macy v. New Bedford & C. St. R. Co.*, 182 Mass. 291; s. c. 65 N. E. Rep. 397.

¹²⁸ *Dallas & C. R. Co. v. Ison*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 408.

the proximate result of the violation of the ordinance.¹²⁹ In no event should the car be propelled at such a rate of speed that the motorman is without control, and this principle is of special application while the car is being run over switches.¹³⁰

§ 3486. **Negligence of Driver, Gripman, etc.**—Broadly stated, it is the management of the car that determines the question of negligence of the motorman, and not the resulting effects.¹³¹ On this question the jury may take into consideration the fact that the motorman faced an emergency at the time and was obliged to act quickly and without time for deliberation.¹³² A motorman may be imputed with negligence in starting his car with an extraordinary jerk;¹³³ and the fact that he employed the usual method of starting will not absolve the carrier from liability if this particular method is dangerous.¹³⁴ Again, this negligence of the motorman may be shown in the sudden and unnecessary acceleration of the speed of a car already in motion;¹³⁵ but the passenger cannot recover for injuries caused by the lurching of the car in passing from a main track onto a switch unless it is also shown that the speed was unusual or dangerous, or the car or track was defective, or the jerk an unusual one.¹³⁶ A sudden and violent stopping of the car, unless it is unusual in degree and caused by some defect in the car or track, or some unusual rate of speed, does not of itself raise a presumption of negligence.¹³⁷ The case in favor of the carrier is stronger where the sudden stopping of the car was necessary to avoid a collision of greater force.¹³⁸

¹²⁹ *Dallas &c. R. Co. v. Ison*. — Tex. Civ. App. —; s. c. 83 S. W. Rep. 408.

¹³⁰ *Klinger v. United Traction Co.*, 92 App. Div. (N. Y.) 100; s. c. 87 N. Y. Supp. 864.

¹³¹ *Faul v. North Jersey St. R. Co.*, 70 N. J. L. 795; s. c. 59 Atl. Rep. 148.

¹³² *Tozier v. Haverhill &c. R. Co.*, 187 Mass. 179; s. c. 72 N. E. Rep. 953; *Howell v. Lansing City &c. R. Co.*, 136 Mich. 432; s. c. 99 N. W. Rep. 406; 11 Det. Leg. N. 82.

¹³³ *Pryor v. Metropolitan St. R. Co.*, 85 Mo. App. 367.

¹³⁴ *Dickert v. Salt Lake City R. Co.*, 20 Utah 394; s. c. 59 Pac. Rep. 95. But the mere fact, without more, that a motorman when about to start or increase the motion of a heavily loaded car turned on the power and released the brake, thereby causing a passenger on the plat-

form to fall a little to the side, does not conclusively establish negligence on the part of the motorman: *Faul v. North Jersey St. R. Co.*, 70 N. J. L. 795; s. c. 59 Atl. Rep. 148.

¹³⁵ *Ilges v. St. Louis Transit Co.*, 102 Mo. App. 529; 77 S. W. Rep. 93; *Sheeron v. Coney Island &c. R. Co.*, 78 App. Div. (N. Y.) 476; s. c. 79 N. Y. Supp. 752; *Merrill v. Metropolitan St. R. Co.*, 73 App. Div. (N. Y.) 401; s. c. 77 N. Y. Supp. 122; *Eberhardt v. Metropolitan St. R. Co.*, 69 App. Div. (N. Y.) 560; s. c. 75 N. Y. Supp. 46; s. c. aff'd, 174 N. Y. 522; 66 N. E. Rep. 1107.

¹³⁶ *Byron v. Lynn &c. R. Co.*, 177 Mass. 303; s. c. 58 N. E. Rep. 1015.

¹³⁷ *Chicago City R. Co. v. Morse*, 98 Ill. App. 662; s. c. aff'd, 197 Ill. 327; 64 N. E. Rep. 304.

¹³⁸ *Cleveland City R. Co. v. Osborn*, 66 Ohio St. 45; s. c. 63 N. E. Rep. 604.

§ 3489. Injuries to Street Railway Passengers from the Sudden Releasing of the Brake.¹³⁹

§ 3490. Negligence of the Conductor in Various Respects.—A street railway company will be liable for injuries to passengers due to the negligence of the conductor—as, for example, where he carelessly falls against a passenger;¹⁴⁰ or, aware of the crowded condition of the platform, boards the car in such a manner as to collide with passengers thereon and throw them from the platform.¹⁴¹ In a case where a passenger was injured by being struck in the eye by the conductor's transfer punch, which flew from his pocket as he hurried through the car to adjust a trolley pole, it was held that the street railway company was not liable for the injuries since it was not a casualty which could reasonably have been anticipated or foreseen.¹⁴²

§ 3491. Injuries in Consequence of Street Cars being Overloaded.—A street railroad company is not to be imputed with negligence, as a matter of law, in taking on passengers after the car is already filled,¹⁴³ but it must exercise care and precaution in the operation of such cars commensurate with the danger.¹⁴⁴

§ 3503. Collisions between Street Cars and Steam Railway Trains.—It is the duty of the operatives of a street car to stop and listen for trains before going onto a steam railroad crossing, and a failure to

¹³⁹ A motorman is negligent who sets the brake of his car in such a way that it can be released by an awkward step of a passenger or by the jostling of the car and then steps aside to allow passengers to enter over the front platform and to avoid being jostled by them, and while so away a passenger is injured by its release: *Kentucky & C. R. Co. v. Shrader*, 80 S. W. Rep. 1094; s. c. 26 Ky. L. Rep. 206. The unexplained slipping of a brake on a street car, so that it revolves and strikes a passenger boarding the car in the face, raises a presumption of negligence on the part of the employé in charge of such brake: *Thompson v. St. Louis & C. R. Co.*, 111 Mo. App. 465; s. c. 86 S. W. Rep. 465. A passenger may be imputed with contributory negligence in riding on the front platform of a car so close to the brake that on its release he is inevitably struck and injured by it: *Brewer v. St. Louis Transit Co.*, 105 Mo. App. 503; s. c. 79 S. W. Rep. 1021.

¹⁴⁰ *Spinney v. Boston Elevated R.*

Co., 188 Mass. 30; s. c. 73 N. E. Rep. 1021.

¹⁴¹ *Fleming v. St. Louis & C. R. Co.*, 101 Mo. App. 217; s. c. 74 S. W. Rep. 382; *McCaw v. Union Traction Co.*, 205 Pa. 271; s. c. 54 Atl. Rep. 893.

¹⁴² *Cheyne v. Van Brunt & C. R. Co.*, 97 App. Div. (N. Y.) 56; s. c. 89 N. Y. Supp. 626.

¹⁴³ *Burns v. Boston & C. R. Co.*, 183 Mass. 96; s. c. 66 N. E. Rep. 418; *State v. Young* (N. J. L.), 56 Atl. Rep. 471; *Anderson v. City & Suburban R. Co.*, 42 Or. 505; s. c. 71 Pac. Rep. 659. But the question of negligence in overloading cars is one of fact for the determination of the jury: *Cattano v. Metropolitan St. R. Co.*, 67 App. Div. (N. Y.) 615; s. c. 73 N. Y. Supp. 1131; s. c. aff'd, 173 N. Y. 565; 66 N. E. Rep. 563.

¹⁴⁴ *McCaw v. Union Traction Co.*, 205 Pa. 271; s. c. 54 Atl. Rep. 893; *Halvorson v. Seattle Electric Co.*, 35 Wash. 600; s. c. 77 Pac. Rep. 1058; *Magrane v. St. Louis & C. R. Co.*, 183 Mo. 119; s. c. 81 S. W. 1158.

do so will amount to actionable negligence,¹⁴⁵ particularly where this precaution is commanded by ordinance.¹⁴⁶ If the street car operatives were negligent, and their negligence contributed to the collision with the train, the street car company will be liable for an injury to a passenger, though the negligence of the steam railway company also contributed to the injury.¹⁴⁷ In a case where the obligation of the officers of an electric railroad line crossing a steam railroad line at grade was the subject of investigation by a criminal court, it was held that these officers had discharged their duty by the adoption of a system which provided that each car on approach to the railroad crossing should be furnished with sand, that it should be brought to a stop at the beginning of an incline toward the crossing, and should proceed slowly under control down the incline until a point thirty feet from the railroad is reached where it was to stop, and the conductor leave the car, enter upon the steam railroad, look in both directions, inform himself that no train was in sight and then give the signal to the motorman to cross.¹⁴⁸

§ 3504. **Collision with Cars of the Same Company on the Same Track.**—A street railway company is not charged with negligence in operating cars running in both directions over the same track. The law does not demand that street railroads should be double tracked;¹⁴⁹ but the collision of street cars running in opposite directions on the same track presumes *prima facie* a case of negligence, and shifts the burden to the street railroad company to show by a preponderance of the evidence that the collision was not due to its fault.¹⁵⁰

§ 3505. **Collisions between Street Cars and Vehicles on the Street.**¹⁵¹

¹⁴⁵ Selma St. & C. R. Co. v. Owen, 132 Ala. 420; s. c. 31 South. Rep. 598; Macon & C. St. R. Co. v. Barnes, 113 Ga. 212; s. c. 38 S. E. Rep. 756.

¹⁴⁶ Selma St. & C. R. Co. v. Owen, 132 Ala. 420; s. c. 31 South. Rep. 598; Gulf & C. R. Co. v. Holt, 30 Tex. Civ. App. 330; s. c. 70 S. W. Rep. 591. Where a motorman of an electric railway started to cross an intersecting steam railroad after his conductor had used proper care to ascertain that no train was expected, and while crossing at a moderate speed a railroad train rounded the curve at a high rate of speed without warning, and a collision seemed imminent, and the motorman instantly applied all power and increased the speed, a verdict attributing negligence to the motor-

man on these facts, whereby a passenger was thrown to the floor of the car by the sudden lurch and injured, cannot be sustained: Corkhill v. Camden & C. R. Co., 69 N. J. L. 97; s. c. 54 Atl. Rep. 522.

¹⁴⁷ Gulf & C. R. Co. v. Holt, 30 Tex. Civ. App. 330; s. c. 70 S. W. Rep. 591.

¹⁴⁸ State v. Young (N. J. L.), 56 Atl. Rep. 471.

¹⁴⁹ Palmer v. Warren St. R. Co., 206 Pa. 574; s. c. 56 Atl. Rep. 49.

¹⁵⁰ Robinson v. St. Louis & C. R. Co., 103 Mo. App. 110; s. c. 77 S. W. Rep. 493. See also Hennessy v. St. Louis & C. R. Co., 173 Mo. 86; s. c. 73 S. W. Rep. 162.

¹⁵¹ A street railroad company is liable to a passenger injured in a collision between the car and a ve-

§ 3511. **Duty toward Passengers Boarding Street Cars.**—It is the duty of a street railway company to stop its cars at its regular crossings on a seasonable signal by intending passengers,¹⁵² and having run over a crossing to an unreasonable distance before stopping the car should be backed to the crossing, and this particularly where the intervening space is muddy.¹⁵³ The law does not require that street railway employes should exercise the highest degree of care to ascertain whether a particular person walking or standing on a public street desires to become a passenger; ordinary care is all that is required in such cases.¹⁵⁴ It is the duty of the carrier toward a passenger in the act of boarding a car to exercise a high degree of care to prevent injury to him.¹⁵⁵ This requires that the car should be stopped for a period reasonably sufficient to afford passengers an opportunity to board it in the exercise of reasonable diligence with due regard to age and physical infirmity.¹⁵⁶ Where the car is so crowded with passengers as to make it unsafe to receive others, the conductor should give notice of that fact to intending passengers.¹⁵⁷ Where the car has

hicle, caused by the failure of the company to restore the street to its former condition after disturbing it: *Freeland v. Brooklyn Heights R. Co.*, 43 Misc. (N. Y.) 132; s. c. 88 N. Y. Supp. 264. See also *Frank v. Metropolitan St. R. Co.*, 91 App. Div. (N. Y.) 485; s. c. 86 N. Y. Supp. 1018. A street railroad company was held liable to a passenger riding on the footboard of an open car, for injuries from a collision with the hub of the wheel of a wagon standing so near the track as to project over the footboard, and, though the position of the wagon was plainly apparent to the motorman for some distance before reaching it, he did not slacken the speed of his car: *Bumbear v. United Traction Co.*, 198 Pa. 198; s. c. 47 Atl. Rep. 961. In the case of a trespassing newsboy injured by being struck by the tongue of a wagon standing on the street, the carrier was absolved from the charge of negligence, it appearing from the evidence that the car was moving at a moderate rate previous to and at the time of the collision, and that the street railroad company had made numerous ineffectual efforts to prevent newsboys from jumping on its cars: *Padgitt v. Moll*, 159 Mo. 143; s. c. 60 S. W. Rep. 121.

¹⁵² *Jackson Electric R. & Co. v. Lowry*, 79 Miss. 431; s. c. 30 South.

Rep. 634; *Maguire v. St. Louis Transit Co.*, 103 Mo. App. 459; s. c. 78 S. W. Rep. 833; *Stoddard v. St. Louis & C. R. Co.*, 105 Mo. App. 512; s. c. 80 S. W. Rep. 33.

¹⁵³ *Jackson Electric R. & Co. v. Lowry*, 79 Miss. 431; s. c. 30 South. Rep. 634.

¹⁵⁴ *Foster v. Seattle Electric Co.*, 35 Wash. 177; s. c. 76 Pac. Rep. 995.

¹⁵⁵ *Lehner v. Metropolitan St. R. Co.*, 110 Mo. App. 215; s. c. 85 S. W. Rep. 110; *Eikenberry v. St. Louis Transit Co.*, 103 Mo. App. 442; s. c. 80 S. W. Rep. 360; *Norfolk & C. Terminal Co. v. Morris*, 101 Va. 423; s. c. 44 S. E. Rep. 719.

¹⁵⁶ *Guenther v. Metropolitan R. Co.*, 23 App. (D. C.) 493; *Shanahan v. St. Louis Transit Co.*, 109 Mo. App. 228; s. c. 83 S. W. Rep. 783; *Clark v. Durham Traction Co.*, 138 N. C. 77; s. c. 50 S. E. Rep. 513; *Spencer v. St. Louis Transit Co.*, 111 Mo. App. 653; s. c. 86 S. W. Rep. 593.

¹⁵⁷ *McCurdy v. United Traction Co.*, 15 Pa. Super. Ct. 29. Plaintiff alleged negligence, in that the servants of defendant street railway negligently started a car as plaintiff was boarding it. Defendant claimed that the car was stopped only to discharge passengers. It was held that defendant was not liable if the car was not stopped to allow plaintiff to board it, and the

slowed down on approach to a crossing, an intending passenger may act on the presumption that the car was slowed down in order that he might board it and is not imputed with contributory negligence in acting on this belief.¹⁵⁸ A city ordinance requiring street cars to stop at crossings cannot be annulled or modified by a rule of the company that cars late for a certain number of minutes shall not stop.¹⁵⁹

§ 3513. Starting Street Car Suddenly while Passenger Getting on.

—A street railway company will be liable for injuries to passengers caused by the sudden starting of the car while they are in the act of boarding it while stopping at a crossing,¹⁶⁰ though the car stopped for the purpose of discharging and not receiving passengers, if intending passengers were not warned of this fact.¹⁶¹ This rule makes it the duty of the conductor to know that all passengers have entered the car before he gives the signal to start.¹⁶² The conductor will be imputed with negligence, though he directs the premature start on information from a passenger; the conductor is without power to delegate his authority to control the movement of the car.¹⁶³ Where the passenger boards a moving car and is injured by the sudden acceleration of the speed, he may not recover damages for his injuries in the absence of proof that the motorman had actual knowledge that he was in the act of boarding the car, or that the place where he attempted to board it was the usual place for taking on passengers.¹⁶⁴ The question whether it is negligence for a motorman to start the car without a signal from the conductor depends on whether it would have been negligence for the conductor to have given the starting signal.¹⁶⁵

conductor warned plaintiff not to do so, in a tone of voice sufficiently loud to be heard by an ordinary person, though plaintiff did not in fact hear: *Maxey v. Metropolitan St. R. Co.*, 95 Mo. App. 303; s. c. 68 S. W. Rep. 1063.

¹⁵⁸ *Maguire v. St. Louis Transit Co.*, 103 Mo. App. 459; s. c. 78 S. W. Rep. 838.

¹⁵⁹ *Maguire v. St. Louis Transit Co.*, 163 Mo. App. 459; s. c. 78 S. W. Rep. 838.

¹⁶⁰ *Lehner v. Metropolitan St. R. Co.*, 110 Mo. App. 215; s. c. 85 S. W. Rep. 110; *Stoddard v. St. Louis & C. R. Co.*, 105 Mo. App. 512; s. c. 80 S. W. Rep. 33; *Schmidt v. North Jersey St. R. Co.* (N. J. L.), 58 Atl. Rep. 72; *Schoenfeld v. Metropolitan St. R. Co.*, 40 Misc. (N. Y.) 201; s. c. 81 N. Y. Supp. 644; *Foster v. Seattle Electric Co.*, 35 Wash. 177; s. c.

76 Pac. Rep. 995; *Normile v. Wheeling Traction Co.*, 57 W. Va. 132; s. c. 49 S. E. Rep. 1030.

¹⁶¹ *Maxey v. Metropolitan St. R. Co.*, 95 Mo. App. 303; s. c. 68 S. W. Rep. 1063.

¹⁶² *Davey v. Greenfield & C. R. Co.*, 177 Mass. 106; s. c. 58 N. E. Rep. 172; *Redington v. Harrisburg Traction Co.*, 210 Pa. 648; s. c. 60 Atl. Rep. 305. This rule is not strictly applied where the passenger enters the car on the wrong side without the knowledge of the conductor: *McCarty v. St. Louis & C. R. Co.*, 105 Mo. App. 596; s. c. 80 S. W. Rep. 7.

¹⁶³ *McCurdy v. United Traction Co.*, 15 Pa. Super. Ct. 29.

¹⁶⁴ *Nathan v. New York & C. R. Co.*, 91 N. Y. Supp. 35.

¹⁶⁵ *Davey v. Greenfield & C. R. Co.*, 177 Mass. 106; s. c. 58 N. E. Rep. 172.

§ 3515. **Starting Street Car with a Sudden Motion before Passengers can get Seated.**—It is not generally held negligence, as a matter of law, for a street car to start while a passenger is passing from the platform into the car;¹⁶⁶ but the question is one of fact for the jury under the evidence having regard to the age and infirmity of the passenger.¹⁶⁷

§ 3518. **Care Required in Favor of Street Railway Passengers in the Act of Alighting.**—The passenger relation on the street car,—as on the steam railroad train,—continues until the passenger has safely alighted,¹⁶⁸ and the high degree of care imposed for his safety ends only when the street railway company has selected a safe place for the passenger to alight, and has afforded him a reasonable time to do so.¹⁶⁹

§ 3519. **Duty of Street Railway Companies toward Passengers Alighting.**—The conductor of the car should be notified of the intention of the passenger to alight, and a passenger, failing to give this notice and alighting while the car is in motion without the knowledge of the conductor, will be refused a recovery for injuries the result of so palpable an indiscretion.¹⁷⁰ And where a street car merely slackens its speed to permit a passenger to board a car, the conductor, in the absence of notice of another passenger's intention to alight, will not be charged with knowledge that he will attempt to alight while the car is in motion.¹⁷¹ It is the duty of the motorman to exercise reasonable care in listening for the signals of passengers to stop the car and give heed thereto, and the company may be charged with actionable negligence where the motorman refuses to heed these signals and the passenger is injured in the attempt to alight from the car while in motion.¹⁷² Where platforms are slippery with sleet and ice, it is the duty of the company to sprinkle the platform and steps with sand or cinders, and this particularly where materials therefor are at hand.¹⁷³ Where a passenger is accompanied by a child, extra time should be allowed such

¹⁶⁶ *Sharp v. New Orleans &c. R. Co.*, 111 La. 395; s. c. 35 South. Rep. 614.

¹⁶⁷ *Herbich v. North Jersey St. R. Co.*, 67 N. J. L. 574; s. c. 52 Atl. Rep. 357; rev'g s. c. 65 N. J. L. 381; 47 Atl. Rep. 427.

¹⁶⁸ *Boone v. Oakland Transit Co.*, 139 Cal. 490; s. c. 73 Pac. Rep. 243; *Fillingham v. St. Louis Transit Co.*, 102 Mo. App. 573; s. c. 77 S. W. Rep. 314; *Senf v. St. Louis &c. R. Co.*, 112 Mo. App. 74; s. c. 86 S. W. Rep. 887.

¹⁶⁹ *West Chicago St. R. Co. v. Buckley*, 102 Ill. App. 314; s. c. aff'd, 200 Ill. 260; 65 N. E. Rep. 708; *Elwood*

v. Connecticut R. Co., 77 Conn. 145; s. c. 58 Atl. Rep. 751.

¹⁷⁰ *Spaulding v. Quincy &c. R. Co.*, 184 Mass. 470; s. c. 69 N. E. Rep. 217; *McCarthy v. Interurban St. R. Co.*, 88 N. Y. Supp. 388; *Brown v. Interurban St. R. Co.*, 43 Misc. (N. Y.) 374; s. c. 87 N. Y. Supp. 461.

¹⁷¹ *Ashtabula Rapid Transit Co. v. Holmes*, 67 Ohio St. 153; s. c. 65 N. E. Rep. 877.

¹⁷² *Fuller v. Denison &c. R. Co.*, 32 Tex. Civ. App. 399; s. c. 74 S. W. Rep. 940.

¹⁷³ *Foster v. Old Colony St. R. Co.*, 182 Mass. 378; s. c. 65 N. E. Rep. 795.

a passenger in alighting, in view of the delay necessary to assist the child to alight.¹⁷⁴

§ 3519b. **Invitations to Alight.**—Where the car stops short of a regular crossing or stopping place, it is the duty of the conductor to warn the passengers to keep their seats until he gives further directions.¹⁷⁵ It has been held a question of fact for the jury whether the acts of the conductor of an electric car in calling out the name of a station and leaving the platform, and putting up the fender, amounted to an invitation to a passenger to leave the car.¹⁷⁶ It is not negligence to ask passengers leaving an elevated railway car to move quickly.¹⁷⁷

§ 3520. **Duty to See and Know that All Passengers have Safely Alighted before Starting the Street Car.**—The conductor of a street car, when he knows that passengers desire to leave the car at a stopping point, must hold the car at a standstill until all of them have safely alighted, and see that all have done so before he gives the motorman his signal to start, and actionable negligence may be predicated on the failure of the conductor in this plain duty.¹⁷⁸ And this is the rule, though the stop was not made to allow passengers to alight, and was not a usual stopping place, if the conductor knew that a passenger was attempting to alight at the time he signaled the motorman to start the car.¹⁷⁹ Thus, where, in compliance with a city ordinance,

¹⁷⁴ Hannon v. St. Louis Transit Co., 102 Mo. App. 216; s. c. 77 S. W. Rep. 158.

¹⁷⁵ United R. & Co. v. Woodbridge, 97 Md. 629; s. c. 55 Atl. Rep. 444.

¹⁷⁶ Elwood v. Connecticut R. & Co., 77 Conn. 145; s. c. 58 Atl. Rep. 751.

¹⁷⁷ Willworth v. Boston Elevated R. Co., 188 Mass. 220; s. c. 74 N. E. Rep. 333.

¹⁷⁸ Little Rock Traction & Co. v. Kimbro, 75 Ark. 211; s. c. 87 S. W. Rep. 121, 644; Bloomington & C. R. Co. v. Zimmerman, 101 Ill. App. 184; Crump v. Davis, 33 Ind. App. 88; s. c. 70 N. E. Rep. 886; Indianapolis St. R. Co. v. Brown, 32 Ind. App. 130; s. c. 69 N. E. Rep. 407; Union Traction Co. v. Siceloff, 34 Ind. App. 511; s. c. 72 N. E. Rep. 266; Paducah St. R. Co. v. Walsh, 58 S. W. Rep. 431; s. c. 22 Ky. L. Rep. 532; Behen v. St. Louis Transit Co., 186 Mo. 430; s. c. 85 S. W. Rep. 346; Reagan v. St. Louis Transit Co., 180 Mo. 117; s. c. 79 S. W. Rep.

435; Bessenger v. Metropolitan St. R. Co., 79 App. Div. (N. Y.) 32; s. c. 79 N. Y. Supp. 1017; Flanagan v. Metropolitan St. R. Co., 31 Misc. (N. Y.) 820; s. c. 64 N. Y. Supp. 379; Memphis St. R. Co. v. Shaw, 110 Tenn. 467; s. c. 75 S. W. Rep. 713. Where a street car was operated by a motorman without a conductor, and, from his station on the front platform, he got the best observation possible to see that no one was getting on or off the car, and then sounded the gong as notice of his intention to start, he was not guilty of negligence, as a matter of law, in failing to ascertain that the plaintiff was in the act of alighting when he started the car: Cramer v. Springfield T. Co., 112 Mo. App. 350; s. c. 87 S. W. Rep. 24.

¹⁷⁹ Houghton v. Louisville Ry. Co., 81 S. W. Rep. 695; s. c. 26 Ky. L. Rep. 393; Selby v. Detroit R., 141 Mich. 112; s. c. 104 N. W. Rep. 376; 12 Det. Leg. N. 382; Jacobson v. St. Louis Transit Co., 106 Mo. App. 339; s. c. 80 S. W. Rep. 309.

street cars were required to come to a full stop before crossing the tracks of a steam railroad, and it was customary to stop long enough for passengers to get off, it was held that it was the duty of the employés of the street railroad company to exercise extraordinary diligence, before starting the car, to ascertain if passengers desired to alight, and to give them a reasonable opportunity to do so.¹⁸⁰

§ 3521. **Starting Street Car before the Passenger has had a Reasonable Time in which to Alight.**—It is the doctrine of this section that it is the duty of street railway companies to stop their cars long enough to permit passengers to alight safely, and that to start a car without giving ample time for this purpose is actionable negligence.¹⁸¹ A female passenger on a street car is entitled not only to time to step off, but to clear her skirts where they catch on an appliance on the platform, and a conductor is negligent in starting before he sees that she is clear therefrom.¹⁸²

§ 3522. **Starting Street Car with Sudden Jerk while Passenger is Getting Off.**¹⁸³—In a case where a passenger signaled the conductor to stop the car and as it was slowing down he prepared to get off and was injured by a sudden increase in the speed of the car, it was held that the passenger could not recover, in the absence of proof that the conductor repeated the signal to the motorman, since he may have slackened the speed in the exercise of reasonable care in the operation of his car and not in response to a signal.¹⁸⁴

§ 3523. **Starting Street Car at Signal of Unauthorized Person.**¹⁸⁵

¹⁸⁰ *Atlanta R. Co. v. Randall*, 117 Ga. 165; s. c. 43 S. E. Rep. 412.

¹⁸¹ *Bartle v. Houghton Co. St. R. Co.*, 132 Mich. 290; s. c. 93 N. W. Rep. 620; 9 Det. Leg. N. 595; *Scamell v. St. Louis Transit Co.*, 102 Mo. App. 198; s. c. 76 S. W. Rep. 660; *Ashtabula Rapid Transit Co. v. Holmes*, 67 Ohio St. 153; s. c. 65 N. E. Rep. 877; *St. Louis & C. R. Co. v. Byers* (Tex. Civ. App.), 69 S. W. Rep. 1009.

¹⁸² *Smith v. Kingston City R. Co.*, 55 App. Div. (N. Y.) 143; s. c. 67 N. Y. Supp. 185; s. c. aff'd, 169 N. Y. 616; 62 N. E. Rep. 1100.

¹⁸³ These cases hold the street railway company liable for injuries caused by starting car with a jerk while a passenger was alighting: *City & Suburban R. Co. v. Svedborg*, 20 App. (D. C.) 543; *Betts v. Wilmington City R. Co.*, 3 Penn. (Del.) 448; s. c. 53 Atl. Rep. 358; *Beringer*

v. Dubuque St. R. Co., 118 Iowa 135; s. c. 91 N. W. Rep. 931; *United R. & C. Co. v. Hertel*, 97 Md. 382; s. c. 55 Atl. Rep. 428; *Skelton v. St. Paul City R. Co.*, 88 Minn. 192; s. c. 92 N. W. Rep. 960; *Kroner v. St. Louis Transit Co.*, 107 Mo. App. 41; s. c. 80 S. W. Rep. 915; *Scamell v. St. Louis Transit Co.*, 102 Mo. App. 198; s. c. 76 S. W. Rep. 660; *Brady v. Metropolitan St. R. Co.*, 33 Misc. (N. Y.) 793; s. c. 67 N. Y. Supp. 588; *Koues v. Metropolitan St. R. Co.*, 83 N. Y. Supp. 380; *Scott v. Bergen Co. Traction Co.*, 64 N. J. L. 362; s. c. 48 Atl. Rep. 1118; aff'g s. c. 63 N. J. L. 407; 43 Atl. Rep. 1060.

¹⁸⁴ *Armstrong v. Metropolitan St. R. Co.*, 36 App. Div. (N. Y.) 525; s. c. 55 N. Y. Supp. 498; s. c. aff'd, 165 N. Y. 641; 59 N. E. Rep. 1118.

¹⁸⁵ In these cases the street railway company was not held liable for injuries to a passenger caused

§ 3525. Stopping Street Car in an Improper or Dangerous Place.

—In the matter of furnishing safe places for the discharge of passengers a distinction is made between the street railway and the steam railway carrier. It is the duty of the latter to furnish safe places for the discharge of their passengers, but no such obligation rests upon the street railway carrier, as every street crossing is a station. If the dangerous condition of a stopping place is obvious to a passenger the carrier will not be liable to him for injuries occasioned by the defect, but if the danger is known, or is such as must have been known to the carrier and is unknown to the passenger, then the carrier is bound to warn the passenger of the danger or to assist him in safely alighting, or stop the car at a point beyond or short of the dangerous point, and a failure to take these precautions will render the carrier liable to a passenger sustaining injury because of this neglect of duty.¹⁸⁹ The duty is the more imperative where the danger arises from excavations¹⁸⁷ and embankments.¹⁸⁸ Like rules govern where the stop is made in the middle of a block.¹⁸⁹ Where the place selected for the discharge of passengers is on the street railway company's own property, then the duty is similar to that of the carrier by steam—that is to use the utmost care in making the place safe for this purpose.¹⁹⁰

§ 3527. Duty to Protect Alighting Passengers against Contact with Car on Parallel Track.¹⁹¹—It is generally regarded as negligence

by the premature starting of the car on an unauthorized signal given by a passenger: *McDonough v. Third Avenue R. Co.*, 95 App. Div. (N. Y.) 311; s. c. 88 N. Y. Supp. 609; *Krone v. Southwest Missouri & C. R. Co.*, 97 Mo. App. 609; s. c. 71 S. W. Rep. 712.

¹⁸⁶ *Sweet v. Louisville R. Co.*, 67 S. W. Rep. 4; s. c. 23 Ky. L. Rep. 2279 (place of alighting dangerous because of dense darkness—company liable).

¹⁸⁷ *Ft. Wayne Traction Co. v. Morvilius*, 31 Ind. App. 464; s. c. 68 N. E. Rep. 304; *McDonald v. St. Louis Transit Co.*, 108 Mo. App. 374; s. c. 83 S. W. Rep. 1001 (open ditch in close proximity to place where passenger alighted—passenger not warned); *Welch v. Syracuse Rapid Transit R. Co.*, 70 App. Div. (N. Y.) 362; s. c. 75 N. Y. Supp. 173; *Wolf v. Third Ave. R. Co.*, 67 App. Div. (N. Y.) 605; s. c. 74 N. Y. Supp. 336. A street railway company which, as part consideration for the acquisition of the franchise of running cars through the streets

of a city, has bound itself by contract to pave and keep in repair the street between its rails, is liable to a person for injuries sustained by accidentally stepping into a hole in the street between the tracks after leaving the car, where the hole had been in existence and visible for a week, and the crossing was liable to have holes in it from extraneous causes. *Mahnke v. New Orleans & C. R. Co.*, 104 La. 411; s. c. 29 South. Rep. 52.

¹⁸⁸ *Lee v. Boston & C. R. Co.*, 182 Mass. 454; s. c. 65 N. E. Rep. 822; *Joslyn v. Milford & C. R. Co.*, 184 Mass. 65; s. c. 67 N. E. Rep. 866.

¹⁸⁹ *West Chicago St. R. Co. v. Buckley*, 102 Ill. App. 314; s. c. aff'd, 200 Ill. 260; 65 N. E. Rep. 708.

¹⁹⁰ *Topp v. United Railways & Co.*, 99 Md. 630; s. c. 59 Atl. Rep. 52.

¹⁹¹ A street railway company is imputed with knowledge that passengers, when they alight, are liable to cross to the opposite side of the street and over an adjoining track of a double track system, and

for a motorman to fail to ring the gong as his car approaches a car on the adjoining track that has stopped to allow passengers to alight.¹⁹²

§ 3529. **And against Contact with Other Vehicles.**—There is a holding that street railway companies are not negligent in not providing means for warning passengers about to leave a car of the danger of colliding with or being run over by other vehicles in the street. It is to be noted, however, that this principle was announced in a case where the car was stopped short of a stopping place to allow fire apparatus to pass and the conductor was unaware that passengers were alighting at the time.¹⁹³

§ 3529a. **And Contact with Objects on the Car from which he has Alighted.**¹⁹⁴

§ 3531. **Instructions to Juries in Cases of Injuries Received by Street Railway Passengers in Alighting.**¹⁹⁵

§ 3534. **Forcing or Frightening Trespassing Children from Street Cars while in Motion.**—"When a child of years so tender that negli-

is charged with the duty to exercise reasonable care in the operation of the cars, having regard to this fact: *Reed v. Metropolitan St. R. Co.*, 87 App. Div. (N. Y.) 427; s. c. 84 N. Y. Supp. 454; *Ackerstadt v. Chicago City Ry. Co.*, 194 Ill. 616; s. c. 62 N. E. Rep. 884; aff'g s. c. 94 Ill. App. 130 (evidence held insufficient to show that the car on the adjoining track was operated negligently).

¹⁹² *Hornstein v. United Rys. Co.*, 97 Mo. App. 271; s. c. 70 S. W. Rep. 1105.

¹⁹³ *Oddy v. West End St. R. Co.*, 178 Mass. 341; s. c. 59 N. E. Rep. 1026.

¹⁹⁴ A Canadian case has held a street railway company liable for an injury to a passenger, free from negligence, caused by stumbling over a fender, after alighting, which had been left down because it was out of repair, although it would have taken some time and expense to have repaired the same. *Mattice v. Montreal St. R. Co.*, Rap. Jud. Que. 20 C. S. 222.

¹⁹⁵ An instruction that if the jury found the car had stopped and that the plaintiff was preparing to alight and the car gave a start or jerk before she had a reasonable opportunity to do so, unless the start or

jerk was satisfactorily explained by the defendant, the street railway company was guilty of negligence, and it was not incumbent upon the plaintiff to prove what caused the same, was held not open to the construction that it in effect told the jury that if they found that the plaintiff's version of the case was true the defendant was liable as a matter of law: *Bente v. Metropolitan St. R. Co.*, 90 App. Div. (N. Y.) 213; s. c. 86 N. Y. Supp. 85; s. c. aff'd, 180 N. Y. 519; 72 N. E. Rep. 1139. An instruction has been approved which told the jury that if the car was stopped near the middle of a block, and, while it was still, the plaintiff attempted to alight, and was seen by the conductor either when she arose or when she was on the footboard, and while she was there the cars were started by the conductor, and she was thrown to the ground and injured, and the conductor, seeing her about to get off the car or on the footboard, started the car, and did nothing to stop it or prevent the starting, if he saw her attempt to get off before it was started, that was negligence, etc. *Beringer v. Du buque St. R. Co.*, 118 Iowa 135; s. c. 91 N. W. Rep. 931.

gence cannot be imputed to it is found by a conductor or motorman on the platform of his moving car, his duty is to remove it from its peril. This can be done by stopping the car and putting it off, or by taking it inside."¹⁹⁶ The carrier will be liable for injuries occasioned by the forcible ejection of a child from a moving car by a servant for whose actions the carrier is responsible;¹⁹⁷ and the case is the same where the child jumps from a moving car through fright caused by the threatening attitude and language of the conductor.¹⁹⁸ After the trespassing child has been safely removed, the carrier is not responsible for injury to him caused by his blindly running into another car or vehicle.¹⁹⁹

§ 3535. Ejecting Adult Persons from Street Cars while in Motion.

—It is no defense to an action for injuries to a person forcibly ejected from a street car while it was in motion that he boarded the car while it was in motion, since, having placed himself in a position of safety so far as the movement of the car had any bearing on his injury, his act did not amount to contributory negligence.²⁰⁰

§ 3537. Assaults upon Street Railway Passengers by the Carrier's Servants.—The carrier is liable for injuries the result of unprovoked assaults by its servants upon passengers.¹ But the conductor or motorman may repel assaults, and may strike a passenger where necessary for his own protection.² The carrier will be liable, however, where

¹⁹⁶ *Levin v. Second Ave. Traction Co.*, 201 Pa. 58; s. c. 50 Atl. Rep. 225. See *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269; s. c. 68 N. E. Rep. 238 (a case where willfulness was easily discovered in the conduct of a motorman who discovered a six-and-a-half-year-old boy clinging to the lower step of a forward end of his car, and, noting his dangerous position, turned on the power in a reckless way and started the car quickly forward, throwing the child to the ground, and injuring him as the car rounded a curve).

¹⁹⁷ *Jackson v. St. Louis & C. R. Co.*, 52 La. An. 1706; s. c. 28 South. Rep. 241.

¹⁹⁸ *Richmond Traction Co. v. Wilkinson*, 101 Va. 394; s. c. 43 S. E. Rep. 622.

¹⁹⁹ *Palmisano v. New Orleans & C. R. Co.*, 103 La. 243; s. c. 32 South. Rep. 364.

²⁰⁰ *Hart v. Metropolitan St. R. Co.*, 34 Misc. (N. Y.) 521; s. c. 69 N. Y. Supp. 906.

¹ *Flynn v. St. Louis Transit Co.*,

113 Mo. App. 185; s. c. 87 S. W. Rep. 560; *Strauss v. St. Louis Transit Co.*, 102 Mo. App. 644; s. c. 77 S. W. Rep. 156; *Moritz v. Interurban St. R. Co.*, 84 N. Y. Supp. 162. The fact that a passenger in a street car, who was unable to get the attention of the conductor, negligently pulls the cord which registers fares instead of the cord which rings the signal bell will not excuse the conductor in making a wanton and willful assault on the passenger. The assault in such a case is not such a natural and probable consequence of the negligence that it might, and ought to have been foreseen as likely to follow the act, and it cannot therefore be said to have contributed proximately to the injury. *Artherholt v. Erie & C. Motor Co.*, 27 Pa. Super. Ct. 141.

² *O'Brien v. St. Louis Transit Co.*, 185 Mo. 263; s. c. 84 S. W. Rep. 939. An instruction was upheld which told the jury that, if a passenger, just before alighting, applied vile epithets to the conductor, and

the conductor, after repelling an assault on the car, voluntarily follows the passenger to the ground after alighting and renewing the altercation, inflicts the injuries complained of.³

§ 3538. Duty to Protect Street Car Passengers from Injury and Annoyance by other Passengers.⁴

§ 3540. Who a Passenger—Who a Trespasser on a Street Car.—A person boarding a car on its last trip and negotiating with the carmen for an extra trip, such as they are sometimes allowed to make, is not a trespasser;⁵ and it is the duty of the carmen to give him warning of an intention to start the car and a reasonable time to alight.⁶ A child permitted to ride on a car in consideration of certain services rendered the motorman is not regarded as a trespasser, though the motorman had no authority to make such an arrangement.⁷ A newsboy mounting the running-board of a moving car is a trespasser, where he is acquainted with a regulation forbidding boys to mount moving cars and allowing them to enter the car to vend papers only when the car is not in motion.⁸ It has been held that a child, though *non sui juris*, riding on the step of the rear platform of a street car, on the side which is not in use, and across which is a closed gate, is a trespasser, to whom the street railroad and those in charge of the car owe no duty of discovering his perilous position.⁹

§ 3543. Questions of Pleading in Street Railway Accident Cases.—An averment that the defendant, through and by its servants in charge of the car, negligently ran the car inflicting the injuries, sufficiently shows that the servant in charge of the car was acting in the scope of his employment.¹⁰ That the plaintiff was a passenger at the

struck him, and the conductor, in resenting the insult and repelling the assault, struck the passenger, and the passenger dragged the conductor from the car, and was shot in a fight which ensued on the ground away from the car, plaintiff was not entitled to recover: *O'Brien v. St. Louis Transit Co.*, 185 Mo. 263; s. c. 84 S. W. Rep. 939.

⁴*O'Brien v. St. Louis Transit Co.*, 185 Mo. 263; s. c. 84 S. W. Rep. 939.

⁵In an action against an electric railway company by a passenger, who jumped or was thrown from the car as a result of a stampede of the passengers following the blowing out of a fuse box, the jury should be instructed that, while the company was not an insurer of its passengers, it was bound to use the

utmost skill and vigilance in avoiding such an accident: *Kight v. Metropolitan R. Co.*, 21 App. (D. C.) 494.

⁶*Brock v. St. Louis Transit Co.*, 107 Mo. App. 109; s. c. 81 S. W. Rep. 219.

⁷*Brock v. St. Louis Transit Co.*, 107 Mo. App. 109; s. c. 81 S. W. Rep. 219.

⁸*Denison & Co. R. Co. v. Carter*, 98 Tex. 196; s. c. 82 S. W. Rep. 782; rev'g s. c. 79 S. W. Rep. 320.

⁹*Albert v. Boston & Co. R. Co.*, 185 Mass. 210; s. c. 70 N. E. Rep. 52.

¹⁰*Monehan v. South Covington & Co. R. Co.*, 117 Ky. 771; s. c. 78 S. W. Rep. 1106; 25 Ky. L. Rep. 1920.

¹¹*Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360; s. c. 71 N. E. Rep. 201.

time of receiving his injuries is sufficiently covered by an allegation that he stepped on the step of the rear platform when the car stopped, which was crowded, when he was thrown to the ground and injured by the starting of the car.¹¹ The proximate cause of the injury has been held sufficiently alleged by an averment that the operatives of the car negligently brought it to a sudden stop, so that one of the passengers was thrown against the plaintiff, causing her injury.¹² The imminence of a collision justifying a passenger in jumping off a car is sufficiently averred by an allegation that the car on which the plaintiff was a passenger was "about to collide with" a locomotive.¹³ The issue of the negligence of the motorman in failing to use ordinary care to hear a signal is raised by an allegation in the complaint that while riding on the defendant's car the plaintiff rang the bell, giving thereby the usual signal to stop, and that, though he did this repeatedly, the motorman negligently failed and refused to stop, whereupon the plaintiff attempted to alight while the car was in motion, and was injured.¹⁴ A complaint based on the unsafety of the place for alighting need not give a minute description of the place where the injuries were inflicted, nor need it set out what constitutes a safe place.¹⁵ Contributory negligence of the alighting passenger is sufficiently negated by an allegation, after a description of the plaintiff's movements in alighting, that "all of which was without negligence on the part of this plaintiff contributing thereto."¹⁶ Other questions of pleading are collected in the margin.¹⁷

¹¹ *Citizens' St. R. Co. v. Jolly*, 161 Ind. 80; s. c. 67 N. E. Rep. 935.

¹² *McCauley v. Rhode Island Co.*, 25 R. I. 558; s. c. 57 Atl. Rep. 376.

¹³ *Selma St. & C. R. Co. v. Owen*, 132 Ala. 420; s. c. 31 South. Rep. 598.

¹⁴ *Fuller v. Denison & C. R. Co.*, 32 Tex. Civ. App. 399; s. c. 74 S. W. Rep. 940.

¹⁵ *Montgomery St. R. Co. v. Mason*, 133 Ala. 508; s. c. 32 South. Rep. 261. The pleader is not required expressly to allege that the place where the car stopped after passing a regular stopping place was unsafe or dangerous if that conclusion can be drawn from the averments of his complaint: *Fillingham v. St. Louis Transit Co.*, 102 Mo. App. 573; s. c. 77 S. W. Rep. 314.

¹⁶ *Citizens' St. R. Co. v. Huffer*, 26 Ind. App. 575; s. c. 60 N. E. Rep. 316.

¹⁷ Under a declaration that a car was suddenly started, and the plain-

tiff thereby thrown from the car onto the platform while attempting to alight, it may be shown that the passenger was injured by a lurch of the car: *Lake St. R. Co. v. Shaw*, 203 Ill. 39; s. c. 67 N. E. Rep. 374; rev'g s. c. 103 Ill. App. 662. There is a variance between an allegation charging negligence in violently starting a car, and evidence that the car was started slowly and smoothly while the gates were open and before the passenger had time to alight: *Lake St. R. Co. v. Shaw*, 203 Ill. 39; s. c. 67 N. E. Rep. 374; rev'g s. c. 103 Ill. App. 662. An allegation that the plaintiff's injuries were caused "solely by the fault carelessness and negligence of the defendant and its servants" sufficiently avers negligence to withstand a demurrer: *Citizens' St. R. Co. v. Jolly*, 161 Ind. 80; s. c. 67 N. E. Rep. 935. A plea of contributory negligence asserting that the plaintiff unnecessarily went on the side

§ 3544. **Questions of Evidence in Actions against Street Railway Companies.**¹⁸—Where the accident is due to some defect in the vehicle or the track, knowledge of which is peculiarly possessed by the carrier, and the injury and its cause is shown, the carrier then, under the doctrine *res ipsa loquitur*, has the burden of proof to show that the accident was not due to any omission of duty resting on it.¹⁹ Where violation of a speed ordinance is charged as negligence, the ordinance is relevant and admissible.²⁰ But an ordinance making it an offense for a passenger to jump off a moving car is without application where the passenger was thrown from the car by an electric shock while he was preparing to alight at a crossing only a few feet away.²¹ So such an ordinance was held properly excluded in a case where a young boy was injured by jumping off a moving car, and it was shown that he was of such tender years that he did not realize the danger, and it was not shown that he was capable of forming a criminal intent.²² Evidence is not admissible in behalf of the defendant that the claim agent or other officers of the company had received no reports of the accident and had not been able to hear of persons who knew anything about it.²³ A passenger, carried past his stopping place in disregard of a signal, and injured by jumping from the moving car, may show the enmity of the motorman to the passenger as tending to sustain the plaintiff's contention that the motorman would carry him still

of the car on which he was injured, that he failed to look or listen for an approaching car, and that he leaned out, when by standing erect he could have avoided injury, has been held not open to the objection that it admitted the defendant's negligence in putting a dangerous car into service: *Allen v. St. Louis Transit Co.*, 183 Mo. 411; s. c. 81 S. W. Rep. 1142. An allegation that the plaintiff was injured by a fall from the car while in the act of boarding it, caused by its being started before he had been given a reasonable opportunity to place himself in a position of security, does not require proof that the car was started with more than ordinary violence: *Fine v. Interurban St. R. Co.*, 45 Misc. (N. Y.) 587; s. c. 91 N. Y. Supp. 43.

¹⁸ That plaintiff has the burden of proof of negligence, see: *Chicago Union T. Co. v. Straud*, 114 Ill. App. 479; *Reagan v. St. Louis Transit Co.*, 180 Mo. 117; s. c. 79 S. W. Rep. 435; *Peck v. St. Louis Transit Co.*, 178 Mo. 617; s. c. 77 S. W. Rep. 735.

¹⁹ *Chicago Union Traction Co. v.*

Mommson, 107 Ill. App. 353; *Heyde v. St. Louis Transit Co.*, 102 Mo. App. 537; s. c. 77 S. W. Rep. 127 (derailment); *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1; s. c. 84 S. W. Rep. 26; *Powell v. Hudson Valley R. Co.*, 88 App. Div. (N. Y.) 133; s. c. 84 N. Y. Supp. 337 (overheating of a plate over a wheel by friction caused by overloading the car).

²⁰ *San Antonio Traction Co. v. Bryant*, 30 Tex. Civ. App. 437; s. c. 70 S. W. Rep. 1015 (case where passenger was knocked off the running board of a car by contact with a bridge girder).

²¹ *Denison & Co. R. Co. v. Johnson*, 36 Tex. Civ. App. 115; s. c. 81 S. W. Rep. 780.

²² *Denison & Co. R. Co. v. Carter*, 98 Tex. 196; s. c. 82 S. W. Rep. 782; rev'g s. c. 79 S. W. Rep. 320.

²³ *Guenther v. Metropolitan R. Co.*, 23 App. (D. C.) 493. But see *Shadletsky v. New York City R. Co.*, 88 N. Y. Supp. 1024, where it was held erroneous to strike out the evidence of defendant to the effect that it had no record of the accident.

further unless he got off at the time he did.²⁴ Previous accidents at the place in question may be proved where it is shown that the track conditions were the same as at the time of the occurrence of the accident sued upon.²⁵ Evidence as to whether other passengers were injured in the collision is competent as tending to show the force of the impact.²⁶

§ 3545. Questions of Fact for the Jury in Case of Street Railway Injuries.²⁷

§ 3547. Instructions which have been Approved, or not Disapproved.—It is the admonition of the court of appeals of Kentucky that it is the safer practice so to frame instructions as to indicate the burden of proof without expressly referring to it. Under this rule this able court has held, in a street-railway accident case, that the jury should have been instructed that, if the plaintiff's injury was due to any defect in the car or cars on which he was riding, or the machinery or appliances connected therewith, and he did not, by his own want of ordinary care contribute to the injury, they should find for him the damages he thereby sustained unless they believe from the evidence that the defendant had exercised the utmost care and skill which prudent men are accustomed to use under similar circumstances to ascertain any defects in the cars and appliances and secure their safety.²⁸ An instruction which was upheld against the objec-

²⁴ Fuller v. Denison &c. R. Co., 32 Tex. Civ. App. 399; s. c. 74 S. W. Rep. 940.

²⁵ Nashville R. Co. v. Howard, 112 Tenn. 107; s. c. 78 S. W. Rep. 1098.

²⁶ Mullin v. Boston &c. R. Co., 185 Mass. 522; s. c. 70 N. E. Rep. 1021.

²⁷ Tucker v. Central of Georgia R. Co., 122 Ga. 387; s. c. 50 S. E. Rep. 128 (whether injury attributable solely to passenger's unnecessary haste in alighting); North Chicago St. R. Co. v. Polkey, 106 Ill. App. 98 (whether negligence to permit passengers to ride on footboard while passing through tunnel, walls of which are from three to twelve inches from footboard); Bishop v. Illinois Cent. R. Co., 77 S. W. Rep. 1099; s. c. 25 Ky. L. Rep. 1363 (whether passenger negligent in manner in which he alighted); Parks v. St. Louis &c. R. Co., 178 Mo. 108; s. c. 77 S. W. Rep. 70 (whether negligence to permit passengers to ride on step of platform while meeting another car on a curve); Scamell v. St. Louis Transit

Co., 103 Mo. App. 504; s. c. 77 S. W. Rep. 1021 (whether passenger left car voluntarily while in motion or was thrown from it by sudden start); Leonard v. Brooklyn Heights R. Co., 57 App. Div. (N. Y.) 125; s. c. 67 N. Y. Supp. 985 (whether accident to car was caused by defective insulation and whether company used due care in inspection of car); Northern Texas Traction Co. v. Royce, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 621 (whether negligence as to small children to use open cars so constructed that children might fall through the side of the car to the street).

²⁸ Davis v. Paducah R. &c. Co., 113 Ky. 267; s. c. 68 S. W. Rep. 140; 24 Ky. L. Rep. 135. An instruction in an action for injuries to an alighting passenger that the burden of proof was on plaintiff to show that the car had stopped or slowed down, and that, while plaintiff was alighting, and before she had a reasonable time to alight, defendant's servants caused the car to

tion that it tended to mislead, told the jury that a street railway company is bound to exercise the highest degree of care reasonably practicable, for the personal safety of its passengers, and that such care should be used for the purpose of safely operating its cars and trains, in having its tracks and switch appliances kept in a reasonably good and safe condition, and for such purpose it was bound to exercise the highest degree of care reasonably practicable in inspecting and keeping its tracks, switch appliances, etc., in good and reasonably safe working order and position.²⁹ An instruction that the burden is on the plaintiff as to the act of negligence "throughout the case" has been held not to require the plaintiff to prove himself free from contributory negligence.³⁰ It is unnecessary to instruct on the care to be exercised by the defendant in preventing the sudden starting of the car where there is no claim by the defendant that the car had started from a cause beyond its control, but its defense is a denial that the car had stopped for the passenger to alight, and that it was moving at a speed rendering it dangerous for him to do so.³¹ It has been held proper to instruct that if the burden is upon either party to show any particular fact, such fact should be established by a fair preponderance of the evidence, and that, if there is no preponderance on any question—that is, if affirmative evidence is only balanced by the negative evidence—then such fact would not be proven.³²

§ 3548. Instructions which have been Held Erroneous, or Properly Refused.³³

move forward with increased motion, and thereby plaintiff was thrown on the street and injured, whereas, if defendant's servants had exercised a high degree of care, they would have prevented such injury, was not open to the objection of throwing on plaintiff the burden of proving that the sudden starting of the car could have been prevented by the exercise of the high degree of care incumbent on defendant: *Reagan v. St. Louis Transit Co.*, 180 Mo. 117; s. c. 79 S. W. Rep. 435.

²⁹ *Logan v. Metropolitan St. R. Co.*, 183 Mo. 582; s. c. 82 S. W. Rep. 126.

³⁰ *Peck v. St. Louis Transit Co.*, 178 Mo. 617; s. c. 77 S. W. Rep. 736.

³¹ *Reagan v. St. Louis Transit Co.*, 180 Mo. 117; s. c. 79 S. W. Rep. 435.

³² *Indianapolis St. R. Co. v. Brown*, 32 Ind. App. 130; s. c. 69 N. E. Rep. 407.

³³ Where the action is based on negligence in suddenly starting the

car as the passenger was about to alight, it is proper to refuse a tendered instruction relating to the negligence in failing properly to stop the car: *Chicago Union Traction Co. v. Hanthorn*, 211 Ill. 367; s. c. 71 N. E. Rep. 1022. An instruction that if the jury find the accident to have happened in a manner testified to by the plaintiff and his witnesses, "then the plaintiff would be entitled to a verdict," withdraws from the jury the issue of negligence and is erroneous: *Goodkind v. Metropolitan St. R. Co.*, 93 App. Div. (N. Y.) 153; s. c. 87 N. Y. Supp. 523. Since the law does not make the carrier of passengers an absolute insurer, an instruction that a street railway company is obliged "as a general proposition to exercise that degree of care which would safely land a passenger at his destination," imposes too great a duty on the carrier: *Croly v. Union R. Co.*, 92 N. Y. Supp. 313. An in-

§ 3554. Limitation of Time in Street Railway Transfer Tickets.

—An ordinance designed to correct abuses of the transfer system by compelling a street car passenger to use his transfer within the time limit, and prohibiting him from selling or giving it away, has been held within the scope of the powers granted to cities by statutes authorizing them to make regulations for the government of street railroads, and not an unreasonable or oppressive provision.³⁴

§ 3557. Contributory Negligence of Street Railway Passengers in General.³⁵—A passenger on a street car is bound to exercise ordinary care only for his personal safety.³⁶ He is not bound to be constantly on the lookout for dangers, but has a right to presume that the company will use the high degree of care for his protection which the law requires.³⁷

§ 3558. Passenger Acting Erroneously in Apprehension of Sudden Danger.—The rule under this head finds frequent application in cases where a passenger, frightened by flashes or explosions due to some disarrangement of the electrical equipment on the car, attempts to escape and is injured, and the courts generally sustain recoveries for these injuries, though the danger was apparent only and the passenger would have been safe if he had remained in his seat.³⁸ A complaint alleging that the defendant negligently caused another car

struction that if the car was derailed and this was the proximate cause of the injury the plaintiff was entitled to recover, has been held erroneous because giving conclusive effect to the mere fact that the car was derailed: *Galveston & C. R. Co. v. Fales*, 33 Tex. Civ. App. 457; s. c. 77 S. W. Rep. 234. Instructions which make the failure of the plaintiff to exercise ordinary care a bar to a recovery are defective wherein they omit the condition that this want of ordinary care must have contributed to the injuries: *St. Louis & C. R. Co. v. Cannon* (Tex. Civ. App.), 81 S. W. Rep. 778. An instruction that a carrier owes to its passengers the duty to use the highest degree of care in transporting them which a person of the highest degree of care and prudence would use under like circumstances has been condemned as calculated to mislead the jury by reason of its repetitions on the subject of the degree of care required of the carrier: *International & C. R. Co. v. Hubbs*, — Tex. Civ. App. —; s. c. 82 S. W. Rep. 1362.

³⁴ *Ex parte Lorenzen*, 128 Cal. 431; s. c. 61 Pac. Rep. 38; 50 L. R. A. 55.

³⁵ That there can be no recovery if a passenger's negligence contributes to his injury as an efficient cause, see: *Root v. Des Moines R. Co.*, 122 Iowa 469; s. c. 98 N. W. Rep. 291; *Williams v. Galveston & C. R. Co.*, 32 Tex. Civ. App. 145; s. c. 78 S. W. Rep. 45. That it is not demanded that the passenger's negligence should have contributed in a "material" degree, see: *Root v. Des Moines R. Co.*, 122 Iowa 469; s. c. 98 N. W. Rep. 291.

³⁶ *West Chicago St. R. Co. v. Horne*, 100 Ill. App. 259; s. c. *aff'd*, 197 Ill. 250; 64 N. E. Rep. 331; *United Rys. & C. Co. v. Beidelman*, 95 Md. 480; s. c. 52 Atl. Rep. 913.

³⁷ *Lake St. El. R. Co. v. Burgess*, 99 Ill. App. 499; *Jones v. United Railways & C. Co.*, 99 Md. 64; s. c. 57 Atl. Rep. 620.

³⁸ *Kight v. Metropolitan R. Co.*, 21 App. (D. C.) 494; *Wanzer v. Chippewa Val. & C. R. Co.*, 108 Wis. 319; s. c. 84 N. W. Rep. 423.

"to appear to be in imminent danger" of colliding with the car on which the plaintiff was a passenger, whereupon she jumped, has been held defective in that it did not show that the appearance was such as to convince a reasonable person of the imminence of the danger.³⁹

§ 3563. **Contributory Negligence in Boarding Street Car.**—A person about to board a street car has a right to rely on the exercise of due care for his safety by the street railway company, and is not to be imputed with contributory negligence because of his failure to anticipate that the car will start suddenly while he is in the act of boarding it and throw him to the ground.⁴⁰ The passenger will not be imputed with negligence by the mere fact, without more, than he attempts to board a crowded car;⁴¹ nor by taking passage on a car knowing that the track is being repaired and that there are iron poles in close proximity to the track on the side of the car on which he is about to enter;⁴² nor by stepping onto the steps of a stationary car without grasping the handholds where this is impracticable because of the bundles he carries;⁴³ nor by attempting to enter a car not carrying passengers but proceeding to the barn for the night, unless the passenger knew, or by ordinary care could have known, that the car was not carrying passengers.⁴⁴ The doctrine of discovered peril applies in full force to street railway injuries. In a case where it appeared that a passenger was injured by the premature starting of a car while he was attempting to board it, an instruction was held proper which told the jury that if they found that, after seeing the plaintiff's dangerous position the conductor could have stopped the car by signaling to the motorman in time to have prevented the injury, and failed to exercise ordinary care so to do, the plaintiff was entitled to recover.⁴⁵

§ 3564. **Negligence Prior to Boarding Car: Walking between Tracks in Transferring from One Car to Another.**⁴⁶

³⁹ *Birmingham R. & Co. v. Butler*, 135 Ala. 388; s. c. 33 South. Rep. 33.

⁴⁰ *Citizens' St. R. Co. v. Merl*, 26 Ind. App. 284; s. c. 59 N. E. Rep. 491; *O'Mara v. St. Louis Transit Co.*, 102 Mo. App. 202; s. c. 76 S. W. Rep. 680; *Austrian v. United Traction Co.*, 19 Pa. Super. Ct. 329. Where a young girl is boarding a street car, and has hold of the hand-rail when it starts, it is not contributory negligence for her to hold onto the rail, even though it causes her to be dragged half a block: *Schoenfeld v. Metropolitan St. R. Co.*, 40 Misc. (N. Y.) 201; s. c. 81 N. Y. Supp. 644.

⁴¹ *Citizens' St. R. Co. v. Jolly*, 161 Ind. 80; s. c. 67 N. E. Rep. 935.

⁴² *Citizens' St. R. Co. v. Merl*, 26 Ind. App. 284; s. c. 59 N. E. Rep. 491.

⁴³ *Birmingham R. & Co. v. Bran-non*, 132 Ala. 431; s. c. 31 South. Rep. 523. See also *Jaques v. Sioux City Traction Co.*, 124 Iowa 257; s. c. 99 N. W. Rep. 1069.

⁴⁴ *Leu v. St. Louis Transit Co.*, 106 Mo. App. 329; s. c. 80 S. W. Rep. 273.

⁴⁵ *Shanahan v. St. Louis Transit Co.*, 109 Mo. App. 228; s. c. 83 S. W. Rep. 783.

⁴⁶ An intending passenger was held not guilty of contributory neg-

§ 3565. **Attempting to Board Street Cars while in Motion.**—Under the accepted rule it is not negligence, as a matter of law, for a passenger to board a moving street car;⁴⁷ but the question is one of fact to be determined by a consideration of the rate of speed of the car and all the attendant circumstances,⁴⁸ and is properly submitted by an instruction that to authorize a recovery for injuries in making the attempt the plaintiff must have exercised ordinary care.⁴⁹ The operatives of a street car are under no obligation to prevent a person from negligently making the attempt to board the moving car.⁵⁰ Though the person making the attempt is not regarded as negligent as a matter of law, yet when the fact that the movement of the car is the sole cause of the injury, the risk is one which the person making the attempt

ligence in stepping back from the track, upon the approach of a car, only a sufficient distance to avoid being struck by cars, such as were ordinarily run on said track, where he did not know that the steps on the car which struck him extended further out from the body of the car than those generally in use, and he was not able to ascertain this fact because of the blinding light on the car: *Denison & Co. v. Craig*, 35 Tex. Civ. App. 548; s. c. 80 S. W. Rep. 865. A passenger may be charged with contributory negligence in placing himself in such close proximity to the track that he will inevitably be struck by the overhang of the ordinary car when it rounds a curve: *Garvey v. Rhode Island Co.*, 26 R. I. 80; s. c. 58 Atl. Rep. 453. A person accustomed to taking the street car at the end of the line with knowledge that before receiving passengers it was necessary to lower a step on one side of the car, was held to have taken the risk of injury in attempting to board the car before the step was lowered: *Clark v. Metropolitan St. R. Co.*, 68 App. Div. (N. Y.) 49; s. c. 74 N. Y. Supp. 267. An intending passenger, after signaling a car about a half block away to stop at the place passengers are customarily taken on, has been held not negligent, as a matter of law, in proceeding diagonally across the tracks to such place and in assuming that the motorman, as the car approached the stopping place, would use reasonable care to permit him to cross in safety: *Copeland v. Metropolitan St. R. Co.*, 78 App. Div.

(N. Y.) 418; s. c. 79 N. Y. Supp. 1054; s. c. aff'd, 177 N. Y. 570; 69 N. E. Rep. 1121.

⁴⁷ *Chicago Union Traction Co. v. Lundahl*, 215 Ill. 289; s. c. 74 N. E. Rep. 155; aff'g s. c. 117 Ill. App. 220; *Pope v. Chicago City R. Co.*, 113 Ill. App. 503; *Eikenberry v. St. Louis Transit Co.*, 103 Mo. App. 422; s. c. 80 S. W. Rep. 360; *McKee v. St. Louis Transit Co.*, 108 Mo. App. 470; s. c. 83 S. W. Rep. 1013; *Spencer v. St. Louis Transit Co.*, 111 Mo. App. 653; s. c. 86 S. W. Rep. 593; *Kimber v. Metropolitan St. R. Co.*, 69 App. Div. (N. Y.) 353; s. c. 74 N. Y. Supp. 966; *Lobsenz v. Metropolitan St. R. Co.*, 72 App. Div. (N. Y.) 181; s. c. 76 N. Y. Supp. 411; *Lewis v. Houston Electric Co.*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 489.

⁴⁸ *Birmingham R. & Co. v. Brannon*, 132 Ala. 431; s. c. 31 South. Rep. 523; *Chicago Union Traction Co. v. Olsen*, 211 Ill. 255; s. c. 71 N. E. Rep. 985; *South Chicago City R. Co. v. Dufresne*, 200 Ill. 456; s. c. 65 N. E. Rep. 1075; aff'g s. c. 102 Ill. App. 493; *Leu v. St. Louis Transit Co.*, 106 Mo. App. 329; s. c. 80 S. W. Rep. 273; *Leu v. St. Louis Transit Co.*, 110 Mo. App. 458; s. c. 85 S. W. Rep. 137; *O'Mara v. St. Louis Transit Co.*, 102 Mo. App. 202; s. c. 76 S. W. Rep. 680; *Clinton v. Brooklyn Heights R. Co.*, 91 App. Div. (N. Y.) 374; s. c. 86 N. Y. Supp. 932.

⁴⁹ *Maguire v. St. Louis Transit Co.*, 103 Mo. App. 459; s. c. 78 S. W. Rep. 838.

⁵⁰ *Leu v. St. Louis Transit Co.*, 106 Mo. App. 329; s. c. 80 S. W. Rep. 273.

will be held to have assumed.⁵¹ In Pennsylvania the rule is "well established that to get on or off a moving car whether propelled by steam or electricity is negligence *per se* in him who attempts it."⁵² In another jurisdiction it has been held negligence, as a matter of law, for one to attempt to board a street car going at a speed of eight or ten miles an hour.⁵³

§ 3566. When not Negligence to Attempt to Board Street Car in Motion.—Generally speaking, contributory negligence will not be imputed to a passenger mounting a car when slowed down on approach to its stopping place, as this action may amount to an invitation to board the car.⁵⁴

§ 3567. What Attempts to Board Street Cars while in Motion have been Held Negligence Per Se.⁵⁵

⁵¹ Pope v. Chicago &c. R. Co., 113 Ill. App. 503; Murphy v. North Jersey St. R. Co., 71 N. J. L. 5; s. c. 58 Atl. Rep. 1018.

⁵² Boulfrois v. United Traction Co., 210 Pa. 263; s. c. 59 Atl. Rep. 1007; Gaffney v. Union T. Co., 211 Pa. 91; s. c. 60 Atl. Rep. 488.

⁵³ Spencer v. St. Louis Transit Co., 111 Mo. App. 653; s. c. 86 S. W. Rep. 593.

⁵⁴ Monroe v. Metropolitan St. R. Co., 79 App. Div. (N. Y.) 587; s. c. 80 N. Y. Supp. 177; Mulligan v. Metropolitan St. R. Co., 89 App. Div. (N. Y.) 207; s. c. 85 N. Y. Supp. 791; Lewis v. Houston Electric Co., — Tex. Civ. App. —; s. c. 88 S. W. Rep. 489. Where plaintiff, wishing to board defendant's street car, signaled for the motorman to stop, and the car slowed down almost to a standstill, and, while plaintiff was in the act of stepping on, the motorman called to him to take the next car, and immediately quickened the speed of the car, throwing plaintiff off, the jury was justified in finding that there was no negligence on the part of plaintiff: Schmidt v. North Jersey St. R. Co. (N. J. L.), 58 Atl. Rep. 72. In one case it was held not contributory negligence as a matter of law for an ordinarily active man, thirty-eight years old, to attempt to board a street car turning out of a curve at a speed of five or six miles an hour; the place being the usual place for cars to stop to let passengers on and off, and he being familiar with the place: Eikenberry

v. St. Louis Transit Co., 103 Mo. App. 442; s. c. 80 S. W. Rep. 360.

⁵⁵ Kroeger v. Seattle Electric Co., 37 Wash. 544; s. c. 79 Pac. Rep. 1115. A passenger, pulled off of car by obstructions at side of track while he was in act of boarding the car before it came to a full stop was charged with contributory negligence where the obstruction could easily be seen: Schmidt v. North Jersey St. R. Co., 66 N. J. L. 424; s. c. 49 Atl. Rep. 438. A passenger was charged with contributory negligence in attempting to board a car moving from four to six miles per hour at place where car did not slow up for passengers and he was not invited by signal or otherwise to make the attempt: Fremont v. Metropolitan St. R. Co., 83 App. Div. (N. Y.) 414; s. c. 82 N. Y. Supp. 307. A passenger was imputed with contributory negligence in attempting to board a car running three miles an hour and at the time slackening its speed preparatory to coming to a full stop: Hunterson v. Union Traction Co., 205 Pa. 568; s. c. 55 Atl. Rep. 543. A passenger, knowing that the car would stop, who took hold of the handholds and walked along the car sideways and fell into a manhole in his path was guilty of contributory negligence precluding a recovery: Sellers v. Union Traction Co., 21 Pa. Super. Ct. 5. An approaching passenger who reached a car from the rear and seized the handle bar and attempted to board the car after the

§ 3568. **Attempting to Board Street Car by Front Platform.**—A passenger is not to be charged with such contributory negligence in boarding a street car by the front platform as will defeat a recovery for injuries suffered as a consequence of being thrown from the platform while the car was rounding a curve, where there was no notice forbidding passengers to enter the platform, and there was no apparent danger in so doing.⁵⁶

§ 3572. **Riding upon Street Car Platform.**⁵⁷—The passenger so placed assumes the risks of injury where there is room inside,⁵⁸ and in any event he is required to exercise the increased care entailed by the obvious dangers of his position.⁵⁹ Interurban electric railways partake of the character of steam railroads, and the rule as to riding on platforms is the same.⁶⁰

§ 3576. **Decisions Imputing Contributory Negligence to the Passenger Riding on the Front Platform.**⁶¹

§ 3578. **Riding on Side Step or Running-Board of Street Car.**—The courts do not generally regard it as negligence *per se* for a passenger to stand on the running-board of an open car where the seats are filled,⁶² but make the question one of fact to be determined by the

signal had been given and the car had started forward in the usual manner, assumed all the natural risks incident to such an attempt to board the car, and could not hold the street railway company responsible for injuries caused thereby: *Foster v. Seattle Electric Co.*, 35 Wash. 177; s. c. 76 Pac. Rep. 995.

⁵⁶ *Townsend v. Binghamton R. Co.*, 57 App. Div. (N. Y.) 234; s. c. 68 N. Y. Supp. 121; *Kroeger v. Seattle Electric Co.*, 37 Wash. 344; s. c. 79 Pac. Rep. 1115 (passenger entered by front entrance while car emerging from barn and was crushed against side of door—guilty of contributory negligence).

⁵⁷ That a passenger is not guilty of negligence as a matter of law in riding on the platform, see: *Chicago Union Traction Co. v. Lawrence*, 113 Ill. App. 269; s. c. aff'd, 211 Ill. 373; 71 N. E. Rep. 1024; *Chicago City R. Co. v. McCaughna*, 216 Ill. 202; s. c. 74 N. E. Rep. 819; aff'g s. c. 117 Ill. App. 538; *Cattano v. Metropolitan St. R. Co.*, 173 N. Y. 565; s. c. 66 N. E. Rep. 563; aff'g s. c. 73 N. Y. Supp. 1131; *Brunnchow v. Rhode Island Co.*, 26 R. I. 211; s. c. 58 Atl. Rep. 656; *Halverson v. Seattle Electric Co.*, 35 Wash. 600;

s. c. 77 Pac. Rep. 1058; *Zimmer v. Fox River & C. R. Co.*, 118 Wis. 614; s. c. 95 N. W. Rep. 957.

⁵⁸ *Bridges v. Jackson Electric R. & C. Co.*, 86 Miss. 584; s. c. 38 South. Rep. 788.

⁵⁹ *Magrane v. St. Louis & C. R. Co.*, 183 Mo. 119; s. c. 81 S. W. Rep. 1158.

⁶⁰ *Cincinnati & C. R. Co. v. Lohe*, 68 Ohio St. 101; s. c. 67 N. E. Rep. 161.

⁶¹ In New York it is the rule that a passenger, electing to ride on the front platform when there is room inside the car, thereby assumes the additional risk of injury incident to such position, and the defendant owes him no higher duty than to operate the car with reasonable care in the practical discharge of its duty to the public as a carrier of passengers: *Wogler v. Central Cross-Town R. Co.*, 83 App. Div. (N. Y.) 101; s. c. 82 N. Y. Supp. 485. In the Pennsylvania courts the act of a passenger in standing on the platform of an electric car in motion when there is room inside is regarded as negligence *per se*: *Kirchner v. Oil City St. R. Co.*, 210 Pa. 45; s. c. 59 Atl. Rep. 270.

⁶² *Hesse v. Meriden & C. Tramway Co.*, 75 Conn. 571; s. c. 54 Atl. Rep.

jury in the light of the circumstances attending the particular case.⁶³ The passenger will generally be regarded as having assumed the risk of dangers from riding in this position if there is room inside and he takes this position voluntarily and unnecessarily.⁶⁴ The use of the footboard to reach a vacant seat on the inside of the car is proper.⁶⁵ A passenger on his part must exercise reasonable care for his safety in view of the danger of his exposed position, and keep a lookout for objects, such as vehicles,⁶⁶ and other objects at the side of the track and in close proximity to the same.⁶⁷ There is no duty devolving on the street railway company to post notices warning passengers to keep off the inner board of open cars equipped with boards on both sides, and its omission to do so is neither negligence nor evidence of negligence.⁶⁸ In one case it was held that a passenger, injured while riding on the footboard by coming in contact with the side of a bridge, was not guilty of contributory negligence in leaning back to return his money to his pocket after paying his fare.⁶⁹ An ordinance enacted previous to the introduction of electricity making it unlawful for any person to hang from the outside of a street car has been held inapplicable to open summer cars operated by electricity.⁷⁰

§ 3581. **Riding with Arm out of Street Car Window.**—The mere fact that the passenger rides with his arm extended beyond the dead line of the window sill of the car does not conclusively charge him with such negligence as to defeat a recovery for an injury from being

299; *Koontz v. District of Columbia*, 24 App. (D. C.) 59; *Ft. Wayne Traction Co. v. Hardendorf*, 164 Ind. 403; s. c. 72 N. E. Rep. 593; *Frank Bird Transfer Co. v. Morrow*, 36 Ind. App. 305; s. c. 72 N. E. Rep. 189; *Indianapolis St. R. Co. v. Haverstick*, 35 Ind. App. 281; s. c. 74 N. E. Rep. 34; *Stone v. Lewiston & C. R. Co.*, 99 Me. 243; s. c. 59 Atl. Rep. 56; *Sheeron v. Coney Island & C. R. Co.*, 78 App. Div. (N. Y.) 476; s. c. 79 N. Y. Supp. 752; *Anderson v. City & Suburban R. Co.*, 42 Or. 505; s. c. 71 Pac. Rep. 659; *Bumbear v. United Traction Co.*, 198 Pa. St. 198; s. c. 47 Atl. Rep. 961; *Bridges v. Jackson Electric R. & C. Co.*, 86 Miss. 584; s. c. 38 South. Rep. 788.

⁶³ *Purington-Kimball Brick Co. v. Eckman*, 102 Ill. App. 183; *Seller v. Market St. R. Co.*, 139 Cal. 268; s. c. 72 Pac. Rep. 1006.

⁶⁴ *Moody v. Springfield St. R. Co.*, 182 Mass. 158; s. c. 65 N. E. Rep. 29; *Bainbridge v. Union Traction*

Co., 206 Pa. 71; s. c. 55 Atl. Rep. 836; *Woodroffe v. Roxborough & C. R. Co.*, 201 Pa. 521; s. c. 51 Atl. Rep. 324.

⁶⁵ *Kreimelmann v. Jourdan*, 107 Mo. App. 64; s. c. 80 S. W. Rep. 323; *San Antonio Traction Co. v. Bryant*, 30 Tex. Civ. App. 437; s. c. 70 S. W. Rep. 1015.

⁶⁶ *Rosen v. Dry Dock & C. R. Co.*, 91 N. Y. Supp. 333.

⁶⁷ *Bridges v. Jackson Electric R. & C. Co.*, 86 Miss. 584; s. c. 38 South. Rep. 788 (posts); *Canavan v. Interurban St. R. Co.*, 87 N. Y. Supp. 491 (pillar); *Third Ave. R. Co. v. Barton*, 107 Fed. Rep. 215; s. c. 46 C. C. A. 241; 52 L. R. A. 471 (pillar).

⁶⁸ *Allen v. St. Louis Transit Co.*, 183 Mo. 411; s. c. 81 S. W. Rep. 1142.

⁶⁹ *Anderson v. City & Suburban R. Co.*, 42 Or. 505; s. c. 71 Pac. Rep. 659.

⁷⁰ *Frank Bird Transfer Co. v. Morrow*, 36 Ind. App. 305; s. c. 72 N. E. Rep. 189.

struck by an object at the side of the track. The question is one purely of fact for the jury.⁷¹

§ 3582. Putting Head out of Street Car Window.⁷²

§ 3583. Riding in other Positions on Street Cars.—The passenger taking a dangerous position by standing on the car steps, outside of the gate, and on the side of the adjacent track on which cars run in the opposite direction, is required to exercise that degree of care for his own safety which prudent persons under like circumstances would observe.⁷³ A person permitted to ride on the bumper, and while in that position paying his fare, is a passenger, and the street railway company is liable for personal injuries inflicted on him by being crushed by a car approaching from the rear.⁷⁴ A passenger was charged with contributory negligence where, standing on the platform, he leaned over a railing for the purpose of seeing where certain smoke came from, and was struck by a trolley pole located from fourteen to seventeen inches from the side of the car, and from nineteen to twenty-four inches from the railing.⁷⁵ In another case contributory negligence, barring a recovery for injuries, was discovered in a case where a passenger on an open electric car signaled the conductor to stop at a crossing before and after reaching it, and the conductor did not heed the signal, and the passenger standing at the edge of the car with his face to the rear, and an arm around a stanchion, again signaled the conductor when the car was in the middle of the block, and the car was then suddenly stopped with a jar, and the passenger was thrown out.⁷⁶

⁷¹ *Tucker v. Buffalo R. Co.*, 53 App. Div. (N. Y.) 571; s. c. 65 N. Y. Supp. 989; s. c. aff'd, 169 N. Y. 589; 62 N. E. Rep. 1101; *McCord v. Atlanta & C. R. Co.*, 134 N. C. 53; s. c. 45 S. E. Rep. 1031. In a case where plaintiff, while seated in a street car with his arm on the frame of an open window, was injured by collision with a load on a passing wagon, and the court instructed that if any part of plaintiff's arm protruded beyond the line of the car, and but for this fact he would not have been injured, then plaintiff had failed to show negligence on the part of the defendant, it was unnecessary to charge that the position suggested for plaintiff's arm evidenced negligence on his part: *Zeliff v. New Jersey St. R. Co.*, 69 N. J. L. 541; s. c. 55 Atl. Rep. 96.

⁷² That such an act amounts to contributory negligence, see: *Christensen v. Metropolitan St. R. Co.*, 137 Fed. Rep. 708.

⁷³ *Parks v. St. Louis & C. R. Co.*, 178 Mo. 108; s. c. 77 S. W. Rep. 70.

⁷⁴ *Grieve v. North Jersey St. R. Co.*, 65 N. J. L. 409; s. c. 47 Atl. Rep. 427. But see *Nieboer v. Detroit & C. R. Co.*, 128 Mich. 486; s. c. 87 N. W. Rep. 626; 8 Det. Leg. N. 745, where it is held that a person riding on the bumper after being warned by the conductor of his dangerous position is guilty of contributory negligence as a matter of law.

⁷⁵ *Huber v. Cedar Rapids & C. R. Co.*, 124 Iowa 556; s. c. 100 N. W. Rep. 478.

⁷⁶ *Jennings v. Union Traction Co.*, 206 Pa. 31; s. c. 55 Atl. Rep. 765.

§ 3584. Instances where Contributory Negligence was Imputed to the Act of Riding in Unsafe Positions.⁷⁷

§ 3586. Instructions on the Question of Contributory Negligence of Street Railway Passengers.⁷⁸

§ 3589. Injuries to Passengers in Alighting from Street Cars.⁷⁹
—The cases do not impute a passenger with negligence *per se* for his failure to take hold of the hand-rail in alighting from the street car.⁸⁰

§ 3590. Duty of Street Car Passenger to give Notice of his Intention to Alight.⁸¹—Where the car is without a conductor, notice to the

⁷⁷ Contributory negligence, as a matter of law, has been imputed to the act of riding in unsafe positions under these circumstances:—Where the plaintiff, a passenger on an open street car, arose as the car was approaching his destination, and stood with one foot on the platform and the other on the car step, with his hand on the rail, and, as the car stopped with a sudden jerk, he was thrown to the ground and injured (*Conroy v. Detroit &c. R. Co.*, 139 Mich. 173; s. c. 102 N. W. Rep. 641; 104 N. W. Rep. 319; 11 Det. Leg. N. 775); where a boy of twelve years, without invitation, got on the step of the front platform of an electric street car, access to which was barred by a closed door, the method of entering being by a rear door, and the motorman did not open the door or stop the car and it struck a wagon and the boy was injured (*Barlow v. Jersey City &c. R. Co.*, 67 N. J. L. 364; s. c. 51 Atl. Rep. 463); where a passenger occupying an end seat, asked for his fare, without necessity arose and put his hands in his trousers pocket for the money, and while doing so leaned to one side and backward and thus fell from an open car (*Witherington v. Lynn &c. R. Co.*, 182 Mass. 596; s. c. 66 N. E. Rep. 206).

⁷⁸ Since it is not, as a matter of law, contributory negligence for a passenger to fail to take hold of a rail or bar of the car while riding on the platform preparatory to alighting, a court may very properly refuse an instruction in an action for an injury in being thrown off by the sudden starting of the car that such failure of the passenger would be contributory negligence: *Chicago Union Traction Co. v. Han-*

thorn, 211 Ill. 367; s. c. 71 N. E. Rep. 1022. An instruction, in an action by a passenger for injuries by being struck by another car passing on another track, that if plaintiff's injuries were due to his violation of the rules of the defendant, and if a guard-rail was placed on the car, so that passengers were warned not to stand on the running board, and plaintiff ignored the presence of the guard-rail, he could not recover, even though the conductor permitted him to stand on the running-board, was properly refused, since it omitted to inform the jury that notice of the existence of the rules must be shown before plaintiff could be bound by them: *Ft. Wayne Traction Co. v. Hardendorf*, 164 Ind. 403; s. c. 72 N. E. Rep. 593. An instruction that the defendant was not responsible for injuries which were the proximate result of the plaintiff's negligent failure to use his natural senses for his own safety was proper: *Fraser v. California St. Cable R. Co.*, 146 Cal. 714; s. c. 81 Pac. Rep. 29.

⁷⁹ *Johnson v. Yonkers R. Co.*, 101 App. Div. (N. Y.) 65; s. c. 91 N. Y. Supp. 508 (passenger bound only to the exercise of reasonable care).

⁸⁰ *Crump v. Davis*, 33 Ind. App. 88; s. c. 70 N. E. Rep. 886; *Root v. Des Moines City R. Co.*, 113 Iowa 675; s. c. 83 N. W. Rep. 904 (a question for the jury); *Brazis v. St. Louis Transit Co.*, 102 Mo. App. 224; s. c. 76 S. W. Rep. 708.

⁸¹ The carrier will not be charged with liability for injury to an alighting passenger due to the fact that the car was moving, where such passenger has failed to give notice to the servants in charge of the car that he desired to alight: *Chicago*

motorman in charge of the car will suffice.⁸² A passenger will not be allowed to excuse his failure to give this notice because of the difficulty of notifying the conductor—as, for instance, where the conductor is in a remote part of the car engaged in collecting fares.⁸³ The rules are to be reasonably construed. They do not require a passenger, in the presence of an impending collision between his car and a train, to notify the conductor of a desire to alight, and hence a failure to do so cannot be urged to defeat a recovery for injuries received in leaping from the car under these circumstances.⁸⁴

§ 3591. Passengers need not Remain Seated Until Street Car is Stopped.⁸⁵

§ 3592. Injuries Received in Consequence of Sudden Starting of the Car While the Passenger is Alighting.⁸⁶

§ 3593. Circumstances from which the Passenger may Assume that the Car has Slowed Up or Stopped to Enable him to Alight.—It has been held that an alighting passenger was not to be imputed with contributory negligence in alighting from a car a few feet from his crossing where the car proceeded at a slow rate of speed, indicating the intention of the motorman to stop at the crossing.⁸⁷ The case is much clearer where, though the car is not actually stopped, its motion is practically imperceptible.⁸⁸ So a passenger will not be imputed with contributory negligence, as a matter of law, where without warning from the conductor that the stopping of the car is not at the place of regular stopping, he alights and suffers injuries.⁸⁹

Union Traction Co. v. Hanthorn, 211 Ill. 367; s. c. 71 N. E. Rep. 1022; *Buchter v. New York City R. Co.*, 90 N. Y. Supp. 335; *Blakney v. Seattle Electric Co.*, 28 Wash. 607; s. c. 68 Pac. Rep. 1037.

⁸² *Chicago & C. R. Co. v. Dice*, 113 Ill. App. 74.

⁸³ *Sims v. Metropolitan St. R. Co.*, 65 App. Div. (N. Y.) 270; s. c. 72 N. Y. Supp. 835.

⁸⁴ *Selma St. & C. R. Co. v. Owen*, 132 Ala. 420; s. c. 31 South. Rep. 598.

⁸⁵ A passenger was charged with contributory negligence where she arose and after signaling the conductor to stop, remained standing without any support, and was thrown by the stopping of the car: *Bendon v. Union Traction Co.*, 26 Pa. Super. Ct. 539.

⁸⁶ That negligence will not be imputed to a passenger thrown from the platform while alighting by the

sudden starting of the car, see *Richmond Traction Co. v. Williams*, 102 Va. 253; s. c. 46 S. E. Rep. 292. The question whether a passenger exercised reasonable care for his safety in continuing the attempt to alight after a car had started is a question of fact for the determination of the jury: *Indianapolis St. R. Co. v. Lawn*, 30 Ind. App. 515; s. c. 66 N. E. Rep. 508. See also *Atchison & C. R. Co. v. Loewe*, 69 Kan. 843; s. c. 74 Pac. Rep. 234; s. c. aff'd, — Kan. —; 76 Pac. Rep. 431; *Murphy v. Union R. Co.*, 47 Misc. (N. Y.) 672; s. c. 94 N. Y. Supp. 350.

⁸⁷ *Denison & C. R. Co. v. Johnson*, 36 Tex. Civ. App. 115; s. c. 81 S. W. Rep. 780. See also *Sweet v. Birmingham R. & C. Co.*, 136 Ala. 166; s. c. 33 South. Rep. 886.

⁸⁸ *Elwood v. Connecticut R. & C. Co.*, 77 Conn. 145; s. c. 58 Atl. Rep. 751.

⁸⁹ *United Rys. & C. Co. v. Woodbridge*, 97 Md. 629; s. c. 55 Atl. Rep.

§ 3594. **Alighting from Street Car while in Motion.**⁹⁰—Though the cases do not regard it as negligence *per se* for a passenger to attempt to alight from a moving car, yet they do hold him to the assumption of the risk of the danger of the act in the absence of negligence or fault on the part of the carrier.⁹¹

§ 3595. **Circumstances under which the Act is Deemed Negligent.**—Under these circumstances the act of the alighting passenger was deemed so negligent as to preclude a recovery for his injuries:—Where a passenger, after the conductor had failed to stop the car in response to his signal, and the passenger turned to signal the conductor again, and leaning outward his head struck a wagon overtaken by the car;⁹² where the passenger, after the failure of the motorman to stop at his crossing as requested, again asked him to stop, and while the car was being slowed down the passenger jumped off after the motorman had told him not to do so until the car had stopped;⁹³

444; *Franklin v. St. Louis &c. R. Co.*, 188 Mo. 533; s. c. 87 S. W. Rep. 930; *Selby v. Detroit R.*, — Mich. —; s. c. 104 N. W. Rep. 376; 12 Det. Leg. N. 382.

⁹⁰ That it is not negligence *per se* to alight from a moving car, see: *Indianapolis St. R. Co. v. Hockett*, 159 Ind. 677; s. c. 66 N. E. Rep. 39; *Dawson v. St. Louis Transit Co.*, 102 Mo. App. 277; s. c. 76 S. W. Rep. 689; *Harris v. Union R. Co.*, 69 App. Div. (N. Y.) 385; s. c. 74 N. Y. Supp. 1012; *St. Louis &c. R. Co. v. Massey* (Tex. Civ. App.), 76 S. W. Rep. 585; but is a question for the jury, see: *Betts v. Wilmington City R. Co.*, 3 Penn. (Del.) 448; s. c. 53 Atl. Rep. 358; *Crump v. Davis*, 33 Ind. App. 88; s. c. 70 N. E. Rep. 886; *Dawson v. St. Louis Transit Co.*, 102 Mo. App. 277; s. c. 76 S. W. Rep. 689; *Willis v. Metropolitan St. R. Co.*, 63 App. Div. (N. Y.) 332; s. c. 71 N. Y. Supp. 554; *El Paso &c. R. Co. v. Harry*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 735; *Dallas Rapid Transit Co. v. Payne*, 98 Tex. 211; s. c. 82 S. W. Rep. 649; rev'g s. c. 78 S. W. Rep. 1085. In an action against a street railway for injuries to a passenger, a request to charge that, if plaintiff jumped or stepped off the car while in motion, she could not recover, was properly refused, because it was indefinite as to the speed of the car, on which the question of negligence in stepping

therefrom would depend: *Cody v. Duluth St. R. Co.*, 94 Minn. 74; s. c. 102 N. W. Rep. 397; rev'g s. c. 102 N. W. Rep. 201. That the passenger alighting from a rapidly moving car is guilty of negligence *per se*, see: *Walker v. Georgia R. &c. Co.*, 122 Ga. 368; s. c. 50 S. E. Rep. 121; *South Covington &c. R. Co. v. Riegler*, 82 S. W. Rep. 382; s. c. 26 Ky. L. Rep. 666; *Lynch v. Interurban St. R. Co.*, 88 N. Y. Supp. 935; *Boulfrois v. United Traction Co.*, 210 Pa. 263; s. c. 59 Atl. Rep. 1007; *Foran v. Union Traction Co.*, 22 Pa. Super. Ct. 10; *Knoxville Traction Co. v. Carroll*, 113 Tenn. 514; s. c. 82 S. W. Rep. 313. Where defendant claimed that plaintiff attempted to alight while the car was in motion, and before it was brought to a stop, defendant was entitled to an instruction that, while it was defendant's duty to stop the car to afford plaintiff an opportunity to alight, yet its failure to do so would not give plaintiff the right to jump from the moving car: *McDonald v. City Electric R. Co.*, 137 Mich. 392; s. c. 100 N. W. Rep. 592; 11 Det. Leg. N. 326.

⁹¹ *Jones v. Canal &c. R. Co.*, 109 La. 213; s. c. 33 South. Rep. 200.

⁹² *Flynn v. Consolidated Traction Co.*, 67 N. J. L. 546; s. c. 52 Atl. Rep. 369.

⁹³ *Campbell v. Los Angeles R. Co.*, 135 Cal. 137; s. c. 67 Pac. Rep. 50.

where a passenger, with his face towards the rear of the car, stepped off while the car was running at a high rate of speed.⁹⁴

§ 3597. Alighting at Other Dangerous and Improper Places.—The passenger is not bound to inquire of the conductor as to the safety of the stopping place,⁹⁵ but may rely on the presumption that the place selected by the operatives is a safe place.⁹⁶ For this reason a passenger on an open car who stepped off the footboard opposite her seat, and was injured by the uneven condition of the ground, was held not guilty of contributory negligence, though had she followed the footboard to the rear of the car she could have alighted on level ground.⁹⁷ The fact that the street railway company has posted a notice in the car that “cars stop to take on and let off passengers at near side of cross streets,” and that those violating the notice do so at their own peril, does not mean that the cars will stop only at such places, and hence does not preclude a passenger alighting at any other place where the car has stopped from recovery for injuries occasioned by the company’s negligence.⁹⁸

§ 3599. Duty of Female Passenger to Gather Up her Dress before Attempting to Alight.—A female passenger is not to be imputed with contributory negligence, as a matter of law, because wearing a dress so long as to be more than likely to catch on appliances extending above the platform.⁹⁹ In one case it was held that a cause of action was stated in a complaint which alleged that the plaintiff alighted from a street car, and that, after the conductor had assisted her in alighting, he stepped back onto the car, and in doing so stepped on her skirt, which had not been removed from the car step, by reason of which,

⁹⁴ *Birmingham R. &c. Co. v. Glover*, 142 Ala. 492; s. c. 38 South. Rep. 836.

⁹⁵ *Montgomery St. R. Co. v. Mason*, 133 Ala. 508; s. c. 32 South. Rep. 261.

⁹⁶ *Senf v. St. Louis &c. R. Co.*, 112 Mo. App. 74; s. c. 86 S. W. Rep. 887; *Fillingham v. St. Louis Transit Co.*, 102 Mo. App. 573; s. c. 77 S. W. Rep. 314; *Clair v. New York City R. Co.*, 92 N. Y. Supp. 837; *Henry v. Grant St. &c. R. Co.*, 24 Wash. 246; s. c. 64 Pac. Rep. 137. The petition in an action against a street railway company for personal injuries was held to state a cause of action which alleged that plaintiff requested the conductor to stop the car at a certain point, and that the conductor did not stop the car pre-

cisely at the point in question, but near by, and at a very narrow point of ground between the car track and a deep gully, the space between the track and the gully being only a foot or two wide, so that petitioner, who was old and afflicted with poor eyesight, took a step and fell into the gully, receiving injuries: *Maccon R. & Light Co. v. Vining*, 120 Ga. 511; s. c. 48 S. E. Rep. 232.

⁹⁷ *Fillingham v. St. Louis Transit Co.*, 102 Mo. App. 573; s. c. 77 S. W. Rep. 314.

⁹⁸ *United Rys. &c. Co. v. Woodbridge*, 97 Md. 629; s. c. 55 Atl. Rep. 444.

⁹⁹ *Smith v. Kingston City R. Co.*, 55 App. Div. (N. Y.) 143; s. c. 67 N. Y. Supp. 185; s. c. aff’d, 169 N. Y. 616; 62 N. E. Rep. 1100.

as the car moved away, she was pulled to the ground and sustained injuries.¹⁰⁰

§ 3600. Other Questions Relating to Contributory Negligence of Street Car Passengers Injured in Alighting.—The passenger relation is at an end when the passenger has been delivered safely at his stopping place, and the carrier owes him no further duty except to use ordinary care to avoid injuring him.¹⁰¹ It is the duty of a passenger alighting from a car on a double track system to look and listen for cars approaching on the parallel track, and he will be imputed with contributory negligence where he fails to take this precaution for his own safety.¹⁰² The question of the passenger's contributory negligence in this situation is not affected by the fact that the rules of the company require a car to stop on meeting another car engaged in discharging passengers, unless it is shown that the rule was commonly observed, and the injured passenger relied on or knew of its existence.¹⁰³

§ 3605. Sleeping-Car Companies not Common Carriers nor Innkeepers.¹⁰⁴

§ 3606. Bound to Exercise Ordinary Care to Protect Passengers from Thieves.—The duty to exercise ordinary care to protect the property of passengers from thieves requires of the sleeping-car company that it maintain a reasonable watch in its cars during the night while the passengers are asleep.¹⁰⁵

§ 3616. Extent of Liability of Sleeping-Car Companies for Loss of Other Personal Property of Passengers.—Generally speaking, a sleeping-car company is liable for property lost by occupants of its car only when the company is shown to have been negligent, or its servants in charge stole the property.¹⁰⁶ This rule makes no distinction be-

¹⁰⁰ *Citizens' St. R. Co. v. Shepherd*, 29 Ind. App. 412; s. c. 62 N. E. Rep. 300.

¹⁰¹ *Louisville R. Co. v. Meglemery*, 78 S. W. Rep. 217; s. c. 25 Ky. L. Rep. 1587; 79 S. W. Rep. 287.

¹⁰² *Harten v. Brightwood R. Co.*, 18 App. (D. C.) 260; *Gray v. Ft. Pitt Traction Co.*, 198 Pa. St. 184; s. c. 47 Atl. Rep. 945; *Metropolitan St. R. Co. v. Ryan*, 69 Kan. 538; s. c. 77 Pac. Rep. 267.

¹⁰³ *Birmingham R. & Co. v. Oldham*, 141 Ala. 195; s. c. 37 South. Rep. 452.

¹⁰⁴ *Morrow v. Pullman Palace Car Co.*, 98 Mo. App. 351; s. c. 73 S. W. Rep. 281.

¹⁰⁵ *Morrow v. Pullman Palace Car*

Co., 98 Mo. App. 351; s. c. 73 S. W. Rep. 281; *Arthur v. Pullman Co.*, 44 Misc. (N. Y.) 229; s. c. 88 N. Y. Supp. 981 (loss of baggage left in drawing room in care of porter is evidence of negligence of the sleeper company sufficient to raise question of fact for the jury); *Pullman Palace Car Co. v. Arents*, 28 Tex. Civ. App. 71; s. c. 66 S. W. Rep. 329 (evidence sufficient to support finding that employes of sleeper company were negligent in not keeping windows closed and preventing theft of passenger's valise).

¹⁰⁶ *Pullman Sleeping Car Co. v. Hatch*, 30 Tex. Civ. App. 303; s. c. 70 S. W. Rep. 771.

tween the occupant of a berth in the main body of the sleeper and a person permitted by the porter to occupy a bed in the smoking compartment.¹⁰⁷

§ 3617. **Responsibility of Sleeping-Car Companies for Thefts of Passenger's Effects by Companies' Servants.**—A sleeping-car company is liable for the thefts of its servants to the extent of necessary baggage or money of the passenger carried by him, having regard to the character, duration and purposes of the journey.¹⁰⁸

§ 3620. **Contributory Negligence of the Passenger whose Money, Baggage, or Valuables are Stolen.**—A passenger is not guilty of contributory negligence, as matter of law, in sleeping with the window of the compartment open, unless it was left open at his request,¹⁰⁹ and his property was stolen by a stranger through the window from the outside.¹¹⁰

§ 3621. **Liability of Sleeping-Car Companies for Negligent Injuries to Passengers.**—It is the holding of a Canadian case that a passenger was not to be imputed with contributory negligence, as a matter of law, by reason of his attempt to reverse his position in the berth while the car was in rapid motion, so as to prevent a recovery for injuries caused by being thrown from the berth by a violent lurch and jerk of the car at the time of changing his position.¹¹¹

§ 3631. **Care and Vigilance Exacted of the Driver of a Stage Coach.**¹¹²

§ 3658. **Duty of Carrier as to Accommodation and Treatment of Passengers.**—A steamboat company, exercising its option to resell a stateroom within a certain time after departure, is bound to refund the money paid therefor.¹¹³ In the absence of evidence showing that it was a custom of a steamboat company to receive telegrams for delivery to passengers, or that it knew or permitted this to be done by

¹⁰⁷ *Morrow v. Pullman Palace Car Co.*, 98 Mo. App. 351; s. c. 73 S. W. Rep. 281.

¹⁰⁸ *Morrow v. Pullman Palace Car Co.*, 98 Mo. App. 351; s. c. 73 S. W. Rep. 281.

¹⁰⁹ *Morrow v. Pullman Palace Car Co.*, 98 Mo. App. 351; s. c. 73 S. W. Rep. 281.

¹¹⁰ *Morrow v. Pullman Palace Car Co.*, 98 Mo. App. 351; s. c. 73 S. W. Rep. 281.

¹¹¹ *Smith v. Canadian Pac. R. Co.*, 34 N. S. 22.

¹¹² An instruction that the proprietor of a stage coach covenants

to insure the safe carriage of passengers by the exercise of extraordinary diligence and is responsible for any neglect, has been held open to the objection that it excluded from the jury the inquiry whether or not the runaway which resulted in the injury was accidental and could have been avoided by the exercise of the utmost care: *Taillon v. Mears*, 29 Mont. 161; s. c. 74 Pac. Rep. 421.

¹¹³ *Clark v. New York & C. R. Co.*, 40 Misc. (N. Y.) 691; s. c. 83 N. Y. Supp. 162.

its officers, a steamboat company is not liable for the non-delivery of a telegram addressed to a passenger on board its steamer, and by direction of the captain accepted by the purser for delivery.¹¹⁴

§ 3662. Rights of Passengers inter Sese to Berths on Steamboats.¹¹⁵

§ 3665. Duty to Provide Safe Means for Boarding and Disembarking.¹¹⁶

§ 3671. Contracts Limiting Liability of Carrier in Respect of Baggage.¹¹⁷—A passenger is bound by stipulations limiting the liability of a carrier by water for loss of baggage to a certain amount only where he has assented thereto.¹¹⁸ Assent will not be presumed where the ticket containing the stipulation is not in fact actually delivered to the passenger,¹¹⁹ or is printed on the ticket in a language unknown to the passenger.¹²⁰ Under a stipulation limiting the liability of a steamship company to a certain amount unless a declaration of the value in excess of this amount is made "at or before the issue of this contract or at or before the delivery of said luggage at the ship," the passenger may make the declaration after the delivery of the baggage on board ship.¹²¹

§ 3673. Non-Liability of Carrier for Baggage Remaining in Personal Custody of Passenger.¹²²

¹¹⁴ *Davies v. Eastern Steamboat Co.*, 94 Me. 379; s. c. 47 Atl. Rep. 896.

¹¹⁵ It has been held that the purchaser of a ticket over the road of the seller and connecting lines, including transportation by water for a portion of the journey, cannot recover from the initial carrier damages for an illness caused by the refusal of the purser of the boat to honor a requisition for a berth, upon which refusal the passenger, though supplied with money sufficient to pay for a berth, slept on a lounge in the cabin, the door of which stood open all night: *Mewethy v. Detroit &c. R. Co.*, 127 Mich. 333; s. c. 86 N. W. Rep. 827; 8 Det. Leg. N. 371.

¹¹⁶ A carrier should take notice of the danger of transferring a passenger from a steamboat to the shore at night while the boat is in motion, and in so doing he assumes a risk of the consequences: *Le Blanc v. Sweet*, 107 La. 355; s. c. 31 South. Rep. 766.

¹¹⁷ That the carrier cannot stipu-

late for exemption from liability for negligence, see: *Tewes v. North German &c. S. S. Co.*, 42 Misc. (N. Y.) 148; s. c. 85 N. Y. Supp. 994; *The New England*, 110 Fed. Rep. 415.

¹¹⁸ The limitation of liability for the loss of a passenger's baggage to \$50 in a ticket for first cabin passage across the Atlantic in a first-class steamship is unreasonable and will not be enforced, especially where the provision was not called to the attention of the passenger and the loss resulted from the dishonesty of the vessel's servants: *The New England*, 110 Fed. Rep. 415.

¹¹⁹ *Wamsley v. Atlas S. S. Co.*, 50 App. Div. (N. Y.) 199; s. c. 63 N. Y. Supp. 761.

¹²⁰ *Engberman v. North German &c. S. S. Co.*, 84 N. Y. Supp. 201.

¹²¹ *Holmes v. North German &c. S. S. Co.*, 100 App. Div. (N. Y.) 36; s. c. 90 N. Y. Supp. 834.

¹²² The mere fact that a steamship company permitted a passenger to

§ 3679. Liability to Passengers as Between Owner and Charterer.

—The lessor of a steamboat is not liable for injury to a passenger from the negligence of the lessee.¹²³

retain control of his valise, and store same on deck, did not exempt it from liability for the willful misconduct of its servant in ordering the same to be thrown overboard: *De Felice v. Compagnie Francaise de*

Navigation à Vapeur, Cyprien Fabre & Cie, 83 App. Div. (N. Y.) 73; s. c. 82 N. Y. Supp. 552.

¹²³ *Phelps v. Windsor Steamboat Co.*, 131 N. C. 12; s. c. 42 S. E. Rep. 335.

TITLE EIGHTEEN.

MASTER AND SERVANT.

[§§ 3721-5746.]

PART ONE.

DUTIES AND LIABILITIES OF THE MASTER.

[§§ 3721-4600.]

§ 3721. **When the Relation of Master and Servant Exists.**¹—The relation is created by contract, express or implied, between the parties;² but a formal or express employment is not required. Neither is it essential that compensation should be paid by, or expected from the one sought to be charged with the relation.³ The right to select and discharge employes is not conclusive on the question of the relation. Thus, the relation does not exist between a road commissioner and men employed by him in repairing a road or street, though the commissioner has a right to select and discharge them, and determine the methods of their work.⁴ It is held that the fact that a person indirectly pays the servant and gives him his working orders does not make him the master, if a third person selects the servant and retains

¹A railroad company, authorized by law to lease its lines to another, is not liable as an employer for injuries to employes of the lessee through the lessee's negligence: *Swice v. Maysville &c. R. Co.*, 116 Ky. 253; s. c. 75 S. W. Rep. 278; 25 Ky. L. Rep. 436; 70 S. W. Rep. 1117. The employer through whose negligence an injury is inflicted is liable therefor notwithstanding a lessee of the plant assumes liability for its operation from a date prior to the lease and the particular act of negligence: *Wieder v. Bethlehem Steel Co.*, 205 Pa. 186; s. c. 54 Atl. Rep. 778.

²*Atlanta &c. R. Co. v. West*, 121 Ga. 641; s. c. 49 S. E. Rep. 711; 67 L. R. A. 701.

³*Aga v. Harbach*, 127 Iowa 144; s. c. 102 N. W. Rep. 833. To establish the relation of master and servant between an infant injured in a mine and the mine operator, it

is not necessary for the plaintiff to prove a direct contract of employment by some authorized agent of the operator, or that his right to work in the mine was included in the terms of the contract with his father, but evidence that he was going into the mine, at the time of his injury, by the request of his father, and with the express or implied consent of the defendant, for the purpose of performing work or labor for the defendant, was sufficient to show him not a trespasser or licensee, but a servant of the defendant within the rule requiring a master to exercise reasonable care to prevent injury to his employes: *Ringue v. Oregon Coal &c. Co.*, 44 Or. 407; s. c. 75 Pac. Rep. 703.

⁴*Bowden v. Derby*, 97 Me. 536; s. c. 55 Atl. Rep. 417. See also *O'Brien v. Derry*, 73 N. H. 198; s. c. 60 Atl. Rep. 843.

him at the particular piece of work to which he is assigned, and alone has the power to substitute another in his place.⁵ There is a holding that the hirer may be fixed with the relation of master where he does not disclose to the servant that his services are performed for another.⁶ But in a case where a government contractor assigned his contract to a corporation in violation of law, and thereafter acting for the corporation employed a workman without any representation as to who employed him, and the workman was injured by the negligent act of the superintendent of the corporation, it was held that the corporation—the party actually guilty of the negligence—and not the original contractor, was liable, though the workman did not know that he was working for the corporation at the time.⁷ Where the relation of master and servant is denied, the burden is on the plaintiff to show that fact.⁸ In the absence of a contrary agreement the relation is terminated by the master's death.⁹

§ 3725. Employer Lending or Hiring his Servants to Another.—“One who is the general agent of another may be loaned or hired by his master to a third party for some special service, and as to that particular service he will become the servant of the third party. The master is the one who has the direction and control of the servant, and the test is whether, in the particular service, the servant continues liable to the direction and control of his master, or becomes subject to the party to whom he is loaned or hired.”¹¹

§ 3726. Receiver of a Railroad.¹²

§ 3729. Servant of One Railroad Company Sent over the Track of Another Company.—A railroad company is liable for injuries to one of its employes resulting from the negligence of another road using its yards and tracks under a trackage agreement, since it is under the duty of furnishing its employes a safe place for work.¹³ So, the owner of the track will be liable to a servant of another company operating trains over its tracks for injuries received while on such tracks through the negligence of the servants of the proprietor company.¹⁴

⁵ *The Slingsby*, 120 Fed. Rep. 748; s. c. 57 C. C. A. 52; aff'g s. c. 116 Fed. Rep. 227.

⁶ *Morris v. Malone*, 200 Ill. 132; s. c. 65 N. E. Rep. 704.

⁷ *Patton v. McDonald*, 204 Pa. 517; s. c. 54 Atl. Rep. 356.

⁸ *Ringue v. Oregon Coal & Co.*, 44 Or. 407; s. c. 75 Pac. Rep. 793.

⁹ *Casto v. Murray*, — Or. —; s. c. 81 Pac. Rep. 883.

¹¹ *Cartwright, J.*, in *Grace & Hyde Co. v. Probst*, 208 Ill. 147; s. c. 70 N. E. Rep. 431.

¹² That receiver is liable, see: *McGhee v. Willis*, 134 Ala. 281; s. c. 32 South. Rep. 301; *St. Louis & C. R. Co. v. Bricker*, 65 Kan. 321; s. c. 69 Pac. Rep. 328; *Tobin v. Central Vermont R. Co.*, 185 Mass. 337; s. c. 70 N. E. Rep. 431.

¹³ *Ft. Worth & C. R. Co. v. Smith*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 371.

¹⁴ *Chicago Terminal Transfer R. Co. v. Vandenberg*, 164 Ind. 470; s. c. 73 N. E. Rep. 990.

§ 3731. **Joint Operation by other Employers.**—Where the servant is in the employ of two corporations both are bound to use ordinary care to furnish the servant with reasonably safe appliances, and a failure to perform this duty through their common foreman renders both or either of the corporations liable to the employé for injuries resulting therefrom.¹⁵

§ 3735. **Servant of One Company Injured in Consequence of Defective Track of Another Company.**—Where the same track is used by two railroad companies it is considered as the property of each while using it, within the meaning of a statute providing that any person who sustains an injury while engaged in railroad work about any train of the company of which he is not an employé shall have only the right of action he would if he were an employé, and it is not material whether the track is used under a joint or several ownership, charter right, license or traffic agreement.¹⁶

§ 3739. **Servants of Different Masters Not Fellow Servants.**¹⁷

§ 3742a. **Sleeping-Car Porter.**—A porter employed and paid by a sleeping-car company is not a servant of the railroad company hauling the car of which he is in charge, where he is not subject to the orders of the railroad company in any particular.¹⁸

§ 3748. **Master Not Liable to Servant when Acting Outside the Scope of his Employment.**¹⁹—The principle is easily applied to a case where a servant engaged in work for his master, and in a safe position, left this work at the request of a servant of another employer engaged in an independent employment, to assist him to correct a defect in an appliance on which he was employed, and while so engaged suffered an injury. Here the injured servant at the time of the accident was clearly not engaged in his employer's service.²⁰

§ 3750. **Injuries to Servants Before Commencing or After Quitting Work, Outside of Working Hours.**—A brakeman entering a caboose while his train is being made up and suffering injuries by negligent handling of the train is not a trespasser or a mere licensee, as a matter of law, though his duties do not begin until the train is made up, especially where there is a custom for brakemen to enter the ca-

¹⁵ American Cotton Co. v. Simmons, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 842.

¹⁶ Keck v. Philadelphia & C. R. Co., 206 Pa. 501; s. c. 56 Atl. Rep. 47.

¹⁷ Breeze v. MacKinnon Mfg. Co., 140 Mich. 372; s. c. 103 N. W. Rep. 908; 12 Det. Leg. N. 195.

¹⁸ Chicago & C. R. Co. v. Hamler,

215 Ill. 525; s. c. 74 N. E. Rep. 705; rev'g s. c. 114 Ill. App. 141.

¹⁹ See generally Moran v. Rockland & C. R. Co., 99 Me. 127; s. c. 58 Atl. Rep. 676.

²⁰ Longa v. Stanley Hod Elevator Co., 69 N. J. L. 31; s. c. 54 Atl. Rep. 251.

boose at this time, but the question is one of fact for the jury.²¹ There is a holding that a laborer permitted to carry his dinner to his work, and eat it on his employer's premises during his noon hour, and leave his pail there until he quits in the evening, is still a servant when going to get his pail after his day's work is done, and he has received his wages.²² So an employé on a building has been held a servant while descending in a hoist at the noon hour to eat his dinner.²³ It has been held that members of a bridge gang borrowing a hand-car from the foreman to use in going to a town on the line for purposes of pleasure were not in the employment of the railroad company so as to render the company liable for injuries received while on the trip, and this though the foreman, as they were starting on the trip, asked them to get his mail and a few nails.²⁴

§ 3751. Injuries to Servants Going to their Place of Employment and Returning therefrom.—A railroad laborer taken to his work in the morning and returned home at night in the company's cars free of charge, is not a passenger, nor entitled to protection as such, but is to be regarded as the servant of the company during the transportation.²⁵

§ 3752. Injuries to Servants During Temporary Cessations of their Employment.—It is held in one case that a servant does not cease to be a servant, nor is he out of his line of duty, when, for a few minutes, he suspends actual work in order to obtain a drink of water.²⁶

§ 3755. Failure of Employer to Restrain Volunteers and Intermeddlers.—It is another form of statement of the doctrine of the main section to say that a servant placed in charge of an appliance has a right to assume that no stranger will attempt to work the same in his absence therefrom.²⁷

§ 3756. Injuries to Mere Volunteers and Intermeddlers.—"Where a volunteer engages in work undertaken in compliance with an unauthorized request of an employé of the defendant, the latter owes him none of the obligations of a master toward a servant, but is only bound to use care not to injure him after notice of his peril. The fact

²¹ Chicago &c. R. Co. v. Oldridge, (Ky.), 71 S. W. Rep. 636; 24 Ky. L. 33 Tex. Civ. App. 436; s. c. 76 S. W. Rep. 1459.
Rep. 581.

²² Taylor v. George W. Bush & Sons Co., — Del. —; s. c. 61 Atl. Rep. 236.
²³ Chicago Terminal Transfer R. Co. v. O'Donnell, 114 Ill. App. 345; s. c. aff'd, 213 Ill. 545; 72 N. E. Rep. 1133.

²⁴ Boyle v. Columbian Fireproofing Co., 182 Mass. 93; s. c. 64 N. E. Rep. 726.
²⁵ Jarvis v. Hitch (Ind. App.), 65 N. E. Rep. 608; s. c. 161 Ind. 217; 67 N. E. Rep. 1057.

²⁶ Illinois Cent. R. Co. v. Dotson
²⁷ Healy v. Patterson, 123 Iowa 73; s. c. 98 N. W. Rep. 576.

that the volunteer is of tender years, and without sufficient mental capacity to appreciate the danger, while it might be an element of notice to the defendant of the peril of the volunteer, cannot change the relations of the parties, or impose upon the defendant any duty not ordinarily imposed by law relatively to volunteers."²⁸ A person rendering assistance to a servant without authority to employ him for this purpose is a mere volunteer,²⁹ and this was held to be the status of one who for several years had ridden once a week on a mixed train, without paying his fare, though he had assisted the trainmen in handling baggage, unloading cars, etc.³⁰ But a person is not regarded as a volunteer during the time he is engaged in learning the work he is afterwards to be employed upon, though during such time he is receiving no pay for his work.³¹ An employer cannot escape liability for injuries to an employé on the ground that he was a volunteer, because the work on which he was engaged at the time was not his regular employment, if he was sent to do the work by the employer's authorized representative.³²

§ 3759. General Statement of Master's Liability.—It is a rule of general application that if the accident might have resulted from more than one cause, for one of which the master is liable and for the other he is not liable, it is necessary for the plaintiff to prove in the first instance that the injury arose from the cause for which the master is liable, "for it is not the province of a court or jury to speculate or guess from which cause the accident happened."³³

§ 3764. Personal Negligence of the Master.³⁴

§ 3767. Master Not Liable as an Insurer, but Bound Only to the Exercise of Ordinary or Reasonable Care.³⁵—An instruction, defining

²⁸ Simmons, C. J., in *Atlanta & R. Co. v. West*, 121 Ga. 641; s. c. 67 L. R. A. 701; *Cincinnati & C. R. v. Finnell*, 108 Ky. 135; s. c. 55 S. W. Rep. 902.

²⁹ *Longa v. Stanley Hod Elevator Co.*, 69 N. J. L. 31; s. c. 54 Atl. Rep. 251. A substitute appointed by the head brakeman of a train without authority, is not an employé for whose negligence a railroad company is liable: *Setterstrom v. Brainerd & C. R. Co.*, 89 Minn. 262; s. c. 94 N. W. Rep. 882.

³⁰ *Chaney v. Louisiana & C. R. Co.*, 176 Mo. 598; s. c. 75 S. W. Rep. 595.

³¹ *Huntzicker v. Illinois Cent. R. Co.*, 129 Fed. Rep. 548.

³² *Krueger v. Bartholomay Brew.*

Co., 94 App. Div. (N. Y.) 58; s. c. 87 N. Y. Supp. 1054.

³³ *Goransson v. Ritter-Conley Mfg. Co.*, 186 Mo. 300; s. c. 85 S. W. Rep. 338.

³⁴ That the master is directly liable to the servant for his own negligence, see: *Pressed Steel Car Co. v. Herath*, 110 Ill. App. 596.

³⁵ That the master is not liable as an insurer of the safety of his servants, see: *Wright v. Stanley*, 119 Fed. Rep. 330 (instruction held not open to the objection that it in effect charged that the master was an insurer); *Merchants' & C. Transp. Co. v. Jackson*, 120 Ga. 211; s. c. 47 S. E. Rep. 522 (instruction held not open to the objection that it in ef-

ordinary care in this connection as that degree of care which a person of ordinary prudence and caution is "accustomed" to exercise under like circumstances, has been held not erroneous because of the use of the word "accustomed" instead of the phrase "would ordinarily use."³⁶

§ 3772. This Care Varies According to the Danger to be Avoided.³⁷—The mere fact that the employment is attended with danger, which the servant contracts with reference to, does not of itself excuse the master from his primary duty of exercising reasonable care for the protection of the servant. The servant still has the right to rely on the presumption of the faithful performance of this duty by the master, and if he receives an injury which he would not have received if the master had exercised reasonable care for his safety, the master will be liable for such an injury.³⁸

§ 3774. Not Liable for Accidents Not Reasonably to be Anticipated.—The master is not bound to anticipate and guard against every possible danger but only such dangers as can be foreseen by the exercise of reasonable care, and he will not be held responsible for the consequences of an act which could not have been reasonably foreseen by him,³⁹ though the injured servant was a minor at the

fect charged that the master was an insurer); *Illinois Steel Co. v. Wierzbicky*, 206 Ill. 201; s. c. 68 N. E. Rep. 1101; aff'g s. c. 107 Ill. App. 69; *Collins v. Louisville & C. R. Co.*, 86 S. W. Rep. 973; s. c. 27 Ky. L. Rep. 825; *Glasscock v. Swofford Bros. Dry Goods Co.*, 106 Mo. App. 657; s. c. 80 S. W. Rep. 364; rev'g s. c. 74 S. W. Rep. 1039; *Kelly v. Stewart*, 93 Mo. App. 47; *Weed v. Chicago & C. R. Co.*, 4 Neb. (unoff.) 623; s. c. 99 N. W. Rep. 827; *Fox v. Clearfield Wooden Ware Co.*, 211 Pa. 645; s. c. 61 Atl. Rep. 245. That the master is bound only to the exercise of ordinary or reasonable care, see: *Illinois Steel Co. v. Wierzbicky*, 107 Ill. App. 69; s. c. aff'd. 206 Ill. 201; 68 N. E. Rep. 1101; *Pressed Steel Car Co. v. Herath*, 110 Ill. App. 596; *Caven v. Bodwell Granite Co.*, 99 Me. 278; s. c. 59 Atl. Rep. 285; *Morehead v. Yazoo & C. R. Co.*, 84 Miss. 112; s. c. 36 South. Rep. 151; *Marks v. Harriet Cotton Mills*, 138 N. C. 401; s. c. 50 S. E. Rep. 769; *Gallman v. Union Hardwood Mfg. Co.*, 65 S. C. 192; s. c. 43 S. E. Rep. 524; *Virginia Iron & C. Co. v. Tomlinson*, 104 Va. 249; s. c. 51 S. E. Rep. 362.

³⁶ *St. Louis & C. R. Co. v. Smith*, 30 Tex. Civ. App. 336; s. c. 70 S. W. Rep. 789.

³⁷ *Karczewski v. Wilmington City R. Co.*, — Del. —; s. c. 54 Atl. Rep. 746.

³⁸ *Illinois Steel Co. v. Ryska*, 102 Ill. App. 347; s. c. aff'd, 200 Ill. 280; 65 N. E. Rep. 734.

³⁹ *Rainbow Coal & C. Co. v. Martin*, 35 Ind. App. 658; s. c. 74 N. E. Rep. 902; *Standard Pottery Co. v. Moudy*, 35 Ind. App. 427; s. c. 73 N. E. Rep. 188; *Cowett v. American Woolen Co.*, 97 Me. 543; s. c. 55 Atl. Rep. 494; *Whitson v. Wrenn*, 134 N. C. 86; s. c. 46 S. E. Rep. 17; *Scanlon v. Lake Shore & C. R. Co.*, 24 Ohio Cir. Ct. R. 256; *Bodie v. Charleston & C. R. Co.*, 66 S. C. 302; s. c. 44 S. E. Rep. 943; *Dullnig v. G. A. Duerler Mfg. Co.*, — Tex. —; 87 S. W. Rep. 332; aff'g s. c. 83 S. W. Rep. 889 (explosion of mineral water bottles); *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67; s. c. 71 Pac. Rep. 713. In a case where the clothing of a servant was caught by a piece of iron unnecessarily projecting from a shaft, and an eighth of an inch by three-sixteenths of an inch in size, and he was whirled to his death, and it ap-

time.⁴⁰ Where the manner of performing a particular piece of work is likely to cause injury in a way that might be foreseen, the fact that it happened to cause the injury in an unusual and unexpected manner will not deprive the method of its negligent character.⁴¹ In a case where the injury to an employé resulted from poison put in a water cooler for the purpose of cleaning it, without warning the employés of the fact, the master was held liable, as this was an event to be anticipated, and was not the result of an unexpected accident.⁴² An employer was absolved from liability for injuries to an employé caused by a shock transmitted from an electric light wire upon which the insulation had become worn at one place and this portion of the wire was blown against a steam pipe which conducted the electricity to the place where the servant was employed. This was not an accident to be reasonably foreseen from an electric light system but recently installed, and inspected at the time of installation.⁴³

§ 3775. Rule Excludes Liability for Injuries Proceeding from the Act of God, or from Inevitable or Inscrutable Accident.⁴⁴

§ 3776. Application of this Rule of Reasonable Care in the Case of Railway Service.⁴⁵

§ 3777. Custom, Adoption of, How Far Excuses Master ⁴⁶—The Supreme Court of the United States has said that “what usually is

peared that the free space for his passage around the machine was three and one-half feet, it was held that the master was not liable, as the accident was not a probable consequence of the condition of the machine: *Persinger v. Alleghany Ore &c. Co.*, 102 Va. 350; s. c. 46 S. E. Rep. 325. An instruction conveying this idea to the jury should contain a definition of the word “accident”: *Barnett & Record Co. v. Schlapka*, 208 Ill. 426; s. c. 70 N. E. Rep. 343; aff’d s. c. 110 Ill. App. 672.

⁴⁰ *Dullnig v. G. A. Duerler Mfg. Co.*, — Tex. —; s. c. 87 S. W. Rep. 332; rev’g s. c. 83 S. W. Rep. 889.

⁴¹ *El Paso &c. R. Co. v. McComas*, 36 Tex. Civ. App. 170; s. c. 81 S. W. Rep. 760.

⁴² *Geller v. Briscoe Mfg. Co.*, 136 Mich. 330; s. c. 99 N. W. Rep. 281; 11 Det. Leg. N. 31.

⁴³ *Fulton v. Grieb Rubber Co.*, 69 N. J. L. 221; s. c. 54 Atl. Rep. 561.

⁴⁴ *Jones v. Kansas City &c. R. Co.*, 178 Mo. 528; s. c. 77 S. W. Rep. 890 (cars standing on a siding with brakes properly set were driven up-

on the main track by a storm of extraordinary violence — company not liable).

⁴⁵ The law of negligence makes no distinction between persons. A servant of a railroad company, though employed in menial labor like that of a section hand, whether in the yards or on a private right of way, is entitled to all the rights afforded to the public by ordinance, statute or general custom of the railroad company employing him: *Indiana R. Co. v. Otsot*, 113 Ill. App. 37; s. c. 212 Ill. 429; 72 N. E. Rep. 387.

⁴⁶ Proof of custom is evidence as to whether the act of the master in selecting and furnishing appliances for the use of his servant was negligent: *Anderson v. Fielding*, 92 Minn. 42; s. c. 99 N. W. Rep. 357. Evidence of the ordinary method of doing a particular character of work, and that the employer was not pursuing such method, is admissible: *Devaney v. Degnon-McLean Const. Co.*, 79 App. Div. (N. Y.) 62;

done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."⁴⁷ It has been held that evidence as to the ordinary method existing among telegraph companies as to providing insulators, and as to the number of wires that should be strung at any one time, was not open to the objection that it was an improper method of proving the existence of a custom, since the evidence was not to prove the custom but merely to show the ordinary manner in which such work is performed, as bearing on the question of negligence of the company through which a lineman was killed by contact with an exposed and highly charged wire.⁴⁸

§ 3781. Obligation of Master to Keep Machinery, etc., in Safe Repair.—It is the rule of this section that it is not only the duty of the master to his servant to provide reasonably safe machinery for him to work with, but it is also his duty to use ordinary care in looking after, inspecting, and keeping such machinery in repair.⁴⁹ Accordingly, it has been very properly held that the negligent failure of a railroad company to keep its automatic couplers in proper condition and repair imputes the company with negligence quite as high in degree as if the cars had never been equipped with such couplers.⁵⁰

§ 3782. Effect of Knowledge or Notice, or Want of Knowledge or Notice, on the Part of the Master of the Danger or Defect.—It must be shown that the master had knowledge of the defective condition of the machine or appliance, or could have known of it by the exercise of ordinary care and diligence.⁵¹ Proof of actual knowledge of the de-

s. c. 79 N. Y. Supp. 1050; s. c. aff'd, 178 N. Y. 620; 70 N. E. Rep. 1098.

⁴⁷ Holmes, J., in *Texas & C. R. Co. v. Behymer*, 189 U. S. 468; s. c. 47 L. Ed. 905; 23 Sup. Ct. Rep. 622; aff'g s. c. 112 Fed. Rep. 35; 50 C. C. A. 106.

⁴⁸ *Fritz v. Western Union Tel. Co.*, 25 Utah 263; s. c. 71 Pac. Rep. 209.

⁴⁹ *Karczewski v. Wilmington City R. Co.*, — Del. —; s. c. 54 Atl. Rep. 746; *Johnson v. Gehbauer*, 159 Ind. 271; 64 N. E. Rep. 855; *Shebek v. National Cracker Co.*, 120 Iowa 414; s. c. 94 N. W. Rep. 930; *Clay City Lumber & Co. v. Noe*, 76 S. W. Rep. 195; s. c. 25 Ky. L. Rep. 668; *Henderson Brew. Co. v. Folden*, 76 S. W. Rep. 520; s. c. 25 Ky. L. Rep. 969; *Gulf & C. R. Co. v. Larkin*, 98 Tex. 225; s. c. 82 S. W. Rep. 1026; *rev'g s. c. 80 S. W. Rep. 94*; *Hirsch Bros. v. Ashe*, 35 Tex. Civ. App. 495; s. c. 80 S. W. Rep. 650; *Boyle*

v. Union Pac. R. Co., 25 Utah 420; s. c. 71 Pac. Rep. 988.

⁵⁰ *Elmore v. Seaboard Air Line R. Co.*, 132 N. C. 865; s. c. 44 S. E. Rep. 620.

⁵¹ *Roche v. Denver & C. R. Co.*, 19 Colo. App. 204; s. c. 73 Pac. Rep. 880; *Hayzel v. Columbia R. Co.*, 19 App. (D. C.) 359; *Baltimore & C. R. Co. v. Greer*, 103 Ill. App. 448; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145; s. c. 69 N. E. Rep. 12; aff'g s. c. 106 Ill. App. 649; *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185; *Zellers v. Missouri Water & C. Co.*, 92 Mo. App. 107; *Bauer v. American Car & C. Co.*, 132 Mich. 537; s. c. 94 N. W. Rep. 9; 10 Det. Leg. N. 17 (knowledge of assistant foreman insufficient to charge master with knowledge of defect). The master will be charged with knowledge of the unsafe condition of a place to work

fect is not absolutely essential to charge the master with liability for an injury resulting from a defect in the machine or appliance. It is sufficient if the evidence shows he might, by the exercise of ordinary care, have acquired knowledge of the defect in time to put it in a safe condition.⁵²

§ 3783. **Degree of Care, Skill and Diligence Required in Performing this Duty of Inspection.**—The master is required to give the appliances used by the servant⁵³ and the place where he is set to work⁵⁴ such inspection as from the nature of the appliance and place a man of ordinary prudence and judgment would give. The master is not chargeable with negligence because an appliance fails to serve a purpose not intended and will not be imputed with negligence in failing to inspect it to discover its unsuitableness for this unexpected use.⁵⁵

§ 3784. **Duty to Apply what Tests in Making Inspections.**—A master who employs the customary and approved means or tests for the discovery of defects in appliances furnished his workmen discharges his duty to them in that regard, and an injury to an employé notwithstanding these tests will be regarded as resulting from a risk of his employment.⁵⁶ In a case where experts differed merely with reference to the sufficiency of the inspection of the machine, a ruling that the defendant could not be held liable for his failure to adopt

where his foreman, a vice-principal, knew of the dangerous condition for a week before the occurrence of the accident in which the injuries were received: *Allen B. Wrisley Co. v. Burke*, 106 Ill. App. 30. Notice of the defective condition of a mine given to the manager or examiner is notice to the owner: *Riverton Coal Co. v. Shepherd*, 111 Ill. App. 294.

⁵² *Herbert v. Mound City Boot & Co.*, 90 Mo. App. 305.

⁵³ *Caven v. Bodwell Granite Co.*, 99 Me. 278; s. c. 59 Atl. Rep. 285; *McGrath v. Delaware & C. R. Co.*, 69 N. J. L. 331; s. c. 55 Atl. Rep. 242; *Randolph v. New York & C. R. Co.*, 69 N. J. L. 420; s. c. 55 Atl. Rep. 240; *Walsh v. New York & C. R. Co.*, 80 App. Div. (N. Y.) 316; s. c. 80 N. Y. Supp. 767 (telegraph pole); *Womble v. Merchants' Grocery Co.*, 135 N. C. 474; s. c. 47 S. E. Rep. 493; *Young v. O'Brien*, 36 Wash. 570; s. c. 79 Pac. Rep. 211. Where the inspection has been adequate and timely the master has performed his whole duty. Thus,

where a servant employed in a mill was injured by the falling of a block of wood through a hole in the floor above, it was held that the master could not be charged with negligence in failing to discover that the hole had been left uncovered, where it appeared that an inspection had been made shortly before the accident, at which time it was covered, and that it was afterward left open by a fellow servant: *Peet v. H. Remington & Co. Pulp & Co.*, 86 App. Div. (N. Y.) 101; s. c. 83 N. Y. Supp. 524.

⁵⁴ *Simone v. Kirk*, 173 N. Y. 7; s. c. 65 N. E. Rep. 739; rev'g s. c. 67 N. Y. Supp. 1019.

⁵⁵ *Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030; s. c. 48 S. E. Rep. 438.

⁵⁶ *Illinois Cent. R. Co. v. Coughlin*, 132 Fed. Rep. 801; s. c. 65 C. C. A. 101; *Furber v. Kansas City Bolt & Co.*, 185 Mo. 301; s. c. 84 S. W. Rep. 890 (question of adequacy of inspection does not arise where there is no suggestion of a better method than that employed).

all the methods of inspection testified to by the experts was held erroneous, since it could not be said, as a matter of law, that the jury would not be justified in finding that all these tests were necessary to a sufficient inspection.⁵⁷ In another case an inspection of an elevator was held inadequate where the inspector had not used the hammer test on the gear wheel, which subsequently broke, for more than a year prior to the accident.⁵⁸ So an inspection of a telegraph pole by jabbing a screw-driver into the pole which only disclosed superficial decay, was held insufficient, though the customary method.⁵⁹ A railroad lantern globe is not regarded as an implement of such a character as to require inspection before being used by an employé.⁶⁰

§ 3785. Master Not Liable for Hidden Defects Not Discoverable by the Exercise of Ordinary Care.⁶¹

§ 3786. Master under a Continuing Duty of Inspection.⁶²—The question of the timeliness of inspections is a question of fact, and a court has been upheld in refusing to charge, as a matter of law, that an employer's duty in regard to inspection of a logging railroad track was discharged by an inspection on the Saturday next before the Monday on which the accident occurred.⁶³ It has been held that the rule does not require an employer to inspect the daily adjustment of the machinery in his establishment.⁶⁴

§ 3792. Master Cannot Absolve Himself from this Duty by a Rule Devolving it upon his Servants Generally.⁶⁵

⁵⁷ *Starer v. Stern*, 100 App. Div. (N. Y.) 393; s. c. 91 N. Y. Supp. 821.

⁵⁸ *Swenson v. Metropolitan St. R. Co.*, 78 App. Div. (N. Y.) 379; s. c. 80 N. Y. Supp. 281.

⁵⁹ *Rowley v. American Illuminating Co.*, 83 App. Div. (N. Y.) 609; s. c. 81 N. Y. Supp. 1099.

⁶⁰ *Gulf & C. R. Co. v. Larkin*, 98 Tex. 225; s. c. 82 S. W. Rep. 1026; rev'g s. c. 80 S. W. Rep. 94.

⁶¹ See generally in support of principle indicated: *Atlantic & C. R. Co. v. Reynolds*, 117 Ga. 47; s. c. 43 S. E. Rep. 456; *Bedford Quarries Co. v. Turner*, — Ind. App. —; s. c. 75 N. E. Rep. 25; *Buttner v. South Baltimore Steel Car & C. Co.*, 101 Md. 168; s. c. 60 Atl. Rep. 597; *South Baltimore Car Works v. Schaefer*, 96 Md. 88; s. c. 53 Atl. Rep. 665. That the question is one for the jury, see: *Wood v. Victor*

Mfg. Co., 66 S. C. 482; s. c. 45 S. E. Rep. 81.

⁶² *Crawford v. United Rys. & C. Co.*, 101 Md. 402; s. c. 61 Atl. Rep. 287 (inspection of street car at 2:30 in the morning insufficient where car left unlighted on sidetrack for several hours thereafter). In ascertaining whether the duty of continuous inspection has been observed the character of the business should be considered: *Dyas v. Southern Pac. Co.*, 140 Cal. 296; s. c. 73 Pac. Rep. 972.

⁶³ *E. E. Jackson Lumber Co. v. Cunningham*, 141 Ala. 206; s. c. 37 South. Rep. 445.

⁶⁴ *South Baltimore Car Works v. Schaefer*, 96 Md. 88; s. c. 53 Atl. Rep. 665.

⁶⁵ *Leduc v. Northern Pac. R. Co.*, 92 Minn. 287; s. c. 100 N. W. Rep. 108.

§ 3794. Master Chargeable with Knowledge of what a Reasonable Inspection would Disclose.⁶⁶

§ 3795. Effect of Want of such Knowledge on the Part of the Master.—Where the accident would not have occurred if the master had made a suitable inspection he will not be relieved from liability for the resulting injuries by the fact, well known to the servant, that like appliances suitably inspected were subject to similar accidents.⁶⁷

§ 3796. Notice or Knowledge that the Appliance has Got Out of Repair.—The master is entitled to a reasonable time to discover and rectify defects. In a case where the derangement had existed only a few minutes before the injury, and no notice thereof had been given except to a fellow servant not charged with any duty as to the examination and repair of the machine, it was held that the facts were insufficient to show negligence warranting recovery.⁶⁸

§ 3797. What will be Notice to the Master of such a Defect.⁶⁹

§ 3800. Manner of Proving such Notice or Knowledge on the Part of the Master.—Knowledge of the master of a defect will be presumed where the defect through which injury to the employé occurs is in the original construction of the appliance.⁷⁰ A mine owner was charged with knowledge of the defective condition of his mine where it was shown that the State mine examiner had ordered the installation of appliances to remedy the particular defective condition.⁷¹

⁶⁶ See generally in support: *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185; *George Doyle & Co. v. Hawkins*, 34 Ind. App. 514; s. c. 73 N. E. Rep. 200; *Covington Sawmill & Co. v. Clark*, 116 Ky. 461; s. c. 76 S. W. Rep. 348; 25 Ky. L. Rep. 694; *Merritt v. Victoria Lumber Co.*, 111 La. 159; s. c. 35 South. Rep. 497; *Cudahy Packing Co. v. Roy*, — Neb. —; s. c. 99 N. W. Rep. 231. The master will be charged with knowledge of the defect where a servant had informed him of its condition in time to have allowed the making of repairs before the accident in which injuries sued upon were received: *Franck v. American Tartar Co.*, 91 App. Div. (N. Y.) 571; s. c. 87 N. Y. Supp. 219.

⁶⁷ *Smith v. New York & C. R. Co.*, 86 App. Div. (N. Y.) 188; s. c. 83 N. Y. Supp. 259; s. c. aff'd, 178 N. Y. 635; 71 N. E. Rep. 1139.

⁶⁸ *Hughes v. Russell*, 104 App.

Div. (N. Y.) 144; s. c. 93 N. Y. Supp. 307.

⁶⁹ The fact that certain appliances had been in the habit of working improperly has been held sufficient to justify an inference that the master knew, or, by the exercise of reasonable care could have known, of their defective condition: *Glasscock v. Swofford Bros. Dry Goods Co.*, 106 Mo. App. 657; s. c. 80 S. W. Rep. 364. The master will be charged with knowledge of the defects in appliances and the place for work possessed by his servants generally: *Shemwell v. Owensboro & C. R. Co.*, 117 Ky. 556; s. c. 78 S. W. Rep. 448; 25 Ky. L. Rep. 1671.

⁷⁰ *Finnerty v. Burnham*, 205 Pa. 305; s. c. 54 Atl. Rep. 996; *Consolidated Stone Co. v. Morgan*, 160 Ind. 241; s. c. 66 N. E. Rep. 696.

⁷¹ *Riverton Coal Co. v. Shepherd*, 207 Ill. 395; s. c. 69 N. E. Rep. 921.

§ 3801. Correlative Duty of Master and Servant with Respect to Knowing and Finding Out.—Generally speaking, the master's liability for injury to his servant through defects in the place for work is fixed by evidence that the place was not reasonably safe; that the master, in the exercise of ordinary care, would have had knowledge of its defects; that the servant did not know of the defects and did not have equal opportunities with the master of knowing them.⁷²

§ 3802. Circumstances under which Master Exonerated from Liability for Failure to Make Inspections.—It has been held that a builder was not to be charged with negligence by failing to make an inspection of stone furnished him by quarrymen to see that no explosives remain in the stone, where it was the duty of the quarrymen to make this inspection before sending the stone to the builder.⁷³ In another case it was properly held that a master was not to be charged with negligence in failing to make an inspection of an appliance not intended for the use of the workman, and taken by the workman in preference to a good and sufficient appliance that was at hand for use in the particular work.⁷⁴ So the employer of a longshoreman was not charged with negligence in failing to inspect the deck of a barge he was employed to unload.⁷⁵

§ 3803. Burden of Proof in Actions Predicated upon Failure to Make Proper Inspections.—There is a presumption that an appliance furnished for the use of a servant is not defective,⁷⁶ and hence the employé in an action for injuries must show not only that there was a defect in the place or appliance which caused the injury but that it was known, or could have been known, to the employer had he exercised ordinary care.⁷⁷

§ 3803b. Evidence Tending to Show an Insufficient Inspection.⁷⁸

§ 3804. Injuries Through Faults of Operation.—In this connection it is proper to observe that courts and juries cannot attempt to dictate

⁷² *Momence Stone Co. v. Turrell*, 205 Ill. 515; s. c. 68 N. E. Rep. 1078; aff'g s. c. 106 Ill. App. 160.

⁷³ *Mooney v. Beattie*, 180 Mass. 451; s. c. 62 N. E. Rep. 725.

⁷⁴ *O'Brien v. Missouri & C. R. Co.*, 36 Tex. Civ. App. 528; s. c. 82 S. W. Rep. 319.

⁷⁵ *Huebner v. Hammond*, 80 App. Div. (N. Y.) 122; s. c. 80 N. Y. Supp. 295.

⁷⁶ *Franklin v. Missouri & C. R. Co.*, 97 Mo. App. 473; s. c. 71 S. W. Rep. 540.

⁷⁷ *Montgomery Coal Co. v. Baringer*, 109 Ill. App. 185; *Brooks v.*

Louisville & C. R. Co. (Ky.), 71 S. W. Rep. 507; s. c. 24 Ky. L. Rep. 1318; *Glasscock v. Swofford Bros. Dry Goods Co.*, 106 Mo. App. 657; s. c. 80 S. W. Rep. 364; rev'g s. c. 74 S. W. Rep. 1039.

⁷⁸ The plaintiff is entitled to show that the machine causing his injury was in a defective condition for a long time before and within half an hour of the time of the accident and that such condition was not apparent, and that the employer had prior knowledge thereof: *Williams v. William Deering & Co.*, 104 Ill. App. 290.

to employers "a choice between methods of operation all of which are shown to be reasonably adequate for the purposes intended to be subserved."⁷⁹

§ 3805. Duty of Master as to Control and Supervision of his Own Business.⁸⁰

§ 3807. Failure of Master to Furnish Adequate Help.—The obligation of the master to provide reasonably safe places and instrumentalities for the use of servants includes the obligation to provide a sufficient number of servants to perform the work safely, and the master will be liable for an injury sustained by reason of the failure to exercise ordinary care in providing a sufficient force for the work in hand.⁸¹ This duty cannot be delegated.⁸² It is necessary, however, that the insufficiency of the force should be the proximate cause of the accident,⁸³ negligence of this character will not be imputed to the master where the injury was caused not by the insufficiency of the force, but by reason of the failure of the force to perform their duties.⁸⁴

§ 3807a. Excessive Hours of Employment.—In New York there is a statute which provides that no corporation operating a railroad shall permit or require an engineer, fireman, etc., who has worked for twenty-four hours to go again on duty or perform any kind of work until he has had at least eight hours rest.⁸⁵ Under this statute it has been held that though those directing the movements of a train crew might have reasonably anticipated that the run on which the crew

⁷⁹Whittle, J., in *Norfolk &c. R. Co. v. Cromer*, 101 Va. 667; s. c. 44 S. E. Rep. 898.

⁸⁰The law is not so impractical as to require the master to oversee and supervise the executive details of mechanical work carried on by his employés: *Dill v. Marmon* (Ind. App.), 71 N. E. Rep. 669; s. c. 164 Ind. 507; 73 N. E. Rep. 67.

⁸¹*Illinois Cent. R. Co. v. Langan*, 116 Ky. 318; s. c. 76 S. W. Rep. 32; 25 Ky. L. Rep. 500; *Bertholet v. J. W. Bishop Co.*, 187 Mass. 32; s. c. 72 N. E. Rep. 342 (master was not charged with knowledge that the particular work required additional men by reason of fact that the men among themselves had discussed the insufficiency of the force, but had not communicated it either to the master or his superintendent); *Peterson v. American Glass Twine Co.*, 90 Minn. 343; s. c. 96 N. W.

Rep. 913; *Bonn v. Galveston &c. R. Co.* (Tex. Civ. App.), 82 S. W. Rep. 808; *San Antonio Traction Co. v. De Rodriguez* (Tex. Civ. App.), 77 S. W. Rep. 420. The fact that a pole might have been lowered with safety in a different manner by a less number of men than were actually employed does not show that the master was not negligent in taking down the pole in the manner that he did with an inadequate force: *Sandquist v. Independent Telephone Co.*, 38 Wash. 313; s. c. 80 Pac. Rep. 539.

⁸²*Alabama &c. R. Co. v. Vail*, 142 Ala. 134; s. c. 38 South. Rep. 124.

⁸³*Lee v. Kansas City Gas Co.*, 91 Mo. App. 612.

⁸⁴*McQueeney v. Norcross*, 75 Conn. 381; s. c. 53 Atl. Rep. 780.

⁸⁵*Laws of New York 1897*, p. 464, chap. 415, § 7.

was engaged would not last twenty-four consecutive hours, yet if the condition of the business of the road was such that the run could not be completed in less time, the company will be liable for an injury due to the exhaustion of the crew caused by working over these hours.⁸⁶ The case is authority that a violation of the statute gives a cause of action to any person injured by reason thereof.⁸⁷

§ 3808. **Master Adopting Unusual or Unsafe Methods of Work.**—A master will be imputed with actionable negligence where he directs a servant to perform work in a manner not reasonably safe and the performance of the work in the manner directed is the proximate cause of the servant's injuries.⁸⁸ Thus, where an employer engaged in constructing a railway track in a mine shaft let down the rails used in constructing the track without fastening them to the car, and one of the rails slipped over the end of the car and fell on and injured an employé working at the bottom of the shaft, the employer was held liable for the injuries, it not being shown that the mode of letting the rails down was the same, or equally as safe, as the mode in general use by men of ordinary prudence in the same kind of business.⁸⁹ So in a case where the plaintiff's work in repairing a machine was dangerous and required the giving of signals to his helper when to start and stop the machine, it was negligence for the defendant to send other men into the room to do other work, which also required signals which might be mistaken for signals from the plaintiff, without informing the plaintiff of the presence of such workmen.⁹⁰ But

⁸⁶ *Pelin v. New York Cent. & C. R. Co.*, 102 App. Div. (N. Y.) 71; s. c. 92 N. Y. Supp. 468.

⁸⁷ *Pelin v. New York Cent. & C. R. Co.*, 102 App. Div. (N. Y.) 71; s. c. 92 N. Y. Supp. 468.

⁸⁸ *Jones v. American Warehouse Co.*, 137 N. C. 337; s. c. 49 S. E. Rep. 355; 138 N. C. 546; 51 S. E. Rep. 106. In a case where an employé was injured by the collapse of a trestle, evidence that the defendant furnished the plans and specifications for the construction of the trestle, and gave directions and orders during the progress of the work, and inspected the materials used therein, was held admissible to show that he was responsible for the method adopted in constructing the trestle which was alleged to be inherently dangerous: *Mengle v. McClintic-Marshall Const. Co.*, 89 App. Div. (N. Y.) 334; s. c. 85 N. Y. Supp. 1012.

⁸⁹ *Johnson v. Union Pac. Coal Co.*, 28 Utah 46; s. c. 76 Pac. Rep. 1089.

⁹⁰ *Sirois v. J. E. Henry & Sons*, 73 N. H. 148; s. c. 59 Atl. Rep. 936. Similarly in an action for injuries to a servant, caused by the act of a stationary engineer in so operating his engine as to permit a timber to fall upon a servant, in the absence of the customary signalman whose duty it was to signal the engineer when to drop the timber, it was held the jury could infer negligence on the part of the master from the withdrawal of the signalman from his station by the master's superintendent: *Aleckson v. Erie R. Co.*, 101 App. Div. (N. Y.) 395; s. c. 91 N. Y. Supp. 1029. And the fact that other servants than the foreman were at times appointed to signal a stationary engineer when and where to drop lumber was held immaterial on the issue of the master's negligence in with-

there can be no recovery on this ground where the method employed is the common method, and there is no suggestion of an adequate substitute inherently safer.⁹¹

§ 3809. **Negligence of Master or his Representative in Giving Orders.**—It may be said generally that the giving of a proper command by a superior does not in every instance impose on him the duty of protecting the servant while engaged in the execution of the order.⁹²

§ 3812. **Oiling, Cleaning or Repairing Machinery while in Motion.**⁹³

§ 3814. **Ordering Servant into More Dangerous Place—Exposing him to Risks Not within the Contract of Service.**—The law demands the exercise of greater care by the master for the safety of a servant ordered to work outside the line of his employment than where he works at his regular employment.⁹⁴ A complaint in an action on this ground should aver that the peril in question was not obvious to the plaintiff, but the failure of the pleader in this regard will be cured by the verdict if it is not attacked by demurrer.⁹⁵

§ 3815. **Injuries in Consequence of Obeying Orders of Superior.**⁹⁶
—In a case where an employé was directed by his superior to go to the

drawing the foreman from his position as signalman and failing to place any one else in his stead: *Aleckson v. Erie R. Co.*, 101 App. Div. (N. Y.) 395; s. c. 91 N. Y. Supp. 1029.

⁹¹ *Bookman v. Masterson*, 83 App. Div. (N. Y.) 4; s. c. 81 N. Y. Supp. 962. In a case where it was shown that over three hundred beams had been raised by hand in the course of the construction of a building and only one had rolled over and fallen while it was being raised and caused the injury, it was held that the owner of the building was not negligent in failing to provide mechanical devices for raising the beams: *Paoline v. J. W. Bishop Co.*, 25 R. I. 298; s. c. 55 Atl. Rep. 752.

⁹² *Muncie Pulp Co. v. Davis*, 162 Ind. 558; s. c. 70 N. E. Rep. 875.

⁹³ The fact that a mill was short of hands cannot be urged as an excuse for requiring those tending the machinery to clean it while it was in motion, if doing so unreasonably increased the hazard of personal injury: *Marks v. Harriet Cotton Mills*, 138 N. C. 401; s. c. 50 S. E. 769.

⁹⁴ *Virginia Portland Cement Co. v.*

Luck, 103 Va. 427; s. c. 49 S. E. Rep. 577. See also *Eichholz v. Niagara Falls & C. Power & Co.*, 68 App. Div. (N. Y.) 441; s. c. 73 N. Y. Supp. 842; s. c. aff'd, 174 N. Y. 519; 66 N. E. Rep. 1107 (servant directed to work in a conduit without knowledge of its condition). Plaintiff and another were shearing a crooked piece of scrap iron, under the direction of defendant's foreman, and just as they had placed the iron between the knives of the shears, in position to be cut, the foreman ordered it to be cut at a different place, which required the removal of the bar of iron from the shears, and, in attempting to change the position thereof, the shears closed down and cut the bar near the end, and caused it to rebound and strike plaintiff, causing his injury. It was held that the question of the negligence of the foreman in giving the order was one of fact for the jury: *Republic Iron & Co. v. Berkes*, 162 Ind. 517; s. c. 70 N. E. Rep. 815.

⁹⁵ *Wiggins Ferry Co. v. Hill*, 112 Ill. App. 475.

⁹⁶ Under an allegation in a declaration that plaintiff was in the ex-

mouth of a coal chute which was clogged and dislodge the coal, and the superior promised to take charge of the gate above so as to prevent the coal from falling down on the servant while so employed, the employers were held liable for injuries to the servant resulting from the failure of the superior to attend the gate as promised.⁹⁷ In another case where a servant was ordered by a foreman to assist in lacing a belt in a dangerous place, and, reaching up to hold the belt, he was caught in the shaft and injured, it was held that his act in reaching up was a sufficient commencement of the work to connect the defendant's negligence, in ordering him into such place, with his injury, though he did not get hold of the belt.⁹⁸

§ 3819. Instances of Liability for Ordering Servants Into Danger.⁹⁹

§ 3823. Liability where the Minor is Employed without Consent of Parents or Guardian.¹⁰⁰

§ 3825. Status of Minor Servants who Procure Employment by Falsely Representing Themselves to be of Age.—There is authority that a servant, employed on his sworn application that he is twenty-one years of age, and having the physique of a man, will be concluded by this representation,¹⁰¹ and this more particularly where the parent or guardian knows of the employment and does not object.¹⁰² Under a statute prohibiting the employment in a manufacturing establishment of children under the age of fourteen years, it has been held that the employer must ascertain the age of a youthful employé at his peril, and he cannot defend an action for injuries to a child, employed in violation of the statute, either on the ground that he did

exercise of due care, evidence that he had been directed to do the work he was attempting to do in the manner in which he had attempted to do it at the time of the injury was admissible though there was no averment of a specific order or direction: *Henrietta Coal Co. v. Campbell*, 211 Ill. 216; s. c. 71 N. E. Rep. 863; aff'g s. c. 112 Ill. App. 452. Under an allegation that the injury was caused by the failure to give "necessary and suitable orders," evidence of the giving of negligent or improper orders cannot be received: *Sanks v. Chicago & A. Ry. Co.*, 112 Ill. App. 385.

⁹⁷ *Fleming v. Tuttle*, 98 App. Div. (N. Y.) 222; s. c. 90 N. Y. Supp. 661.

⁹⁸ *Grijalva v. Southern Pac. Co.*, 137 Cal. 569; s. c. 70 Pac. Rep. 622.

⁹⁹ A master was charged with negligence where he ordered an inexperienced laborer to go into a cov-

ered pit full of hot ashes and turn water on them, and as a result of obeying this order the employé was scalded to death by the steam: *Hout v. Desloge Consol. Lead Co.*, 104 Mo. App. 377; s. c. 79 S. W. Rep. 710.

¹⁰⁰ In a case where an employer at the time of hiring a minor was forbidden by his father to put him to work on a train, but the employer did so, it was held that the employer was liable for the death of the minor while thus employed, unless it was shown that the death was due to the willful act of the minor: *Coleman v. Himmelberger-Harrison Land &c. Co.*, 105 Mo. App. 254; s. c. 79 S. W. Rep. 981.

¹⁰¹ *Williams v. Illinois Cent. R. Co.*, 114 La. 13; s. c. 37 South. Rep. 992.

¹⁰² *Moore v. St. Louis &c. R. Co.*, 115 La. 86; s. c. 38 South. Rep. 913.

not know that the child was under the required age, or obtained employment by falsely representing himself as above such age.¹⁰³

§ 3826. Liability for Employing Minors who are Too Young and Inexperienced.¹⁰⁴

§ 3827. Status of Children Employed in Violation of Statute.¹⁰⁵—These statutes are strictly construed.¹⁰⁶ The Illinois statute provides that before any boy can be permitted to work in a mine he must produce an affidavit from his parent or guardian that he is fourteen years of age. In one case in that State it was held that the statute contemplated personal production of the affidavit by the child alone, and that the plaintiff, having shown that it was not so produced, was not required to go further and show that it was not presented by the parent or guardian.¹⁰⁷ The New York statute prohibits the employment of a child under sixteen years of age in a mercantile establishment, unless he shall produce a certificate by the executive officer of the board of health, which is required to be filed in the office of the establishment in which he is employed. In a case involving this provision, it was held that the part of the statute requiring the filing of the certificate was merely directory, and that the law was complied with by procuring the certificate, and that the failure of the minor or his parent to file it did not enlarge the liability of the employer.¹⁰⁸ It must be kept clearly in mind that the violation of the statute must have been the

¹⁰³ American Car Co. v. Armentrout, 214 Ill. 509; s. c. 73 N. E. Rep. 766; aff'g s. c. 116 Ill. App. 121. Under a child labor statute making it unlawful to employ children under a certain age in factories, evidence is not admissible that instructions were given the servant charged with the employment of help not to employ children without being satisfied as to their age, and this particularly where it is admitted that an affidavit as to age required by the statute was not demanded: La Porte Carriage Co. v. Sullender, — Ind. App. —; s. c. 71 N. E. Rep. 922.

¹⁰⁴ In jurisdictions where the age at which children may be allowed to work is not fixed by statute, the question of the age at which a child may be employed becomes one of fact for the determination of the jury: Canton Cotton Mills v. Edwards, 120 Ga. 447; s. c. 47 S. E. Rep. 937.

¹⁰⁵ That the hiring constitutes negligence *per se* see: Nickey v.

Steuder, 164 Ind. 189; s. c. 73 N. E. Rep. 117; Lee v. Sterling Silk Mfg. Co., 47 Misc. (N. Y.) 182; s. c. 93 N. Y. Supp. 560; Marino v. Lehmaier, 173 N. Y. 530; s. c. 66 N. E. Rep. 572; aff'g s. c. 72 N. Y. Supp. 1118; Kirkham v. Wheeler-Osgood Co., 39 Wash. 415; s. c. 81 Pac. Rep. 869. See *post* §§ 4599, 4600.

¹⁰⁶ A statute providing that no person under eighteen years of age shall be permitted or directed to clean machinery while in motion was not violated where a boy of sixteen years was called upon to hold a belt while repairs were being made to it; it appearing that he was in a safe place while doing so: Scialo v. Steffens, 105 App. Div. (N. Y.) 592; s. c. 94 N. Y. Supp. 305.

¹⁰⁷ Marquette &c. Coal Co. v. Diehl, 208 Ill. 116; s. c. 70 N. E. Rep. 17.

¹⁰⁸ Lowry v. Anderson Co., 96 App. Div. (N. Y.) 465; s. c. 89 N. Y. Supp. 107.

proximate cause of the injuries.¹⁰⁹ If this is not the case, as, for example, where the injuries were caused solely by the failure of the master properly to instruct a servant as to his duties, it is clear that the violation of the statute was not the proximate cause of the injuries and is not to be considered by the jury.¹¹⁰ In case where the violation of the statute is the cause of the injuries, contributory negligence of the child cannot be urged as a defense.¹¹¹

§ 3833. Failure of Master to Conform to Other Statutory Requirements.—A statute, forbidding the employment of persons under a certain age to clean machinery while in motion, has been construed to prohibit the cleaning of the parts intended to remain stationary while the parts designed to move are in motion.¹¹²

§ 3842. When Employer Liable for Negligence or Malpractice of Physician or Surgeon: Liable for Negligence in Selecting Incompetent or Unfit Physician or Surgeon.¹¹³

§ 3843. Duty of Employer where he Undertakes by Contract to Furnish Medical and Surgical Attendance.¹¹⁴—The law only requires the employer to use ordinary care in the selection of the physician or surgeon.¹¹⁵ Evidence that the surgeon employed was not duly registered in the proper office in the county does not tend to show a want of proper care in this regard and is not admissible.¹¹⁶ In one case an employé who contributed a portion of his salary to the hospital fund

¹⁰⁹ The act of a person coming on the premises as a customer of an employer, and negligently throwing a stick of wood or timber so as to strike an illegally employed child and injure him, is the intervention of an independent human agency, relieving the employer from liability for the injuries: *Nickey v. Steuder*, 164 Ind. 189; s. c. 73 N. E. Rep. 117.

¹¹⁰ *Jacobs v. Fuller & Co.*, 67 Ohio St. 70; s. c. 65 N. E. Rep. 617.
¹¹¹ *American Car & Co. v. Armentrout*, 214 Ill. 509; s. c. 73 N. E. Rep. 766; aff'g s. c. 116 Ill. App. 121.

¹¹² *Brower v. Locke*, 31 Ind. App. 353; s. c. 67 N. E. Rep. 1015.

¹¹³ In a case where an injured employé belonging to the relief department of a railroad company was first attended by an outside physician, whose work was approved by the physician employed by the railroad company, who directed him to continue his attendance and send his bill to the company, and the physician of the com-

pany visited the patient and admitted advising against a certain proposed operation, it was held that the facts warranted a finding that both physicians were attending physicians in the treatment of the injured employé: *Haggerty v. St. Louis, K. & C. R. Co.*, 100 Mo. App. 424; s. c. 74 S. W. Rep. 456.

¹¹⁴ An employer who contracts for a consideration to treat employés for injuries received by them while in his employ, is liable for the malpractice of the physician employed (*Sawdey v. Spokane Falls & C. R. Co.*, 30 Wash. 349; s. c. 70 Pac. Rep. 972), unless he has used due care to employ a competent medical attendant (*Poling v. San Antonio & C. R. Co.*, 32 Tex. Civ. App. 487; s. c. 75 S. W. Rep. 69).

¹¹⁵ *Poling v. San Antonio & C. R. Co.*, 32 Tex. Civ. App. 487; s. c. 75 S. W. Rep. 69.

¹¹⁶ *Big Stone Gap Iron Co. v. Ketrone*, 102 Va. 23; s. c. 45 S. E. Rep. 740.

was injured while going home after work. He was taken to the company's hospital and treated without being told that the company only engaged to treat for injuries in the course of employment, and was treating him gratuitously. In an action by the employé for malpractice of the medical attendant, it was held that the railroad company would not be allowed to claim that it was only required to treat for injuries in the course of employment and was treating the plaintiff as a matter of charity.¹¹⁷

§ 3850. Contract with Servant Exempting Master from Liability for His Own Negligence.—The conflict between the courts on this question noted in the main section is not cleared by the later decisions. On grounds of public policy one line of courts condemn and invalidate these contracts.¹¹⁸ Other courts take the opposite position and hold that contracts of Pullman porters and express messengers assuming all the risks of injury from railroad travel do not contravene public policy and are valid,¹¹⁹ though not read by the employé,¹²⁰ or signed by him until long after his employment had commenced.¹²¹

§ 3851. Statutes Making Such Contracts Null and Void.¹²²—A Federal court holds that the Missouri statute invalidating contracts between "a railroad corporation and any of its agents or servants" exempting the railroad company from liability for negligence, is without application to contracts between Pullman porters and the company releasing the Pullman company from liability for negligence and allowing the assignment of the contract to the carrying company, since the contract is not between "a railroad company and its servant" within the meaning of the statute.¹²³ The statute is held clearly inapplicable in a case where the carrying company is neither a Missouri corporation nor operating within that State, and the accident in question occurred outside the State. This construction finds strong support in the language of one of the provisions of the statute that the

¹¹⁷ *Sawdey v. Spokane Falls &c. R. Co.*, 30 Wash. 349; s. c. 70 Pac. Rep. 972.

¹¹⁸ *Johnson v. Fargo*, 98 App. Div. (N. Y.) 436; s. c. 90 N. Y. Supp. 725. See also *Mexican Nat. R. Co. v. Jackson*, 118 Fed. Rep. 549; s. c. 55 C. C. A. 315.

¹¹⁹ *McDermon v. Southern Pac. Co.*, 122 Fed. Rep. 669; *New York &c. R. Co. v. Difendaffer*, 125 Fed. Rep. 893; *Chicago &c. R. Co. v. Hamler*, 215 Ill. 525; s. c. 74 N. E. Rep. 705; rev'g s. c. 114 Ill. App. 141; *Kelly v. Malott*, 135 Fed. Rep. 74; s. c. 67 C. C. A. 548 (express

messenger); *Russell v. Pittsburgh &c. R. Co.*, 157 Ind. 305; s. c. 61 N. E. Rep. 678; 55 L. R. A. 253 (Pullman porter).

¹²⁰ *New York &c. R. Co. v. Difendaffer*, 125 Fed. Rep. 893.

¹²¹ *Chicago &c. R. Co. v. Hamler*, 215 Ill. 525; s. c. 74 N. E. Rep. 705; rev'g s. c. 114 Ill. App. 141.

¹²² *Rev. Laws Mass.*, c. 106, § 16, has this effect, see: *Wagner v. Boston &c. R. Co.*, 188 Mass. 437; s. c. 74 N. E. Rep. 919.

¹²³ *McDermon v. Southern Pac. Co.*, 122 Fed. Rep. 669.

term "railroad corporation" shall be taken to mean corporations owning and operating "railroads in this State."¹²⁴

§ 3852. Contracts with Third Parties Do Not Affect Master's Liability to his Servant.¹²⁵

§ 3853. Contracts between Railroad Companies and their Employés by which Employés Agree to Release Damages in Consideration of Participation in Sick, Accident, or Death Benefits, Relief-Funds, etc.—A provision in a benefit certificate issued by the relief department of a railroad company, that members electing to accept the benefits provided by their certificates must waive all right of action against the company for the injury received, is valid, and not opposed to public policy.¹²⁶ There is a holding that the fact that a railroad employé is insured in an accident company against injury in his employment,—the premium being paid partly by him and partly by his employer,—and his acceptance of benefits thereunder does not discharge his employer from liability to him for negligent injury unless he accepts or agrees to accept the insurance money in settlement of his claim against the company.¹²⁷

§ 3856. Questions of Proximate and Remote Cause in Actions by Servants Against their Masters for Injuries.¹²⁸—In order that the

¹²⁴ *McDermon v. Southern Pac. Co.*, 122 Fed. Rep. 669.

¹²⁵ A contract for the construction of a railroad right-of-way fence providing that the railroad company should not be liable for accidents which might occur on the outfit or material cars used by the contractor, did not relieve the railroad company from liability to a trackman in its employ for injuries caused by the joint negligence of the servants of the railroad company and the contractor in throwing timbers from one of the railroad company's regular freight trains while running at a negligent rate of speed: *St. Louis & C. R. Co. v. Arnold*, 32 Tex. Civ. App. 272; s. c. 74 S. W. Rep. 819.

¹²⁶ *Oyster v. Burlington Relief Department of Chicago, B. & C. R. Co.*, 65 Neb. 789; s. c. 91 N. W. Rep. 699; 59 L. R. A. 291.

¹²⁷ *Dover v. Mississippi River & C. R.*, 100 Mo. App. 330; s. c. 73 S. W. Rep. 298.

¹²⁸ These cases support the well-recognized principle that there can be no recovery by the servant for

injuries unless the negligence complained of was the proximate cause of the injury: *Webster Mfg. Co. v. Goodrich*, 104 Ill. App. 76; *Monongahela River Consol. Coal & C. Co. v. Campell*, 78 S. W. Rep. 405; s. c. 25 Ky. L. Rep. 1599 (failure to nail cleats on a sloping runway proximate cause of injury to laborer carrying material down runway and not the sleet on the surface); *Ray v. Vicksburg & C. R. Co.*, 113 La. 502; s. c. 37 South. Rep. 43; *Schoultz v. Eckardt Mfg. Co.*, 112 La. 568; s. c. 36 South. Rep. 593 (causes of break in machinery remote and repair of break proximate cause of injuries received while making repairs); *Fay v. Wilmarth*, 183 Mass. 71; s. c. 66 N. E. Rep. 410; *Yazoo & C. R. Co. v. Schraag*, 84 Miss. 125; s. c. 36 South. Rep. 193 (defective condition of track remote cause of collision which would not have occurred but for the grossly negligent occupation of the track by a switch crew); *Anderson v. Forrester-Nace Box Co.*, 103 Mo. App. 382; s. c. 77 S. W. Rep. 486 (darkness of room not proximate

neglect by the master to obey a statute may be deemed the proximate cause of injury to a servant, it is not required that the master shall have expected or anticipated the identical or precise injury sustained by the servant. It is sufficient if, by the exercise of reasonable care, the master should have foreseen or anticipated that it was probable that injury of some kind might result to his employes engaged in operating the machinery.¹²⁰ A complaint or declaration is fatally defective which fails clearly to aver that the master's negligence was the proximate cause of the injuries complained of.¹³⁰

§ 3857. Rule where the Injury is the Result of the Concurrence of Several Causes.¹³¹

§ 3858. Rule where Negligence of Master Concurs with Negligence of Fellow Servant.¹³²

§ 3859. Rule where Negligence of Master Concurs with Negligence of Third Person.—The mere fact that the negligence of a third person contributes with that of the master in causing the servant's injury will not relieve the master from liability; in such a case each of the wrongdoers is responsible for the entire injury.¹³³

§ 3860. Circumstances under which the Question whether the Negligence of the Master was the Proximate Cause of the Injury, is a Question for the Jury.¹³⁴

cause of injury to a servant, owing to a nail springing from its place as he struck it, where it appeared that he struck the nail a square blow; *Stenger v. Buffalo Union Furnace Co.*, 98 App. Div. (N. Y.) 361; s. c. 90 N. Y. Supp. 222; *Fullmer v. New York & C. R. Co.*, 208 Pa. 598; s. c. 57 Atl. Rep. 1062 (absence of signal target not proximate cause of injuries to inspector under car caused by collision with car thrown on a switch negligently left open by brakeman, where the presence of the target would not have reminded the switchman of his duty, and its absence did not mislead the inspector).

¹²⁰ *Davis v. Mercer Lumber Co.*, 164 Ind. 413; s. c. 73 N. E. Rep. 899. See also *South Bend & C. Plow Co. v. Cissne*, 35 Ind. App. 373; s. c. 74 N. E. Rep. 282.

¹³⁰ *Langlois v. Dunn Worsted Mills*, 25 R. I. 645; s. c. 57 Atl. Rep. 910.

¹³¹ *Gulf & C. R. Co. v. Boyce*, — Tex. Civ. App. —; s. c. 87 S. W.

Rep. 395 (railroad company liable where its negligence concurred with act of God).

¹³² That the master is liable where his negligence is combined with the negligence of a fellow servant in producing the injury and is the efficient cause of the injury, see generally: *Chicago & A. R. Co. v. Wise*, 206 Ill. 453; s. c. 69 N. E. Rep. 500; aff'g s. c. 106 Ill. App. 174; *Missouri & C. Iron Co. v. Dillon*, 206 Ill. 145; s. c. 69 N. E. Rep. 12; aff'g s. c. 106 Ill. App. 649.

¹³³ *Neal v. St. Louis & C. R. Co.*, 71 Ark. 445; s. c. 78 S. W. Rep. 220.

¹³⁴ *Shugart v. Atlanta & C. R.*, 133 Fed. Rep. 505; s. c. 66 C. C. A. 379 (whether defective condition of track was proximate cause of derailment notwithstanding speed of train and fact that engine was run with tender in front); *Chicago Screw Co. v. Weiss*, 107 Ill. App. 39; s. c. aff'd, 203 Ill. 536; 68 N. E. Rep. 54 (whether defective condition of lever on machine was proximate cause of injury); *Las-*

§ 3861. Illustrative Cases where the Negligence of the Master was the Proximate Cause of the Injury, or Presented a Question for the Jury.¹³⁵

§ 3862. Illustrative Cases where the Negligence of the Master was Not the Proximate Cause of the Injury.¹³⁶

§ 3864. General Presumption in Favor of Master.¹³⁷

§ 3865. What the Servant must Prove to Overcome this Presumption.—It is essential to a recovery for an injury resulting from the master ordering his servant into a dangerous place, that the plaintiff must prove affirmatively that at the time of his injury he was acting under and in obedience to the orders of a superior, whose orders it was his duty to obey; that the danger in question was known to such superior or ought to have been known to him in the exercise of ordinary care; that he did not know the danger and could not have known it by the exercise of reasonable care, and, in some jurisdictions, that

siter v. Raleigh & G. R. Co., 133 N. C. 244; s. c. 45 S. E. Rep. 570 (whether failure to station switchman on box cars was proximate cause of injury to employé run over by switched car); San Antonio & C. R. Co. v. Lester, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 401 (whether failure of standing train to send a flagman back to warn following trains, as required by company's rule, was proximate cause of injury to engineer on following train, who jumped from his engine to save his life before collision).

¹³⁵ The negligence of the master was held to be the proximate cause of the injury to the employé in these cases:—Where a motorman on an electric car in a mine was injured in a collision with a car negligently left on the track by a preceding train, and the track was so insufficiently lighted that the motorman could not see obstructions ahead of it—the insufficient lighting, and not the negligence of the motorman leaving the car on the track, being regarded as the proximate cause of the injuries (Central Coal & C. Co. v. Pearce, 80 S. W. Rep. 449; s. c. 25 Ky. L. Rep. 2269); where an employé was injured by the falling of the wall of a brick kiln—the proximate cause of the injury being the insecure condition of the wall, and not the foreman's directions for the servant to work

thereon (Browning v. Kasten, 107 Mo. App. 59; s. c. 80 S. W. Rep. 354); so the employer's failure to acquaint a new employé with the existence and location of cog wheels around a crane was held the proximate cause of injuries resulting therefrom, and not the act of a fellow servant in prematurely starting the train: Shickle-Harrison & C. Co. v. Beck, 212 Ill. 268; s. c. 72 N. E. Rep. 423.

¹³⁶ Robinson v. Pittsburg Coal Co., 129 Fed. Rep. 324; s. c. 63 C. C. A. 258 (unsoundness of mast which, struck by an ore bucket negligently hoisted, fell and killed a seaman not proximate cause of death). A train's failure to give the statutory signals on its approach to a highway crossing was not the proximate cause of injuries to a section man in removing a loaded hand-car from the track to avoid a collision, where the hand-car was in this dangerous situation because of the section foreman's negligence in running his car on the train's time: Illinois Cent. R. Co. v. McIntosh, 118 Ky. 145; s. c. 80 S. W. Rep. 496; 26 Ky. L. Rep. 14, 347; 81 S. W. Rep. 270.

¹³⁷ Edgens v. Gaffney Mfg. Co., 69 S. C. 529; s. c. 48 S. E. Rep. 538 (mere fact of breaking of machinery does not raise presumption of master's negligence).

he was free from negligence which in any way contributed to the injury.¹³⁸ Where the servant's injury may have resulted from more than one cause, for some of which the master is not liable, the plaintiff must show that his injury arose from causes for which the master is liable;¹³⁹ and where the evidence shows that it is as probable that the injuries resulted from a cause for which the master was not responsible as from a cause for which he was responsible the plaintiff cannot recover.¹⁴⁰ The servant has the burden of proof of the existence of the relation of master and servant;¹⁴¹ and the master that of fellow servant where he defends on that ground.¹⁴²

§ 3868. **Conflict of Laws—Law of Place Governs.**¹⁴³—It is the law of Canada that contributory negligence and the assumption of risk on the part of the servant injured in the course of his employment by the alleged negligence of his master does not constitute a bar to the servant's action, but only operates to reduce the damages. In most of the American States this doctrine is not recognized. But in Vermont and Michigan, States holding views opposed to the Canadian rule, the courts have held that this doctrine is not so contrary to the public policy of these States that their courts would not enforce the same in an action for injuries to a servant occurring in Canada.¹⁴⁴

§ 3873. **Duty of the Master as to the Safety of the Place where he Sends his Servant to Work.**¹⁴⁵—It is now settled that State legislatures may in their discretion, with a view to the greater safety and

¹³⁸ *Wiggins Ferry Co. v. Hill*, 112 Ill. App. 475. See also *Goodhines v. Chase*, 100 App. Div. (N. Y.) 87; s. c. 91 N. Y. Supp. 313.

¹³⁹ *Goransson v. Ritter-Conley Mfg. Co.*, 186 Mo. 300; s. c. 85 S. W. Rep. 338; *Meehan v. Great Northern R. Co.*, — N. D. —; s. c. 101 N. W. Rep. 183.

¹⁴⁰ *Nelson v. New York*, 101 App. Div. (N. Y.) 18; s. c. 91 N. Y. Supp. 763.

¹⁴¹ *Western Wheel Works v. Stachnick*, 102 Ill. App. 420.

¹⁴² *Chicago, P. & C. R. Co. v. Mike-sell*, 113 Ill. App. 146.

¹⁴³ That the law of the place where the injury was received governs, see: *Illinois Cent. R. Co. v. Jordan*, 117 Ky. 512; s. c. 78 S. W. Rep. 426; 25 Ky. L. Rep. 1610; *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 490; s. c. 79 S. W. Rep. 664; *Williams v. Chicago, R. I. & P. R. Co.*, 106 Mo. App. 61; s. c. 79 S. W. Rep. 1167; *El Paso & C. R. Co. v. McComas* (Tex. Civ. App.), 72 S. W. Rep.

629; *El Paso & C. R. Co. v. McComas*, 36 Tex. Civ. App. 170; s. c. 81 S. W. Rep. 760; *Missouri & C. R. Co. of Texas v. Keefe*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 679; *Johnson v. Union Pacific Coal Co.*, 28 Utah 46; s. c. 76 Pac. Rep. 1089; *Sartin v. Oregon Short Line R. Co.*, 27 Utah 447; s. c. 76 Pac. Rep. 219; *Morisette v. Canadian Pac. R. Co.*, 76 Vt. 267; s. c. 56 Atl. Rep. 1102.

¹⁴⁴ *Morisette v. Canadian Pac. R. Co.*, 76 Vt. 267; s. c. 56 Atl. Rep. 1102; *Rick v. Saginaw Bay Towing Co.*, 132 Mich. 237; s. c. 93 N. W. Rep. 632; 9 Det. Leg. N. 589.

¹⁴⁵ That it is the absolute duty of a master to exercise reasonable care to provide a reasonably safe place in which the servant should work, having regard to the kind of work and the conditions under which it must necessarily be performed, see: *Bunker Hill & Sullivan Mining & C. Co. v. Jones*, 130 Fed. Rep. 813; *Grijalva v. Southern Pac. Co.*, 137 Cal. 569; s. c. 70 Pac. Rep. 622;

protection of employes, set up definite standards of duty to be observed by their employers in providing working places for their employes where the matter is not controlled by the rules of the common law.¹⁴⁶ The rule of the text of the principal section does not go to the extent of making the employer an insurer of the safety of the place in which his employé works; it is sufficient if he furnishes a reasonably safe place under all the circumstances, and conducts his business in accordance with ordinary usages of the employment,¹⁴⁷ whether or not he has done so in a particular case is a question of fact for the

Greeley v. Foster, 32 Colo. 292; s. c. 75 Pac. Rep. 351 (instruction that employer should provide a safe place for the employé to work in was erroneous, it not qualifying the word "safe" by the adjective "reasonably"); *Karczewski v. Wilmington City R. Co.*, — Del. —; s. c. 54 Atl. Rep. 746; *Stauble v. Potomac Elec. Power Co.*, 21 App. (D. C.) 160; *Chenall v. Palmer Brick Co.*, 117 Ga. 106; s. c. 43 S. E. Rep. 443; *Jackson v. Merchants' & C. Transp. Co.*, 118 Ca. 651; s. c. 45 S. E. Rep. 254; *Allen B. Wrisley Co. v. Burke*, 106 Ill. App. 30; *Barnett & Record Co. v. Schlapka*, 110 Ill. App. 672; s. c. aff'd, 208 Ill. 426; 70 N. E. Rep. 343; *Illinois Steel Co. v. Ryska*, 102 Ill. App. 347; s. c. aff'd, 200 Ill. 280; 65 N. E. Rep. 734; *Libby, McNeill & Libby v. Banks*, 209 Ill. 109; s. c. 70 N. E. Rep. 599; aff'g s. c. 110 Ill. App. 330; *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185; *Pressed Steel Car Co. v. Herath*, 110 Ill. App. 596; *Emporia v. Kowalski* 66 Kan 64; s. c. 71 Pac. Rep. 232; *Tradewater Coal Co. v. Johnson* (Ky.), 72 S. W. Rep. 274; s. c. 24 Ky. L. Rep. 1777 (not necessary to show gross negligence); *Dixon v. Swift*, 98 Me. 207; s. c. 56 Atl. Rep. 761; *Sinberg v. Falk Co.*, 98 Mo. App. 546; s. c. 72 S. W. Rep. 947; *Sykes v. St. Louis & C. R. Co.*, 88 Mo. App. 193; *Zellars v. Missouri Water & C. Co.*, 92 Mo. App. 107; *McCabe v. Montana Cent. R. Co.*, 30 Mont. 323; s. c. 76 Pac. Rep. 701; *New Omaha Thompson-Houston Elec. Light Co. v. Rombold*, 66 Neb. 393; s. c. 93 N. W. Rep. 966; s. c. rev'd, — Neb. —; 97 N. W. Rep. 1030; *Burns v. Delaware & C. Tele. & Tel. Co.*, 70 N. J. L. 745; s. c. 59 Atl. Rep. 220, 592; 67 L. R. A. 956; *Muhlens v. Obermeyer & Liebmann*, 83 App. Div.

(N. Y.) 88; s. c. 82 N. Y. Supp. 527; *Parlett v. Dunn*, 102 Va. 459; s. c. 46 S. E. Rep. 467; *Williams v. Belmont Coal & C. Co.*, 55 W. Va. 84; s. c. 46 S. E. Rep. 802; *National Biscuit Co. v. Nolan*, 138 Fed. Rep. 6; *Southern Pac. Co. v. Gloyd*, 138 Fed. Rep. 388; *Hansell-Elcock Foundry Co. v. Clark*, 115 Ill. App. 209; s. c. aff'd, 214 Ill. 399; 73 N. E. Rep. 787; *Williams v. Levert Lumber & C. Co.*, 114 La. 805; s. c. 38 South. Rep. 567; *Erickson v. Monson Consol. Slate Co.*, 100 Me. 107; s. c. 60 Atl. Rep. 708; *McTaggart v. Maine Cent. R. Co.*, 100 Me. 223; s. c. 60 Atl. Rep. 1027; *Zeigenmeyer v. Chas. Goetz Lime & C. Co.*, 113 Mo. App. 330; s. c. 88 S. W. Rep. 139; *Purcell v. Tenant Shoe Co.*, 187 Mo. 276; s. c. 86 S. W. Rep. 121; *Kalker v. Hedden*, — N. J. L. —; s. c. 61 Atl. Rep. 395; *Haber v. Jenkins Rubber Co.*, — N. J. L. —; s. c. 61 Atl. Rep. 382 (obligation covers matter of mode of entrance and exit from place of employment); *Sweigert v. Klingensmith*, 210 Pa. 565; s. c. 60 Atl. Rep. 253; *Texas & C. R. Co. v. Hemphill*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 350; *Mueller v. Northwestern Iron Co.* 125 Wis. 326; s. c. 104 N. W. Rep. 67. An employer may, when necessary use appliances particularly dangerous to employes, provided precautions are taken so that the danger is reduced to a condition of reasonable safety: *Welch v. Bath Iron Works*, 98 Me. 361; s. c. 57 Atl. Rep. 88.

¹⁴⁶ *Green v. American Car & C. Co.*, 163 Ind. 135; s. c. 71 N. E. Rep. 268.

¹⁴⁷ *Wilson v. Chess & Wymond Co.*, 117 Ky. 567; s. c. 78 S. W. Rep. 453; 25 Ky. L. Rep. 1655; *Glasscock v. Swofford Bros. Dry Goods Co.*, 106 Mo. App. 657; s. c. 80 S. W. Rep. 364; *Roth v. Eccles*, 28 Utah 456; s. c. 79 Pac. Rep. 918.

jury.¹⁴⁸ In a case where an employer manufactured and furnished his employes a water cooler in which red lead and grease were used in its construction, and took no steps to cleanse it for two weeks after its installation, the jury was held warranted in finding that the employer did not furnish his employes a reasonably safe receptacle for drinking water.¹⁴⁹

§ 3874. **This Duty Primary, Absolute and Non-assignable.**¹⁵⁰—Where the duty is delegated, the person so delegated represents the master and is not a fellow servant.¹⁵¹ But the master having performed his duty in this respect may then commit the details of the work and the making of incidental repairs or adjustments of the machinery to his employes.¹⁵²

§ 3876. **Rule does Not Apply with Respect to Dangers Arising in the Progress of Work.**¹⁵³—This exception has found application in cases where employes were engaged in the construction of new buildings,¹⁵⁴ the sheeting of ditches to render them safe,¹⁵⁵ and in excavating gravel from gravel banks.¹⁵⁶ The exception will not avail where

¹⁴⁸ *Armour v. Golkowska*, 202 Ill. 144; s. c. 66 N. E. Rep. 1037; aff'g s. c. 95 Ill. App. 492; *Libby, McNeill & Libby v. Banks*, 209 Ill. 109; s. c. 70 N. E. Rep. 599; aff'g s. c. 110 Ill. App. 330; *Depuy v. Chicago & C. R. Co.*, 110 Mo. App. 110; s. c. 84 S. W. Rep. 103; *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. C. 254; s. c. 42 S. E. Rep. 612.

¹⁴⁹ *Geller v. Briscoe Mfg. Co.*, 136 Mich. 330; s. c. 99 N. W. Rep. 281; 11 Det. Leg. N. 31.

¹⁵⁰ *National Steel Co. v. Lowe*, 127 Fed. Rep. 311; *Allen B. Wrisley Co. v. Burke*, 106 Ill. App. 30; *Evans v. Louisiana Lumber Co.*, 111 La. 534; s. c. 35 South. Rep. 736; *Chisholm v. New England Tel. & Teleg. Co.*, 185 Mass. 82; s. c. 69 N. E. Rep. 1042; *Hoelter v. McDonald*, 82 App. Div. (N. Y.) 423; s. c. 81 N. Y. Supp. 616; *Virginia & C. Wheel Co. v. Harris*, 103 Va. 708; s. c. 49 S. E. Rep. 991; *George Weideman Brewing Co. v. Wood*, 87 S. W. Rep. 772; 27 Ky. L. Rep. 1012; *Carlson v. Haglin*, 95 Minn. 347; s. c. 104 N. W. Rep. 297.

¹⁵¹ *Roche v. Denver & C. R. Co.*, 19 Colo. App. 204; s. c. 73 Pac. Rep. 880; *Good Eye Min. Co. v. Robinson*, 67 Kan. 510; s. c. 73 Pac. Rep. 102; *Eichholz v. Niagara Falls & C. Power & Co.*, 68 App. Div. (N. Y.)

441; s. c. 73 N. Y. Supp. 842; s. c. aff'd, 174 N. Y. 519; 66 N. E. Rep. 1107; *Merchants' & C. Oil Co. v. Burns* (Tex. Civ. App.), 72 S. W. Rep. 626; *Baumann v. C. Reiss Coal Co.*, 118 Wis. 330; s. c. 95 N. W. Rep. 139.

¹⁵² *Williams v. North Wisconsin Lumber Co.*, 124 Wis. 328; s. c. 102 N. W. Rep. 589.

¹⁵³ See generally: *Davis v. Trade Dollar Consol. Min. Co.*, 117 Fed. Rep. 122; s. c. 54 C. C. A. 636; *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138; s. c. 77 Pac. Rep. 515. See also *Galow v. Chicago & C. R. Co.*, 131 Fed. Rep. 242; *Dill v. Marmion*, 164 Ind. 507; s. c. 73 N. E. Rep. 67; *Belt v. Henry Du Bois' Sons Co.*, 97 App. Div. (N. Y.) 392; s. c. 89 N. Y. Supp. 1072; *Koszowski v. American Locomotive Co.*, 96 App. Div. (N. Y.) 40; s. c. 89 N. Y. Supp. 55; *Penner v. Vinton Co.*, 141 Mich. 77; s. c. 104 N. W. Rep. 385; 12 Det. Leg. N. 381.

¹⁵⁴ *Fournier v. Pike*, 128 Fed. Rep. 991; *Gittens v. William Porten Co.*, 90 Minn. 512; s. c. 97 N. W. Rep. 378.

¹⁵⁵ *Greeley v. Foster*, 32 Colo. 292; s. c. 75 Pac. Rep. 351.

¹⁵⁶ *Cully v. Northern Pac. R. Co.*, 35 Wash. 241; s. c. 77 Pac. Rep. 202.

the danger could have been entirely obviated by the master at a slight expense,¹⁵⁷ or the injury was due to the false information given by the master's representative—in this case that an unexploded blast in a mine which had been left by a former shift of workmen, had been exploded.¹⁵⁸

§ 3877. Nor where the Work Consists in Making a Dangerous Place Safe.¹⁵⁹

§ 3878. Other Situations where the Rule does Not Apply.—The rule does not apply where the risk of working in a place is expressly assumed by the employé.¹⁶⁰ Neither is it applicable to cases where the servant is sent by the master to the premises of a third person to make repairs. Here, in the absence of actual notice, the master may assume that the premises are in a safe condition.¹⁶¹ Again the rule is limited to places where the servant is required to go in the performance of his duties, and it has been held without application in a case where a hotel servant, in obedience to a command of a fellow servant, stepped over an inclosure onto a skylight too thin to support her weight and not intended for this use, and suffered injuries.¹⁶²

§ 3880. Defects in Premises Leased by the Master.—Generally, the mere fact that the premises are not owned by a master but leased from a third person does not absolve him from the duty of seeing that they are safe for his servants to work in.¹⁶³ But in one case, where the master did not own the building in which his servants were employed but hired rooms therein as a tenant at will—the lessor furnishing everything in the rooms except the chairs and tools with which the servants worked—it was held that the master had a right to assume, in the absence of any indications to the contrary, that a pail attached to an overhead hot water pipe by a plumber of the lessor to catch the drip from a leak in the pipe was properly and safely fastened, and that he was not required to inspect the same, although it had been hanging in that position for three or four weeks.¹⁶⁴

¹⁵⁷ *Barnett & Record Co. v. Schlacka*, 208 Ill. 426; s. c. 70 N. E. Rep. 343; aff'g s. c. 110 Ill. App. 672.

¹⁵⁸ *Allen v. Bell*, 32 Mont. 69; s. c. 79 Pac. Rep. 582.

¹⁵⁹ See generally: *Indiana & Coal Co. v. Batey*, 34 Ind. App. 16; s. c. 71 N. E. Rep. 191; *Baltimore & C. R. Co. v. Hunsucker*, 33 Ind. App. 27; s. c. 70 N. E. Rep. 556 (railroad wreck); *Jennings v. Ingle*, 35 Ind. App. 153; s. c. 73 N. E. Rep. 945.

¹⁶⁰ *Greeley v. Foster*, 32 Colo. App. 292; s. c. 75 Pac. Rep. 351.

¹⁶¹ *Roche v. Llewellyn Ironworks Co.*, 140 Cal. 563; s. c. 74 Pac. Rep. 147.

¹⁶² *Ahern v. Hildreth*, 183 Mass. 296; s. c. 67 N. E. Rep. 328.

¹⁶³ *Adams Exp. Co. v. Smith (Ky.)*, 72 S. W. Rep. 752; s. c. 24 Ky. L. Rep. 1915.

¹⁶⁴ *Kirk v. Sturdy*, 187 Mass. 87; s. c. 72 N. E. Rep. 349.

§ 3882. Liability of Master for Injuries from Objects Falling from Above.¹⁶⁵

§ 3888. Duty of Master to Prevent or Guard Man-Traps, Trap-Doors, and Other Hidden Dangers on such Premises.—A cable railway company whose excavation holding the wheels on which the cable ran was not of sufficient size to permit a man to remain therein during the passage of cars while oiling or adjusting the machinery, and it was necessary in performing the work for the oiler to place his head and shoulders in the excavation, was held to have satisfied the rules as to safety of the place to work where it furnished a competent servant to keep watch and warn the oiler of danger while in this position.¹⁶⁶ Whether the master was acquainted with the defective condition of a floor, or could have discovered it by the use of ordinary care, is a question of fact for the jury.¹⁶⁷

§ 3889. Passageways, Walks, etc.—It is the duty of the master sufficiently to support floors over which heavy weights are moved,¹⁶⁸ and repair holes therein.¹⁶⁹ In one case where a gangway slightly elevated above the floor had been used for several years without accident it was held that the failure of the master to construct railings along the side of the gangway was not negligence.¹⁷⁰

§ 3890. Dangerous Stairways.¹⁷¹

¹⁶⁵ In the case where the injuries sued upon were caused by the fall of a crowbar used in pinching a pile in place under the hammer of a pile driver and it was not shown that any platform could have been erected which would have averted the injury, the failure of the master to provide a platform over the servant to protect him from falling tools, was held not to impute the master with negligence: *Minitier v. Chicago & C. R. Co.*, 122 Iowa 46; s. c. 96 N. W. Rep. 1108. The contractor for the wood work on a building was held not liable for injury to his employé from negligence of an employé of the contractor for the mason work in dropping a brick on him. The place was safe, and was only made unsafe by the negligent act of a person for which the master was not responsible: *Penner v. Vinton Co.*, 141 Mich. 77; s. c. 104 N. W. Rep. 385; 12 Det. Leg. N. 381. The owner of a lumber yard allowing lumber to be piled in such a manner as to be dangerous to his servants, was held liable for resulting injuries, though the

lumber was originally so piled by employes for whose negligence he was not responsible: *Brooks v. W. T. Joyce Co.*, 127 Iowa 266; s. c. 103 N. W. Rep. 91.

¹⁶⁶ *Ryan v. Third Ave. R. Co.*, 92 App. Div. (N. Y.) 306; s. c. 86 N. Y. Supp. 1070.

¹⁶⁷ *Montgomery Coal Co. v. Bar-ringer*, 109 Ill. App. 185.

¹⁶⁸ *Thompson v. American Writing Paper Co.*, 187 Mass. 93; s. c. 72 N. E. Rep. 343.

¹⁶⁹ *Missouri & C. Iron Co. v. Dillon*, 206 Ill. 145; s. c. 69 N. E. Rep. 12; aff'g s. c. 106 Ill. App. 649.

¹⁷⁰ *Baker v. Empire Wire Co.*, 102 App. Div. (N. Y.) 125; s. c. 92 N. Y. Supp. 355.

¹⁷¹ *Rogers v. Samuel Meyerson Print. Co.*, 103 Mo. App. 683; s. c. 78 S. W. Rep. 79 (question for the jury whether master was negligent where he failed to place guards across a window level with the floor at the foot of a steep stairway to prevent persons hurriedly descending from falling through the unprotected window).

§ 3892. **Furnishing Insufficient Lights or Negligently Allowing them to Become Extinguished.**—The duty of the master properly to light the place of work is a primary duty and cannot be delegated,¹⁷² and is not discharged by merely furnishing lamps, material for new lights and an electrician.¹⁷³ The servant, on his part, may assume the risk of injury from working in an insufficiently lighted workroom by undertaking to do work without the lights.¹⁷⁴ The New York factory law provides that, when in the opinion of the factory inspector, it is necessary, the workroom, halls, and stairs leading to workrooms shall be properly lighted. Under this statute the owner of a building used as a factory has been held not liable for injuries resulting from a failure to provide the lights in the absence of any showing that the factory inspector had required the lights, or that, in his opinion, they were necessary.¹⁷⁵

§ 3894. **Negligence of Master with Respect to Elevators in Buildings, Hoisting Apparatus, etc.**¹⁷⁶—The duty of the master in this regard is discharged when he furnishes an elevator reasonably safe for the purpose and maintains it in this condition.¹⁷⁷ An employer will be liable for injuries to a servant sent by him into an elevator shaft to remove obstructions where he fails to furnish light sufficient to perform this duty with reasonable safety.¹⁷⁸

§ 3900. **Instances where the Master was held Not Liable.**¹⁷⁹

§ 3902. **Master under What Duty of Inspection.**—The duty of the master as to inspection is a positive and affirmative duty which must

¹⁷² *English v. Amidon*, 72 N. H. 301; s. c. 56 Atl. Rep. 548; *Madigan v. Oceanic Steam Nav. Co.*, 82 App. Div. (N. Y.) 206; s. c. 81 N. Y. Supp. 705.

¹⁷³ *Devaney v. Degnon-McLean Const. Co.*, 79 App. Div. (N. Y.) 62; s. c. 79 N. Y. Supp. 1050; s. c. aff'd, 178 N. Y. 620; 70 N. E. Rep. 1098.

¹⁷⁴ *Schoultz v. Eckardt Mfg. Co.*, 112 La. 568; s. c. 36 South. Rep. 593.

¹⁷⁵ *Brancato v. Kors*, 36 Misc. (N. Y.) 776; s. c. 74 N. Y. Supp. 891.

¹⁷⁶ That an employer is bound only to the exercise of reasonable care and skill, see: *Young v. Mason Stable Co.*, 96 App. Div. (N. Y.) 305; s. c. 89 N. Y. Supp. 349; *Parlett v. Dunn*, 102 Va. 459; s. c. 46 S. E. Rep. 467.

¹⁷⁷ *Young v. Mason Stable Co.*, 96 App. Div. (N. Y.) 305; s. c. 89 N. Y. Supp. 349; *Continental Tobacco*

Co. v. Knoop, 71 S. W. Rep. 3; s. c. 24 Ky. L. Rep. 1268.

¹⁷⁸ *Nash v. Kansas City Hydraulic Press Brick Co.*, 109 Mo. App. 600; s. c. 83 S. W. Rep. 90.

¹⁷⁹ In a case where it was shown that the master had provided his servant with other means for reaching the various floors of the building than by riding on a freight elevator not intended to carry passengers, and that this servant had been in the defendant's employ for seven years and had used the freight elevator but once before, and was entirely ignorant of its operation, his employer was held not liable for his death by falling off such elevator by reason of a failure of the defendant to employ an elevator conductor to operate the same: *O'Donnell v. MacVeagh*, 205 Ill. 23; s. c. 68 N. E. Rep. 646.

be continuously performed,¹⁸⁰ and cannot be delegated so as to absolve the master from liability for injuries the proximate result of insufficient inspection.¹⁸¹ In a case where the master had employed two competent persons acquainted with the construction of the particular elevator to make an inspection, it was held that his failure to employ a skilled engineer for that purpose was not evidence of negligence.¹⁸²

§ 3904. **Negligence in Permitting Elevator-Shafts to Remain Open and Unguarded.**¹⁸³

§ 3905. **Negligence in Operating Elevators.**¹⁸⁴

§ 3906. **Violation of Statutes and Municipal Ordinances Respecting Elevators.**—A violation of an ordinance regulating the operation of elevators renders the employer liable for injuries only where the failure to comply with the ordinance was the proximate cause of the injury received.¹⁸⁵

§ 3909. **Whether the Fall of an Elevator is Prima Facie Evidence under the Rule of Res Ipsa Loquitur.**¹⁸⁶

§ 3912. **Liability of Masters to Servants for Injuries from the Caving in of Embankments in Excavating.**—It is the duty of a master to inspect the progress of the work of excavating with such care and diligence as the nature of the materials and the danger of the work require, and when any place becomes dangerous he must give warning of such danger to employes on the work without knowledge of such dangers. And generally the master, though allowed to delegate and entrust the conduct of this duty to a competent foreman, cannot do so

¹⁸⁰ *Womble v. Merchants' Grocery Co.*, 135 N. C. 474; s. c. 47 S. E. Rep. 493.

¹⁸¹ *Starer v. Stern*, 100 App. Div. (N. Y.) 393; s. c. 91 N. Y. Supp. 821.

¹⁸² *Young v. Mason Stable Co.*, 96 App. Div. (N. Y.) 305; s. c. 89 N. Y. Supp. 349.

¹⁸³ That the failure to safeguard evidences negligence, see: *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233; s. c. 73 Pac. Rep. 163; *Wolf v. Devitt*, 83 App. Div. (N. Y.) 42; s. c. 82 N. Y. Supp. 189; s. c. aff'd, 179 N. Y. 569; 72 N. E. Rep. 1152.

¹⁸⁴ The manager of a hotel was held liable for injuries to an elevator attendant occasioned by the manager permitting the use of the elevator by guests of the hotel:

Lyons v. Dee, 88 Minn. 490; s. c. 93 N. W. Rep. 899.

¹⁸⁵ *Middendorf v. Schulze*, 105 Ill. App. 221.

¹⁸⁶ The master is not liable where elevator fell without apparent cause: *Starer v. Stern*, 100 App. Div. (N. Y.) 393; s. c. 91 N. Y. Supp. 821; *Stackpole v. Wray*, 99 App. Div. (N. Y.) 262; s. c. 90 N. Y. Supp. 1045; *Spring Valley Coal Co. v. Buzis*, 115 Ill. App. 196; s. c. aff'd, 213 Ill. 341; 72 N. E. Rep. 1060 (doubtful whether presumption recognized in Illinois). Proof that safety catches on a freight elevator designed to arrest the fall of the elevator were defective was sufficient to make out a *prima facie* case of negligence by the master: *Droney v. Doherty*, 186 Mass. 205; s. c. 71 N. E. Rep. 547.

without being liable for the manner in which it is performed, and whether this duty is well or illy performed by the foreman, it is regarded in law as performed by the master himself.¹⁸⁷

§ 3917. Unguarded and Unsafe Excavations, Ditches, etc.¹⁸⁸

§ 3919. Care of Dynamite.—The act of placing a quantity of dynamite, which a jar of sixty pounds would explode, in the air shaft of a mine near a furnace fire is denounced by one court as gross negligence and a palpable violation of the master's duty to furnish a safe place for the tender of the fire to work,¹⁸⁹ and the master held liable, though it was placed in this dangerous position by a fellow servant.¹⁹⁰

§ 3925. Fall of Stone from the Side of a Quarry Caused by Blasting.—Where employes engaged in the removal of material loosened by blasts are prevented by the nature of the work from properly protecting themselves from falling material, it is the duty of the master to make efficient and permanent provision for warning signals to be given in time for the employes to avoid injury from this source.¹⁹¹

§ 3926. Explosions of Steam-Boilers and their Connections.¹⁹²

¹⁸⁷ *Simone v. Kirk*, 173 N. Y. 7; s. c. 65 N. E. Rep. 739; rev'g s. c. 67 N. Y. Supp. 1019. See also *Rafferty v. Nawn*, 182 Mass. 503; s. c. 65 N. E. Rep. 830; *Winters v. Naughton*, 91 App. Div. (N. Y.) 80; s. c. 86 N. Y. Supp. 439 (a question for the jury); *Van Derhoff v. New York & C. R. Co.*, 88 App. Div. (N. Y.) 418; s. c. 84 N. Y. Supp. 650. A master was not bound to anticipate a landslide and keep a watchman to warn servants of its approach where the bank in process of excavation was in a state of nature, and had a slope equal to one-third of its height, and was not undermined: *Reilly v. Troy Brick Co.*, 108 App. Div. (N. Y.) 108; s. c. 94 N. Y. Supp. 576; 47 Misc. (N. Y.) 530. An employer is not liable for injuries to an employe caused by the caving of a bank beside which the employe was at work when the same was due to the nature of the soil which was apparent: *McQueeney v. Chicago & C. R. Co.*, 120 Iowa 522; s. c. 94 N. W. Rep. 1124.

¹⁸⁸ *Norris v. Cudahy Packing Co.*, 124 Iowa 748; s. c. 100 N. W. Rep. 853 (duty of master to have lights at excavation; loose boards as barrier insufficient).

¹⁸⁹ *Angel v. Jellico Coal Min. Co.*, 115 Ky. 728; s. c. 74 S. W. Rep. 714; 25 Ky. L. Rep. 108 (the cause of the explosion in this case held a question for the jury, notwithstanding evidence that heat alone would not explode it).

¹⁹⁰ *Angel v. Jellico Coal Min. Co.*, 115 Ky. 728; s. c. 74 S. W. Rep. 714; 25 Ky. L. Rep. 108; *Harp v. Cumberland Tel. & C. Co.*, 80 S. W. Rep. 510; s. c. 25 Ky. L. Rep. 2133. ¹⁹¹ *Coffeyville Vitrified Brick & Co. v. Shanks*, 69 Kan. 306; s. c. 76 Pac. Rep. 856.

¹⁹² In an action for injuries predicated on negligence in operating a boiler under a greater pressure than it was adapted to, it was held that an instruction imposed too high a degree of care which informed the jury that it was the duty of the employer to furnish a safe and suitable boiler, and then keep it in that condition, and that the defendant was bound to keep the boiler within the limits of safety. Reasonable care in these respects is all that the law requires: *Beunk v. Valley City Desk Co.*, 133 Mich. 440; s. c. 95 N. W. Rep. 548; 10 Det. Leg. N. 288.

§ 3929. What Inspections and Tests in the Case of Steam-Boilers.—

Where the water furnished for a boiler is charged with chlorides which have a tendency to increase corrosion in the boiler, the duty of the master to make close and frequent inspections of the boiler is imperative, and the failure to perform this plain duty will charge him with actionable negligence.¹⁹³

§ 3935. Explosions of Gas.¹⁹⁴

§ 3936. Injuries to Employés in Other Explosions.—A violation of the rule of a railroad company forbidding the placing of torpedoes at or near stations where they might injure passengers, has been held negligence *per se*, entitling an employé injured by the explosion of a torpedo so placed to recover damages,¹⁹⁵ and the rule is construed to include flag stations where some passenger trains do not stop.¹⁹⁶

§ 3947. Obligation of the Master to Make Reasonable Inspections.¹⁹⁷—Some authorities regard temporary scaffolds as mere appliances or instrumentalities by means of which the work is to be done and not as places to work, under the rules of this chapter.¹⁹⁸

§ 3949. Liability of Master for Want of Ordinary or Reasonable Care in Performing this Duty.¹⁹⁹—It is immaterial on the question of liability under this head whether the employer had or did not have legal title to the scaffold.²⁰⁰ Furthermore, the master may be charged with actionable negligence in failing to guard men on stagings against

¹⁹³ *Nelson v. New York*, 101 App. Div. (N. Y.) 18; s. c. 91 N. Y. Supp. 763.

¹⁹⁴ *Paden v. Van Blarcom*, 100 Mo. App. 185; s. c. 74 S. W. Rep. 124 (in an action for injuries to a domestic through the explosion of a gas range it was held a question for the jury whether the employer was guilty of negligence in not testing the valves before turning on the gas).

¹⁹⁵ *Illinois Cent. R. Co. v. Burton*, 79 S. W. Rep. 231; s. c. 25 Ky. L. Rep. 1916.

¹⁹⁶ *Illinois Cent. R. Co. v. Burton*, 79 S. W. Rep. 231; s. c. 25 Ky. L. Rep. 1916.

¹⁹⁷ That the master is liable where he fails to make reasonable inspections, see: *Rincicotti v. John J. O'Brien Contracting Co.*, 77 Conn. 617; s. c. 60 Atl. Rep. 115 (derick); *Ingham v. John B. Honor Co.*, 113 La. 1040; s. c. 37 South. Rep. 963 (stagings); *Twombly v. Consolidated Elec. Light Co.*, 98 Me.

353; s. c. 57 Atl. Rep. 85 (long extension ladder); *Rapson v. Leighton*, 187 Mass. 432; s. c. 73 N. E. Rep. 540 (stagings). There is a holding that a superintendent in charge of the construction of a building, and ordering a staging to be moved a short distance, is under no duty to inspect the staging after the removal to see if it has been rendered unsafe in the process of moving: *White v. Unwin*, 188 Mass. 490; s. c. 74 N. E. Rep. 924.

¹⁹⁸ *Phoenix Bridge Co. v. Castleberry*, 131 Fed. Rep. 175.

¹⁹⁹ That the master is held to the exercise of reasonable care, see: *E. B. Hunting & Co. v. Quarterman*, 120 Ga. 344; s. c. 47 S. E. Rep. 928; *John S. Metcalf Co. v. Nystedt*, 102 Ill. App. 71; s. c. aff'd, 203 Ill. 333; 67 N. E. Rep. 764; *McCarthy v. Claffin*, 99 Me. 290; s. c. 59 Atl. Rep. 293.

²⁰⁰ *Ehlen v. O'Donnell*, 205 Ill. 38; s. c. 68 N. E. Rep. 766; aff'g s. c. 102 Ill. App. 141.

injuries from outside causes. Thus an employer was held liable to an employé at work on a staging placed above a railroad switch in his yards, and thrown from the staging by an engine running against it. In such a case it was the duty of the master to provide a watchman to warn the employé of the approach of the engine.¹

§ 3950. This Duty Absolute and Unassignable.²

§ 3952. Master Not Liable for Giving Way of such Structure unless he might have known by a Reasonable Inspection that it was Defective.—Here it is the rule that where unsound materials are employed in the erection of a scaffold, and the master or his foreman knew it, or ought to have known it by due care, the master will be liable to an employé injured thereon while exercising reasonable care, unless the employé by ordinary care could have discovered the fact that defective materials were used.³ The plaintiff has the burden of showing that a reasonable inspection would have disclosed the defect that was responsible for his injury.⁴

§ 3953. Master Not Liable for Injuries which may Happen through the Negligent Use of the Structure.⁵

§ 3954. Master Providing Safe and Suitable Appliances, Materials, etc., but Servant Selecting Unsuitable Ones with which to Build the Structure.⁶

§ 3957. Personal Liability for Ordering Servant to Use a Defective Ladder or Scaffold.⁷

¹ Merchants' &c. Oil Co. v. Burns (Tex. Civ. App.), 72 S. W. Rep. 626.

² That the duty of care in this regard is an absolute one that cannot be delegated to another so as to absolve the master from liability, see: *Siversen v. Jenks*, 102 App. Div. (N. Y.) 313; s. c. 92 N. Y. Supp. 382; *Twombly v. Consolidated Elec. Light Co.*, 98 Me. 353; s. c. 57 Atl. Rep. 85.

³ *Richards v. Riverside Iron Works*, 56 W. Va. 510; s. c. 49 S. E. Rep. 437. See also *Indiana &c. Gas &c. Co. v. Vauble*, 31 Ind. App. 370; s. c. 68 N. E. Rep. 195.

⁴ *Snyder v. J. S. Rogers Co.*, 69 N. J. L. 347; s. c. 55 Atl. Rep. 303.

⁵ A decorator at work on a staging, one end of which projected into an elevator shaft, and thrown therefrom when the plank was struck by the ascending elevator, was denied a recovery on the ground that the dangerous situation

was obvious: *Durell v. Hartwell, Williams &c.*, 26 R. I. 125; s. c. 58 Atl. Rep. 448.

⁶ That the master providing safe and suitable appliances is not liable where the servant uses unsuitable ones, see: *Thompson v. Worcester*, 184 Mass. 354; s. c. 68 N. E. Rep. 833; *Landowski v. Chapoton*, 137 Mich. 429; s. c. 100 N. W. Rep. 564; 11 Det. Leg. N. 307 (use of board weakened by knot); *Lockwood v. Tennant*, 137 Mich. 305; s. c. 100 N. W. Rep. 562; 11 Det. Leg. N. 342; *Fukare v. Kerbaugh*, — N. J. L. —; s. c. 61 Atl. Rep. 376.

⁷ A master is not to be charged with negligence in failing to provide a ladder with prongs or safety hooks at the bottom, though it was to stand on a granitoid floor: *Blundell v. William A. Miller Elevator Mfg. Co.*, 189 Mo. 552; s. c. 88 S. W. Rep. 103.

§ 3959. **Interpretation and Application of New York Statute Imposing upon Employers the Duty of Furnishing Safe Scaffolds for their Workmen.**—This statute imposes an absolute duty on the master which he cannot delegate so as to relieve himself from liability.⁸ The term “scaffold” has been held to include scaffoldings erected in factories for use in attaching machinery to the ceiling,⁹ cross beams in steel structures in course of construction,¹⁰ and platforms used in laying concrete.¹¹ It has been held not to include temporary arches used to support brick work while being laid, and upon which the workmen are in the habit of stepping from the scaffold by its side;¹² platforms upon which machinery is temporarily rested pending its removal to another position;¹³ and ordinary stagings put up in rooms to facilitate the placing of fixtures.¹⁴ It has been held that a servant engaged in placing large beams lengthwise across the middle of each of the pockets of a scow—the ends resting in holes bored in the bulkheads—is engaged in the work of repairing or altering a structure, within the meaning of the statute requiring employers to furnish safe scaffoldings for servants thus employed.¹⁵ The decisions of the various supreme courts of the State are not harmonious on the question whether the statute abrogated the fellow-servant doctrine so as to exempt the master from liability for the negligence of fellow servants in the construction of these appliances.¹⁶ The presumption of the master’s negligence has been held to arise from the happening of such accidents as the breaking of a ladder;¹⁷ the splitting of a plank in a scaffold;¹⁸ and the unexplained fall of a scaffolding.¹⁹ In actions for injuries from this cause it is not a defense that the master followed the

⁸ *Madden v. Hughes*, 104 App. Div. (N. Y.) 101; s. c. 93 N. Y. Supp. 324.

⁹ *Wingert v. Krakauer*, 76 App. Div. (N. Y.) 34; s. c. 78 N. Y. Supp. 664.

¹⁰ *Welk v. Jackson Architectural Ironworks*, 98 App. Div. (N. Y.) 247; s. c. 90 N. Y. Supp. 541.

¹¹ *Swenson v. Wilson & Baillie Mfg. Co.*, 102 App. Div. (N. Y.) 477; s. c. 92 N. Y. Supp. 849.

¹² *Haughey v. Thatcher*, 89 App. Div. (N. Y.) 375; s. c. 85 N. Y. Supp. 935.

¹³ *Conley v. Lackawanna Iron & Co.*, 94 App. Div. (N. Y.) 149; s. c. 88 N. Y. Supp. 123.

¹⁴ *Schapp v. Bloomer*, 181 N. Y. 125; s. c. 73 N. E. Rep. 563; rev’g s. c. 90 App. Div. (N. Y.) 612; 85 N. Y. Supp. 1146.

¹⁵ *Madden v. Hughes*, 104 App. Div. (N. Y.) 101; s. c. 93 N. Y. Supp. 324.

¹⁶ That such was the effect of the statute, see: *Holloway v. McWilliams*, 97 App. Div. (N. Y.) 360; s. c. 89 N. Y. Supp. 1074. But see *contra*, *Walters v. George A. Fuller Co.*, 82 App. Div. (N. Y.) 254; s. c. 81 N. Y. Supp. 919; *Gmaehle v. Rosenberg*, 40 Misc. (N. Y.) 267; s. c. 81 N. Y. Supp. 930; *Rotondo v. Smyth*, 92 App. Div. (N. Y.) 153; s. c. 86 N. Y. Supp. 1103.

¹⁷ *Cummings v. Kenny*, 97 App. Div. (N. Y.) 114; s. c. 89 N. Y. Supp. 579.

¹⁸ *Tierney v. Vunck*, 97 App. Div. (N. Y.) 1; s. c. 89 N. Y. Supp. 612.

¹⁹ *Johnson v. Roach*, 83 App. Div. (N. Y.) 351; s. c. 82 N. Y. Supp. 203; 13 N. Y. Ann. Cas. 86.

usual mode of construction if the scaffold was in fact negligently constructed.²⁰

§ 3960. Evidence of Negligence to Charge Employer for Failing to Provide Safe Scaffolds, Ladders, etc.²¹

§ 3963. A Question of Pleading in an Action Grounded on this Liability.²²

§ 3970. Foundries and their Operation.—In a case where foundry men maintained and operated blast furnaces from which molten iron and other materials were liable to be thrown without warning from the mouth of the furnace, and the owners had provided a screen in front of the opening to save operatives from injury, which screen was not replaced after some repairs had been made, and an employé was injured by molten metal flying from the furnace, it was held that the defendant's failure to replace the screen constituted such negligence as to justify a recovery for the injuries, since the original placing of the screen showed a recognition of its necessity.²³

§ 3973. Platforms in Buildings and in Mechanical Operations.²⁴

²⁰ *Siversen v. Jenks*, 102 App. Div. (N. Y.) 313; s. c. 92 N. Y. Supp. 382.

²¹ *Bourbonnais v. West Boylston Mfg. Co.*, 134 Mass. 250; 68 N. E. Rep. 232 (evidence held sufficient to sustain a finding that a staging was furnished by defendant as a completed structure for plaintiff's use in the work in which he was engaged). The fact that a lumber rack fell when only half full, and that the light stuff that was on it at the time constituted half the weight thereon, was sufficient to support a finding that the rack was insufficient: *Corbett v. American Screen Door Co.*, 133 Mich. 669; s. c. 95 N. W. Rep. 737; 10 Det. Leg. N. 305. Evidence is admissible to show in what manner the scaffold could have been made more secure, as, for example, by the use of more nails: *Gratz v. Worden*, 26 Ky. L. Rep. 721; s. c. 82 S. W. Rep. 395.

²² An allegation that the defendant negligently caused the scaffold to be negligently constructed, and to remain in an unsafe condition, and that while the plaintiff was then and there working as a laborer, and using due care for his own safety, the scaffold collapsed, and injured the plaintiff, was held, in the absence of demurrer, not objection-

able after verdict, for failure to allege that the scaffold fell because of its defective condition: *Illinois Terra Cotta Lumber Co. v. Hanley*, 214 Ill. 243; s. c. 73 N. E. Rep. 373.

²³ *Curtis v. McNair*, 173 Me. 270; s. c. 73 S. W. Rep. 167.

²⁴ In a case where a workman employed by defendant to lay brick-work on a temporary arch put in by an independent contractor was injured by the falling of the arch, caused either by negligence in setting it, or in dealing with it by defendant's workmen afterward, it was held that defendant would be liable only on proof of knowledge of its dangerous condition, or that its fall was caused by incompetent servants or an insufficient number of servants: *Haughey v. Thatcher*, 89 App. Div. (N. Y.) 375; s. c. 85 N. Y. Supp. 935. A comparatively new station platform built of three by ten inch yellow pine laid longitudinally was held a reasonably safe place for a car cleaner to walk upon though it had become somewhat splintery by exposure to the weather and trundling done over it, and one of such splinters penetrated the sole of the employé's shoe into his foot and caused the injuries sued upon: *Wendall v. Chicago &c.*

§ 3975. **Quarries and Quarrymen.**—The use of dynamite in slate quarrying does not charge the master with negligence as a matter of law.²⁵

§ 3977. **Steam, Injuries from, Other than from Explosions.**²⁶

§ 3980. **Telegraph Poles.**—Generally speaking, it is the duty of an employer, who sends a servant to the top of a telegraph pole, to inspect the pole in order to see whether it is in a safe condition.²⁷

§ 3986. **Duty of Master to Provide Reasonably Safe Tools, Machinery and Appliances.**²⁸—It is another expression of the doctrine of this

R. Co., 100 Mo. App. 556; s. c. 75 S. W. Rep. 689. In another case it was held that evidence that a plank in a station platform had been in place at least two years longer than its ordinary life, was sufficient to show that the plank was in fact rotten and unsafe when the servant was injured by its giving way: *Adams Exp. Co. v. Smith*, 24 Ky. L. Rep. 1915; s. c. 72 S. W. Rep. 752. ²⁵*Erickson v. Monson Consol. Slate Co.*, 100 Me. 107; s. c. 60 Atl. Rep. 708.

²⁶The owner of a packing house was held liable for injuries to a servant caused by a failure to furnish a cooking retort with a sufficient waste pipe to carry off scalding water, or permitted the pipe to become obstructed and ineffectual, and failed properly to inspect it: *Cudahy Packing Co. v. Sedlack*, 69 Kan. 472; s. c. 77 Pac. Rep. 102. It is the holding of one court that pipes about a mill, subject at times to heavy pressure from escaping steam, should be screwed on the boilers with special care: *Bonnin v. Crowley*, 112 La. 1025; s. c. 36 South. Rep. 842. In a case where the whole apparatus used for conveying steam into a beater in a paper mill was simple, and the only danger arose out of the sudden application of steam to the beater, which would cause the pipe conveying it to swing upward, but a servant properly operating the apparatus would be in a position so as not to be injured thereby, it was held that the master was not negligent, in failing to provide a fastening for the pipe, to a servant who knew the proper method of operating the apparatus, and who was negligent in believing that a wire

running from the end of the movable pipe to the valve stem was designed to keep the pipe from flying up: *Alvey v. American Writing Paper Co.*, 184 Mass. 234; s. c. 68 N. E. Rep. 333.

²⁷*Walsh v. New York & C. R. Co.*, 80 App. Div. (N. Y.) 316; s. c. 80 N. Y. Supp. 767; s. c. aff'd, 178 N. Y. 588; 70 N. E. Rep. 1111. But see *Kellogg v. Denver City Tramway Co.*, 18 Colo. App. 475; s. c. 72 Pac. Rep. 609.

²⁸That it is the master's duty to provide reasonably safe tools, machinery and appliances having in view the work that is to be performed, see generally: *Roche v. Denver & C. R. Co.*, 19 Colo. App. 204; s. c. 73 Pac. Rep. 830; *Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030; s. c. 48 S. E. Rep. 438; *Riverside Mills v. Jones*, 121 Ga. 33; s. c. 48 S. E. Rep. 700; *John S. Metcalf Co. v. Nystedt*, 102 Ill. App. 71; s. c. aff'd, 203 Ill. 333; 67 N. E. Rep. 764; *Bates Mach. Co. v. Crowley*, 115 Ill. App. 540; *Johnson v. Gehbauer*, 159 Ind. 271; s. c. 64 N. E. Rep. 855; *Atchison & C. Bridge Co. v. Miller*, — Kan. —; s. c. 80 Pac. Rep. 18; *Buey v. Chess & Wymond Co.*, 84 S. W. Rep. 563; s. c. 27 Ky. L. Rep. 198; *Conrad Tanning Co. v. Munsey*, 76 S. W. Rep. 841; s. c. 25 Ky. L. Rep. 936; *Broadfoot v. Shreveport Cotton Oil Co.*, 111 La. 467; s. c. 35 South. Rep. 643; *Moses v. Grant Lumber Co.*, 114 La. 933; s. c. 38 South. Rep. 684; *Cowett v. American Woolen Co.*, 97 Me. 543; s. c. 55 Atl. Rep. 494; *Foster v. New York & C. R. Co.*, 187 Mass. 21; s. c. 72 N. E. Rep. 331; *Vant Hul v. Great Northern R. Co.*, 90 Minn. 329; s. c. 96 N. W. Rep. 789 (a flogging hammer used in a machine

section that it is the duty of the master to provide suitable appliances with which the employé, in the exercise of reasonable care, can perform his duty without being exposed to unnecessary danger.²⁹ The rule does not render the master liable for injuries to a servant occasioned by defects in appliances unless he had knowledge thereof or in the exercise of reasonable care could have acquired such knowledge.³⁰ Neither will the master be liable where the servant selected or made the tool,³¹ or was employed by the master to repair the very defect which caused the injury.³² There is a holding that a "buggy" consisting of a tongue about fourteen feet long, with two large wheels at its rear end, connected by an axle, used to move iron beams in the construction of a building, is not a mechanical contrivance, within the meaning of a statute requiring persons employing others to perform labor in the erection of a building to furnish safe and suitable mechanical contrivances.³³

§ 3988. This Duty Primary and Unassignable.³⁴

§ 3989. Degree of Care Demanded of the Master in this Respect.

—It is one expression of the rule to say that a master owes his servant

shop is an implement within the rule); *Kelly v. Stewart*, 93 Mo. App. 47; *Robbins v. Big Circle Min. Co.*, 105 Mo. App. 78; s. c. 79 S. W. Rep. 480; *McDonald v. Standard Oil Co.*, 69 N. J. L. 445; s. c. 55 Atl. Rep. 289; *Pluckham v. American Bridge Co.*, 104 App. Div. (N. Y.) 404; s. c. 93 N. Y. Supp. 748; *Womble v. Merchants' Grocery Co.*, 135 N. C. 474; s. c. 47 S. E. Rep. 493; *Finnerty v. Burnham*, 205 Pa. 305; s. c. 54 Atl. Rep. 996; *Anderson v. Southern R. Co.*, 70 S. C. 490; s. c. 50 S. E. Rep. 202; *Charging v. Toxaway Mills*, 70 S. C. 470; s. c. 50 S. E. Rep. 186; *Sims v. Southern R. Co.*, 66 S. C. 520; s. c. 45 S. E. Rep. 90; *Lancaster Cotton Oil Co. v. White*, 32 Tex. Civ. App. 608; s. c. 75 S. W. Rep. 339; *Atlantic & C. R. Co. v. West*, 101 Va. 13; s. c. 42 S. E. Rep. 914.

²⁹ *Giebell v. Collins Co.*, 54 W. Va. 518; s. c. 46 S. E. Rep. 569.

³⁰ *Stackpole v. Wray*, 99 App. Div. (N. Y.) 262; s. c. 90 N. Y. Supp. 1045; *Meehan v. Great Northern R. Co.*, — N. D. —; s. c. 101 N. W. Rep. 183; *San Antonio & C. R. Co. v. Hahl*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 27.

³¹ *Brundige v. Dodge Mfg. Co.*, 183 Mass. 100; s. c. 66 N. E. Rep. 604.

³² *Kleine v. S. E. Freunds Sons Shoe & C. Co.*, 91 Mo. App. 102.

³³ *Pluckham v. American Bridge Co.*, 104 App. Div. (N. Y.) 404; s. c. 93 N. Y. Supp. 748.

³⁴ *Shea v. Pacific Power Co.*, 145 Cal. 680; s. c. 79 Pac. Rep. 373; *Buey v. Chess & C. Co.*, 84 S. W. Rep. 563; s. c. 27 Ky. L. Rep. 198; *Clay City Lumber & C. Co. v. Noe*, 76 S. W. Rep. 195; s. c. 25 Ky. L. Rep. 668; *Beal v. Bryant*, 99 Me. 112; s. c. 58 Atl. Rep. 428; *Ellis v. Thayer*, 183 Mass. 309; s. c. 67 N. E. Rep. 325; *Kirk v. Sturdy*, 187 Mass. 87; s. c. 72 N. E. Rep. 349; *Franklin v. Missouri & C. R. Co.*, 97 Mo. App. 473; s. c. 71 S. W. Rep. 540; *Newton v. New York & C. R. Co.*, 96 App. Div. (N. Y.) 81; s. c. 89 N. Y. Supp. 23; *Orr v. Southern Bell Tel. & Teleg. Co.*, 132 N. C. 691; s. c. 44 S. E. Rep. 401; *Meehan v. Great Northern R. Co.*, — N. D. —; s. c. 101 N. W. Rep. 183; *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356; s. c. 75 Pac. Rep. 537; 64 L. R. A. 145; *Schiglizzo v. Dunn*, 211 Pa. 253; s. c. 60 Atl. Rep. 724; *Wood v. Rio Grande Western R. Co.*, 28 Utah 351; s. c. 79 Pac. Rep. 182; *Metzler v. McKenzie*, 34 Wash. 470; s. c. 76 Pac. Rep. 114.

reasonable care in view of the situation of the parties, the nature of the business, the character of the appliance, and the exigencies requiring vigilance and attention, and that a breach of this duty is negligence.³⁵ Extraordinary diligence is not demanded. This would be the effect of a rule requiring that an appliance intended for one use should be suitable to every unintended use to which it might be unexpectedly applied.³⁶ The employer is not an insurer of the safety of his employes. He is only required to exercise all reasonable care to provide and maintain safe, sound, and suitable machines and instrumentalities.³⁷ Where the master changes the appliances used in the work, it is his duty to use reasonable care to see that the new appliances are equally safe with the old, and where he has knowledge of a danger caused by the change which would not be imputed to a common laborer, he cannot be said, as a matter of law, to be free from negligence.³⁸

§ 3990. The "Reputable Manufacturer" Doctrine.³⁹

³⁵ That the master is required to exercise reasonable or ordinary care, see generally: *Roche v. Denver & C. R. Co.*, 19 Colo. App. 204; s. c. 73 Pac. Rep. 880; *McCormick Harvesting Mach. Co. v. Wojciechowski*, 111 Ill. App. 641; *Pressed Steel Car Co. v. Herath*, 110 Ill. App. 596; *Cleveland & C. R. Co. v. Snow*, — Ind. App. —; s. c. 74 N. E. Rep. 908; *Twombly v. Consolidated Electric Light Co.*, 98 Me. 353; s. c. 57 Atl. Rep. 85; *Kirk v. Sturdy*, 187 Mass. 87; s. c. 72 N. E. Rep. 349; *Palmer v. Kinloch Tel. Co.*, 91 Mo. App. 106; *New Omaha & C. Light Co. v. Rombold*, — Neb. —; s. c. 97 N. W. Rep. 1030; *Campbell v. T. A. Gillespie Co.*, 69 N. J. L. 279; s. c. 55 Atl. Rep. 276; *Bodie v. Charleston & C. R. Co.*, 66 S. C. 302; s. c. 44 S. E. Rep. 943; *Hightower v. Gray*, 36 Tex. Civ. App. 674; s. c. 83 S. W. Rep. 254; *Parlett v. Dunn*, 102 Va. 459; s. c. 46 S. E. Rep. 467; *Fulton v. Crosby & C. Co.*, 57 W. Va. 91; s. c. 49 S. E. Rep. 1012. Where the question of a master's liability rests on the single question whether he used ordinary care in furnishing appliances, and his liability may rest largely on the question whether the defect was one which could have been discovered by ordinary care, or was such that reasonable care could not have discovered it, the unqualified statement, in an instruction, that it was

the master's duty to furnish reasonably safe appliances, was erroneous: *Cudahy Packing Co. v. Roy*, — Neb. —; s. c. 99 N. W. Rep. 231.

³⁶ *Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030; s. c. 48 S. E. Rep. 438.

³⁷ *McCabe v. Montana Cent. R. Co.*, 30 Mont. 323; s. c. 76 Pac. Rep. 701.

³⁸ *Welle v. Celluloid Co.*, 175 N. Y. 401; s. c. 67 N. E. Rep. 609; rev'g s. c. 65 N. Y. Supp. 370.

³⁹ These cases support the reputable manufacturer doctrine: *Westinghouse Electric & C. Co. v. Heimlich*, 127 Fed. Rep. 92 (injury caused by break in derrick chain purchased from reputable chain maker and chain appeared externally sound and in three months' use had not disclosed defects due to crystallization of iron); *Langdon-Creasy Co. v. Rouse*, 72 S. W. Rep. 1113; s. c. 24 Ky. L. Rep. 2095 (injury from explosion of lamp bought from reputable manufacturer, and purchaser assured by many persons using similar lamps that they were safe, and had made a personal test with the same conclusion); *South Baltimore Car Works v. Schaefer*, 96 Md. 88; s. c. 53 Atl. Rep. 665 (injury caused by knife flying from molding machine and accident of this character unprecedented with machines of this type); *Corbett v. St. Vincent's Industrial*

§ 3991. **Ordinary Use as a Test of the Suitableness of a Machine or Appliance.**—Some courts hold that a master has discharged the duty he owes his servant in regard to the appliances furnished him, where he provides machinery or appliances equally as safe as those in general use by men of ordinary prudence who are engaged in the same kind of business.⁴⁰

§ 3992. **Master Bound to a Care in Proportion to the Danger to be Avoided.**⁴¹

§ 3993. **Master not Bound to Provide the Safest and Best Machinery, but Only Such as is in Common Use.**—The master is not a guarantor of the safety of the appliances furnished for the use of his servants, but his duty is discharged if he exercises ordinary care and furnishes appliances which the experience of the particular trade or business has sanctioned as reasonably safe. It is not demanded of him that he should furnish machinery of the latest, most improved or best type.⁴² The master is not charged with negligence in failing to adopt

School, 79 App. Div. (N. Y.) 334; s. c. 79 N. Y. Supp. 369 (mangle of type in general use for a period of nine years without accident); Koehler v. New York Steam Co., 84 App. Div. (N. Y.) 221; s. c. 82 N. Y. Supp. 588 (injury from bursting of steam elbow pipe and master had made provision for inspection by competent servants with conclusion that master was not liable whether or not inspection had actually been made by servant charged with that duty).

⁴⁰ Pressly v. Dover Yarnmills, 138 N. C. 410; s. c. 51 S. E. Rep. 69; Boyle v. Union Pac. R. Co., 25 Utah 420; s. c. 71 Pac. Rep. 988. See generally Robert Portner Brewing Co. v. Cooper, 116 Ga. 171; s. c. 42 S. E. Rep. 408; Weed v. Chicago & O. R. Co., 5 Neb. (unoff.) 623; s. c. 99 N. W. Rep. 827; Stauning v. Great Northern R. Co., 88 Minn. 480; s. c. 93 N. W. Rep. 518. A skid for rolling barrels into a door being secured in the usual manner, the master is not liable to an employé injured thereby, though it might have been safer if attached so as to be immovable: Beckman v. Anheuser-Busch Brewing Ass'n, 98 Mo. App. 555; s. c. 72 S. W. Rep. 710.

⁴¹ That an employer who can and should provide against the possibility of injury to his employés from defective machinery and fails to do

so is liable for a resulting injury, see: Collins v. H. F. Lewis & Co., 111 La. 741; s. c. 35 South. Rep. 886.

⁴² Glenmont Lumber Co. v. Roy, 126 Fed. Rep. 524; Westinghouse Electric & Mfg. Co. v. Heimlich, 127 Fed. Rep. 92; Wabash R. Co. v. Burress, 111 Ill. App. 258; Buttner v. South Baltimore Steel Car & Co., 101 Md. 168; s. c. 60 Atl. Rep. 597; Blundell v. William A. Miller Elevator Mfg. Co., 189 Mo. 552; s. c. 88 S. W. Rep. 103; Goransson v. Riter-Conley Mfg. Co., 186 Mo. 300; s. c. 85 S. W. Rep. 338; Smith v. Fordyce, 190 Mo. 1; s. c. 88 S. W. Rep. 679; Franklin v. Missouri, K. & T. R. Co., 97 Mo. App. 473; s. c. 71 S. W. Rep. 540; Tompkins v. Marine Engine & Co., 70 N. J. L. 330; s. c. 58 Atl. Rep. 393; Rosa v. Volkening, 64 App. Div. (N. Y.) 426; s. c. 72 N. Y. Supp. 236; s. c. aff'd, 173 N. Y. 590; 65 N. Y. Supp. 1122; Marks v. Harriet Cotton Mills, 135 N. C. 287; s. c. 47 S. E. Rep. 432; Womble v. Merchants' Grocery Co., 135 N. C. 474; s. c. 47 S. E. Rep. 493; Carr v. American Locomotive Co., 26 R. I. 180; s. c. 58 Atl. Rep. 678; Desrosiers v. Bourn, 26 R. I. 6; s. c. 57 Atl. Rep. 935; Koon v. Southern Ry., 69 S. C. 101; s. c. 48 S. E. Rep. 86; Giebell v. Collins Co., 54 W. Va. 518; s. c. 46 S. E. Rep. 569. But see Going

some method or instrumentality which some people believe to be less perilous than the method adopted.⁴³ A party attempting to establish negligence in the use of an old style appliance by showing that later appliances are in general use must also show the practicability and increased safety of the later devices.⁴⁴

§ 3995. Duty to Maintain Machinery, Tools and Appliances in a Reasonable State of Repair.⁴⁵

§ 3996. Machinery Long Used without Accident.⁴⁶

§ 3997. Rule does not Justify Master in Supplying Appliances Inherently or Obviously Dangerous.—Where the liability of the master depends solely on whether an appliance furnished the servant was out of repair, it is, of course, immaterial that similar machines were in general use throughout the country.⁴⁷

§ 4000. Master Furnishing Suitable Appliances, but Servant Using them for a Purpose not Contemplated or Intended.⁴⁸—Under this

v. Alabama Steel &c. Co., 141 Ala. 537; s. c. 37 South. Rep. 784; and Davis v. Korman, 141 Ala. 479; s. c. 37 South. Rep. 789, to the effect that it does not necessarily follow from the fact that the appliances in question were used by many prudent persons in the same business that the master was free from negligence in using them.

⁴³ Parlett v. Dunn, 102 Va. 459; s. c. 46 S. E. Rep. 467.

⁴⁴ Bryce v. Burlington &c. R. Co., 119 Iowa 274; s. c. 93 N. W. Rep. 275.

⁴⁵ It is the duty of the master not only to provide reasonably safe machinery and appliances, but he must exercise ordinary care to keep them in proper repair, and he will be liable where he negligently performs the duty and an employé suffers injury thereby: Houston Biscuit Co. v. Dial, 135 Ala. 168; s. c. 23 South. Rep. 268; Rock Island Sash &c. Co. v. Pohlman, 210 Ill. 133; s. c. 71 N. E. Rep. 428; aff'g s. c. 99 Ill. App. 670; Klaffke v. Bettendorf Axle Co., 125 Iowa 223; s. c. 100 N. W. Rep. 1116; Buey v. Chess & Wymond Co., 84 S. W. Rep. 563; s. c. 27 Ky. L. Rep. 198; Ball v. Gussenhoven, 29 Mont. 321; s. c. 74 Pac. Rep. 371; Lee v. St. Louis &c. R. Co., 112 Mo. App. 372; s. c. 87 S. W. Rep. 12; Meehan v. Great Northern R. Co., — N. D. —; s. c. 101 N. W. Rep. 183; Finnerty v.

Burnham, 205 Pa. 305; s. c. 54 Atl. Rep. 996; Southern Ry. Co. v. Carson, 194 U. S. 136; s. c. 48 L. Ed. 907; 24 Sup. Ct. Rep. 609. An instruction that it was defendant's duty to furnish an appliance that was in a reasonably safe condition, and to keep it in such condition, was held to impose too high a degree of care on the defendant: Missouri &c. R. Co. v. Smith, — Tex. Civ. App. —; s. c. 82 S. W. Rep. 787. That repairs must be made promptly, see: Franck v. American Tartar Co., 91 App. Div. (N. Y.) 571; s. c. 87 N. Y. Supp. 219.

⁴⁶ Skapura v. National Sugar Refining Co., 83 App. Div. (N. Y.) 21; s. c. 81 N. Y. Supp. 1085 (master not negligent where hooks used for hoisting similar to the one in question had been used for eight years without accident); Turner v. Detroit Southern R. Co., 137 Mich. 142; s. c. 100 N. W. Rep. 268; 11 Det. Leg. N. 206 (master not negligent where it was shown that cars similar to the one causing the injury had been used for four years without accident and were in common use on other roads).

⁴⁷ Dean v. St. Louis Woodenware Works, 106 Mo. App. 167; s. c. 80 S. W. Rep. 292.

⁴⁸ That the master is not liable where this is done, see: Miniter v. Chicago &c. R. Co., 122 Iowa 46; s. c. 96 N. W. Rep. 1103.

principle it has been held that a master furnishing adequate appliances for the work is not liable for injuries to a servant resulting from a part of the appliances furnished by him being used by the servant in conjunction with an implement not furnished by the master, but substituted without his knowledge, and this though his foreman was instrumental in causing the substitution.⁴⁹

§ 4001. **Suitable Machinery, etc., Furnished by Master, but Servant Injured in Consequence of its Negligent Use by his Fellow Servants.**⁵⁰—But the law will not presume that the fellow servant selected an obviously imperfect appliance when he might have chosen a good one.⁵¹ The master will be liable, of course, where the selection is directed by an employé sustaining the relation of vice-principal.⁵²

§ 4002. **Machinery Dangerous if Improperly Used.**—Speaking generally, the mere fact that an appliance may become dangerous if carelessly used is not a test of the master's liability.⁵³ Thus the master was absolved from a charge of negligence in failing to furnish a servant with a reasonably safe hammer, where the hammer furnished was ordinarily as safe as any other for doing the work, and could have been used without danger at any other place, and was rendered dangerous and caused the injury solely by the act of the servant in using it—without necessity therefor—at a place where it could readily be caught in the machinery.⁵⁴

§ 4003. **Servant Selecting Something Insufficient where the Master has Provided Materials or Appliances which are Sufficient.**⁵⁵

§ 4004. **Lack of Suitable Appliances.**—Where the master, through a lack of sufficient appliances, requires a servant to use appliances originally intended for another use he will be as responsible to the servant as if the appliance had originally been intended for this new use.⁵⁶

⁴⁹ Hackett v. Masterson, 88 App. Div. (N. Y.) 73; s. c. 84 N. Y. Supp. 751.

⁵⁰ That the master is not liable in such a case, see: Amburg v. International Paper Co., 97 Me. 327; s. c. 54 Atl. Rep. 765.

⁵¹ Campbell v. T. A. Gillespie Co., 69 N. J. L. 279; s. c. 55 Atl. Rep. 276.

⁵² Farrell v. Eastern Machinery Co., 77 Conn. 484; s. c. 59 Atl. Rep. 611; 68 L. R. A. 239.

⁵³ Donohoe v. Lonsdale Co., 25 R. I. 187; s. c. 55 Atl. Rep. 326.

⁵⁴ Hettich v. Hillje, 33 Tex. Civ. App. 571; s. c. 77 S. W. Rep. 641.

⁵⁵ That the master is not liable under these circumstances, see: Kellogg v. Denver City Tramway Co., 18 Colo. App. 475; s. c. 72 Pac. Rep. 609; Amburg v. International Paper Co., 97 Me. 327; s. c. 54 Atl. Rep. 765; Morris v. Eastern R. Co., 88 Minn. 112; s. c. 92 N. W. Rep. 535; O'Brien v. Missouri & C. R. Co. of Texas, 36 Tex. Civ. App. 528; s. c. 82 S. W. Rep. 319.

⁵⁶ Babcock Bros. Lumber Co. v. Johnson, 120 Ga. 1030; s. c. 48 S. E. Rep. 438.

In one case it was held that a manufacturer of screws was not liable to an employé on the ground of not furnishing suitable appliances because a pipe-horse to hold the wire before it entered the machine was not furnished, it appearing that there was a horse sufficient for the length of the wire at the time of the accident, which occurred from the horse not being moved up toward the machine as the wire grew shorter, either through the negligence of the employé, in getting a truck in the way, or of a fellow servant, who should have moved it up.⁵⁷

§ 4005. Defects or Dangers Suddenly Appearing.⁵⁸

§ 4006. Injuries to Servants Through the Sudden Starting of Machinery.—Under a statute giving a servant an action against his master for injuries caused by the negligence of a superintendent, it is held to be the duty of a superintendent who puts a servant at work in a place which is dangerous if the machinery is started, to look after the servant and see that the machinery does not start prematurely.⁵⁹ In another case a servant who was employed in the defendant's mill as repairman, was informed by its superintendent that he was going to shut the mill down for half an hour for repairs, as was the custom when repairs were being made, and requested the plaintiff to make the repairs. The servant began work, and leaned over a belt to tighten a cap, when the superintendent gave the order to start the mill, without the customary warning, and the plaintiff was injured. The court held that the evidence showed gross negligence on the part of the superintendent and that this negligence was the proximate or immediate cause of the injury.⁶⁰

§ 4009. Employer Need Not Own the Dangerous Machine by which Employé is Injured.⁶¹—The rule that the duty of a master with respect to the care of the tools and appliances furnished for his servant's work is limited to such as are in fact supplied by the master is held not to apply to the failure of the master to supply appliances needed, not for the work itself, but solely to protect the servant against latent dangers arising out of the work.⁶²

⁵⁷ Conner v. Draper Co., 182 Mass. 184; s. c. 65 N. E. Rep. 39.

⁵⁸ On the ground that such an accident could not have been anticipated, it has been held that a mineral water manufacturer was not required to furnish masks to employées handling bottles, to prevent injuries from explosions: Dulling v. G. A. Duerler Mfg. Co., — Tex. —; s. c. 87 S. W. Rep. 332; aff'g s. c. 83 S. W. Rep. 889.

⁵⁹ Greenstein v. Chick, 187 Mass. 157; s. c. 72 N. E. Rep. 955.

⁶⁰ Mathews v. Daly West Min. Co., 27 Utah 193; s. c. 75 Pac. Rep. 722.

⁶¹ Central of Georgia R. Co. v. McClifford, 120 Ga. 90; s. c. 47 S. E. Rep. 590; Sharpley v. Wright, 205 Pa. 253; s. c. 54 Atl. Rep. 896 (derick); Wood v. Rio Grande Western R. Co., 28 Utah 351; s. c. 79 Pac. Rep. 182.

⁶² Burns v. Delaware & C. Tel. Co., 70 N. J. L. 745; s. c. 59 Atl. Rep. 220, 592; 67 L. R. A. 956.

§ 4011. **Various Defects with Respect to which Negligence has been Imputed to the Master.**—There is authority that the failure of an employer to furnish a domestic servant with a lodging room in such repair as not to endanger her health is a violation of his legal duty to furnish safe appliances.⁶³

§ 4013. **Injuries from Defects in Machinery, etc., with Respect to which Employers have been Exonerated.**⁶⁴

§ 4019. **Statutes Defining and Enforcing the Duty to Safeguard.**—These laws are reasonably construed.⁶⁵ They are not generally regarded as having changed the rules of law as to contributory negligence or the assumption of risk by the employé.⁶⁶ It is essential to a recovery in all cases that the violation of the statute should have been the proximate cause of the injury.⁶⁷ The statutes are not limited in their operation to places where goods are manufactured for sale, but include shops devoted exclusively to repairs.⁶⁸ It is not necessary that the employé should demand that the machines be equipped with guards.⁶⁹ Under these statutes the master will be liable for injuries to

⁶³ *Collins v. Harrison*, 25 R. I. 489; s. c. 56 Atl. Rep. 678; 64 L. R. A. 156.

⁶⁴ In a case where a servant employed as a carpenter was injured by a nail flying out when he struck it in attempting to drive it, causing an injury to his eye, the mere fact that the nail was of a character more difficult to start into the wood than others, and that it was more inclined to fly out, was held not to render the master liable, the servant being an experienced carpenter and having used a great many nails of that character: *Anderson v. Forrester-Nace Box Co.*, 103 Mo. App. 382; s. c. 77 S. W. Rep. 486.

⁶⁵ The statutes do not require the master to provide a hood or guard for inner and ordinarily inaccessible parts of machinery: *Schoultz v. Eckardt Mfg. Co.*, 112 La. 568; s. c. 36 South. Rep. 593. The Ohio statute has been construed not to require guards for reciprocating parts of a steam engine: *Crossman v. P. & T. Degnan Sand & Co.*, 24 Ohio Cir. Ct. Rep. 585. It is not necessary to guard shafting located as high above the floor as eight (*Scialo v. Steffens*, 105 App. Div. (N. Y.) 592; s. c. 94 N. Y. Supp. 305) and thirteen feet (*Dillon v. National Coal Tar Co.*, 181 N. Y. 215; s. c. 73 N. E. Rep. 978; rev'g s. c. 88 App.

Div. (N. Y.) 614; 84 N. Y. Supp. 1123).

⁶⁶ *Espenlaub v. Ellis*, 34 Ind. App. 163; s. c. 72 N. E. Rep. 527; *Swenson v. Osgood-Blodgett Mfg. Co.*, 91 Minn. 509; s. c. 93 N. W. Rep. 645; *Sitts v. Waiontha Knitting Co.*, 94 App. Div. (N. Y.) 38; s. c. 87 N. Y. Supp. 911; *Langlois v. Dunn Worsted Mills*, 25 R. I. 645; s. c. 57 Atl. Rep. 910. But see *Hall v. West & Slade Mill Co.*, 39 Wash. 447; s. c. 81 Pac. Rep. 915; *American Car & Co. v. Clark*, 32 Ind. App. 644; s. c. 70 N. E. Rep. 828.

⁶⁷ *Davis v. Mercer Lumber Co.*, 164 Ind. 413; s. c. 73 N. E. Rep. 899; *P. H. & F. M. Roots Co. v. Meeker*, 165 Ind. 132; s. c. 73 N. E. Rep. 253. The mere fact that the servant slipped on the floor and thereby caught his hand in the unguarded machinery does not relieve the master from liability or render his negligent act in leaving the machinery unguarded any less the proximate cause of the injury: *Espenlaub v. Ellis*, 34 Ind. App. 163; s. c. 72 N. E. Rep. 527.

⁶⁸ *Baltimore & C. R. Co. v. Cavanaugh*, 35 Ind. App. 32; s. c. 71 N. E. Rep. 239.

⁶⁹ *Blanchard-Hamilton Furniture Co. v. Colvin*, 32 Ind. App. 398; s. c. 69 N. E. Rep. 1032.

a servant caused by the disobedience by a fellow servant of orders requiring him to use a guard, where the disobedience is known to the superintendent and tacitly acquiesced in by such superintendent.⁷⁰ A category of machinery requiring safeguards includes emery belts for polishing metals,⁷¹ saws,⁷² cog-wheels,⁷³ and trip hammers.⁷⁴ The Rhode Island law making it the duty of the master to provide "all belts and gearing" with proper safeguards, has been held not to oblige him to guard shaftings and pulleys.⁷⁵ The Indiana act has been held not violated by the failure of the owner of a sawmill to construct a chute for conveying slabs from the second floor of the mill to the ground.⁷⁶ The question as to the practicability of the sufficiency of guards is regarded as one of fact for the jury.⁷⁷

§ 4020. Doctrines and Decisions which Exonerate the Master in this Regard.—In the absence of statute on the question, the fact that a piece of machinery causing an injury would have been less dangerous had it been safeguarded does not of itself impute the master with negligence as a matter of law.⁷⁸ In one jurisdiction it has been held proper to admit evidence of custom or usage as to safeguarding rip-saws, as bearing on the question of the master's negligence, though a failure to comply with this custom would not necessarily charge the master with negligence.⁷⁹

§ 4022. Decisions Relating to Injuries from Unguarded Set-Screws—Employers Exonerated.—The use of a set-screw does not charge the master with negligence as a matter of law,⁸⁰ and the failure to comply with a statute requiring set-screws to be covered when deemed neces-

⁷⁰ *Espenlaub v. Ellis*, 34 Ind. App. 163; s. c. 72 N. E. Rep. 527.

⁷¹ *La Porte Carriage Co. v. Sulender*, — Ind. App. —; s. c. 71 N. E. Rep. 922.

⁷² *Baltimore & c. R. Co. v. Cavanaugh*, 35 Ind. App. 32; s. c. 71 N. E. Rep. 239; *Davis v. Mercer Lumber Co.*, 164 Ind. 413; s. c. 73 N. E. Rep. 899.

⁷³ *Buehner v. Creamery Package Mfg. Co.*, 124 Iowa 445; s. c. 100 N. W. Rep. 345.

⁷⁴ *Green v. American Car & c. Co.*, 163 Ind. 135; s. c. 71 N. E. Rep. 268.

⁷⁵ *Pierce v. Contrexville Mfg. Co.*, 25 R. I. 512; s. c. 56 Atl. Rep. 778.

⁷⁶ *Crum v. North Vernon Pump & c. Co.*, 34 Ind. App. 253; s. c. 72 N. E. Rep. 193.

⁷⁷ *La Porte Carriage Co. v. Sulender*, — Ind. App. —; s. c. 71 N. E. Rep. 922; *Baltimore & c. R. Co. v. Cavanaugh*, 35 Ind. App. 32; s. c.

71 N. E. Rep. 239; *Bair v. Heibel*, 103 Mo. App. 621; s. c. 77 S. W. Rep. 1017; *Fronk v. J. H. Evans City Steam Laundry*, — Neb. —; s. c. 96 N. W. Rep. 1053.

⁷⁸ *Marks v. Harriet Cotton Mills*, 135 N. C. 287; s. c. 47 S. E. Rep. 432. In a case where a small circular rip-saw in a mill was set in a table so that less than one-half its diameter protruded above the same, the mill owner was held not guilty of negligence justifying a recovery for injury to a mature servant operating the same for failure to provide a guard on or about the saw: *Chicago Veneer Co. v. Walden* (Ky.), 82 S. W. Rep. 294.

⁷⁹ *Crooker v. Pacific Lounge & c. Co.*, 34 Wash. 191; s. c. 75 Pac. Rep. 632.

⁸⁰ *Aurora Boiler Works v. Colli-gan*, 115 Ill. App. 527.

sary by the factory inspector is regarded only as evidence of the master's negligence.⁸¹ The New York factory act has been held not to apply to set-screws so located that the person operating the machinery would not come in contact with them, and is not available to persons not employed in operating the machinery.⁸² It has been held that the existence upon the collar of a revolving shaft of a small set-screw with an oval head one-fourth of an inch in diameter, and projecting only one-sixteenth of an inch above the surface of the collar, is not such a circumstance as would lead a prudent man to apprehend danger from it to a workman having no occasion to touch the collar.⁸³

§ 4026. Care Demanded of Master in the Construction and Operation of Derricks, Lifting Cranes, etc.⁸⁴—Under the general rule the master is not liable for injuries the result of a defect in the derrick not known to him, and which he could not have known by the exercise of reasonable diligence in time to have corrected the defect.⁸⁵ A New York case is authority that a derrick car, being operated as a single and entire piece of apparatus, is an appliance, and not a place to work, under the rules.⁸⁶

§ 4027. Care in Selecting the Materials from which such Appliances are Constructed.—In one case it was held that the inspection of a derrick constructed of hickory, a timber peculiarly susceptible to dry rot and discoverable only by boring, was defective, where the only test employed was the raising of a weight a foot or two and then shaking it to see whether the derrick would stand the strain.⁸⁷

§ 4030. Defects with Respect to which the Employer was Held Liable.—In a case where one of the cables supporting the mast of a derrick was spliced, but no "thimbles" to obviate friction were placed in the loops of the splice, and the constant friction caused the cable at the splice to become worn, which fact would have been disclosed by a proper inspection, it was held that the proximate cause of an injury to a servant resulting from the parting of the cable was not the failure to use the "thimbles," but the failure of the master's agent in charge of the work to inspect the splice and make proper repairs.⁸⁸

⁸¹ *Sipes v. Michigan Starch Co.*, 137 Mich. 258; s. c. 100 N. W. Rep. 447; 11 Det. Leg. N. 287.

⁸² *Shaw v. Union Bag & Co.*, 76 App. Div. (N. Y.) 296; s. c. 79 N. Y. Supp. 276.

⁸³ *Cowett v. American Woolen Co.*, 100 Me. 65; s. c. 60 Atl. Rep. 703.

⁸⁴ That it is the duty of the master to provide and maintain a reasonably safe derrick, see: *Rincocotti v. John J. O'Brien Contracting*

Co., 77 Conn. 617; s. c. 60 Atl. Rep. 115.

⁸⁵ *Southern Car & Co. v. Jennings*, 137 Ala. 247; s. c. 34 South. Rep. 1002.

⁸⁶ *Wagner v. New York & C. R. Co.*, 76 App. Div. (N. Y.) 552; s. c. 78 N. Y. Supp. 696.

⁸⁷ *Meehan v. Atlas Safe Moving & Co.*, 94 App. Div. (N. Y.) 306; s. c. 87 N. Y. Supp. 1031.

⁸⁸ *Rincicotti v. John J. O'Brien*

§ 4034. Faults in the Operation of Derrick with Respect to which Negligence has been Ascribed to the Master.⁸⁹

§ 4036. Electrical Appliances.⁹⁰—A telephone company allowing an electric light company to string wires on its poles is charged with the duty to use reasonable precaution to see that the highly charged electric light wires do not expose its employes to unusual peril.⁹¹ The decisions are not harmonious on the question whether a telegraph pole is to be regarded as a place to work or an appliance. Both views find support in the later decisions.⁹²

§ 4041. Animals, Vicious.⁹³—In a case where an employer exhibiting a gentle mare at a fair unbridled her, put on a halter, and left the driver to lead her to a feed box in front of a tent on the fair grounds without unhitching her from the wagon, and there was nothing apparently calculated to frighten her at the time, it was held that the master was not guilty of negligence, although immediately afterward the mare became unmanageable and ran over the driver and fatally injured him.⁹⁴

§ 4042. Belts.—The failure of a master to comply with the statute requiring him to install belt shifters when directed by the proper official, is negligence, as a matter of law, in some jurisdictions.⁹⁵ The master will not be liable for not furnishing a better appliance for shifting belts if the appliance furnished is safe and suitable when properly used and the servant had made no objection to its use.⁹⁶

Contracting Co., 77 Conn. 617; s. c. 60 Atl. Rep. 115.

⁸⁹ Consolidated Stone Co. v. Morgan, 160 Ind. 241; s. c. 66 N. E. Rep. 696 (complaint in action for death caused by fall of derrick, held to state a good cause of action).

⁹⁰ That the master is charged with a degree of care commensurate with the danger to be apprehended from contact with charged wires, see: Paducah R. & C. Co. v. Bell, 27 Ky. L. Rep. 428; s. c. 85 S. W. Rep. 216. In a case where a lineman was injured by the breaking of a cross-arm at the top of a telephone pole upon which he was stretching certain wires and the break was caused by the existence of a knot in the timber which was obscured by paint, and could not have been discovered by ordinary inspection, and was purchased by the telephone company after being painted, it was held that the facts were insufficient to conclusively establish negligence

on the part of the employer: Maryland Tel. & C. Co. v. Cloman, 97 Md. 620; s. c. 55 Atl. Rep. 681.

⁹¹ Barto v. Iowa Tel. Co., 126 Iowa 241; s. c. 101 N. W. Rep. 876.

⁹² Dawson v. Lawrence Gaslight Co., 188 Mass. 481; s. c. 74 N. E. Rep. 912 (is a place to work); Britton v. Central Union Tel. Co., 131 Fed. Rep. 844; s. c. 65 C. C. A. 598 (is an appliance).

⁹³ That master is liable for injuries to servants caused by vicious horses, see: Carena v. Zanmatti, 82 App. Div. (N. Y.) 11; s. c. 81 N. Y. Supp. 463; McCready v. Stepp, 104 Mo. App. 340; 78 S. W. Rep. 671.

⁹⁴ Fifer v. Burch, 68 Neb. 217; s. c. 94 N. W. Rep. 107.

⁹⁵ Indiana Mfg. Co. v. Wells, 31 Ind. App. 460; s. c. 68 N. E. Rep. 319.

⁹⁶ Duntley v. Inman, Poulsen & Co., 42 Ore. 334; s. c. 70 Pac. Rep. 529; 59 L. R. A. 785.

§ 4046. **Teams, Wagons, Vehicles, Drawn by Animals.**—Gross and palpable negligence was discovered by a court in a case where a foreman ordered an employé to place himself in a dangerous position under a wagon drawn by a span of mules and then directed the teamster to leave the mules, without taking any other precaution to prevent their starting up than to place himself in front of them.⁹⁷

§ 4048. **General Nature of Master's Obligation to Employ Competent, Sober, and Fit Fellow Servants.**⁹⁸

§ 4052. **Cases Exhibiting no Evidence of Negligence in this Respect.**⁹⁹

§ 4053. **Evidence to Make out a Case of Incompetency on the Part of an Employé.**—There is a presumption that the master exercised proper care in providing competent workmen in the absence of contrary evidence.¹⁰⁰ In a case where the negligence relied on for a recovery was based on the employment by the master of an alleged incompetent master mechanic, it was held that mere proof that the master mechanic removed from a throttle-valve a "drip cock" which had been attached to it after many years of safe and effective use of the valve without the "drip cock," was insufficient without more to sustain the charge of negligence.¹⁰¹

§ 4055. **General Nature of the Duty to Warn and Instruct.**¹⁰²—The master will be liable for injuries the result of a failure to warn a

⁹⁷ *Borden v. Falk Co.*, 97 Mo. App. 566; s. c. 71 S. W. Rep. 478.

⁹⁸ That the master must exercise reasonable care to employ competent servants and is liable for injuries due to neglect of such duty, see: *Southern Pac. Co. v. Hetzer*, 135 Fed. Rep. 272; s. c. 68 C. C. A. 26; *Atchison & Co. v. Miller*, — Kan. —; s. c. 80 Pac. Rep. 18.

⁹⁹ Negligence of a master in the employment of a servant addicted to drinking was held not shown by mere evidence of two witnesses that the employé in question had been known to drink, but there was no evidence by any witness that he was ever intoxicated or that his employer had knowledge that he drank and there was in fact evidence that he was not in the habit of drinking: *Delory v. Blodgett*, 185 Mass. 126; s. c. 69 N. E. Rep. 1078; 64 L. R. A. 114. An employer will not be charged with negligence of a foreman in ordering an intoxicated employé to perform a piece of work

wherein a fellow servant is injured by reason of the intoxicated condition of the employé where it is shown that the foreman did not know at the time that the employé was under the influence of liquor, and there is no evidence that he should have known his condition: *Rose v. Louisville & C. R. Co.*, 26 Ky. L. Rep. 321; s. c. 81 S. W. Rep. 248.

¹⁰⁰ *Hilton v. Fitchburg R. Co.*, 73 N. H. 116; s. c. 59 Atl. Rep. 625.

¹⁰¹ *Moore Lime Co. v. Johnston*, 103 Va. 84; s. c. 48 S. E. Rep. 557.

¹⁰² That the master must warn servants of all dangers to which they will be exposed in the course of their employment except those which the employé may be deemed to have foreseen as necessarily incident to his employment, or which may be open and obvious to a person of his experience and understanding, or such as the master cannot be deemed to have foreseen, see generally: *Staubley v. Potomac Electric Power Co.*, 21 App. (D. C.)

servant, though he could not have anticipated that the particular injury would result in the form in which it actually happened.¹⁰³ In the case of an employment particularly hazardous it is the master's duty to give full and complete information to the servant as to the dangers, and sufficient instruction so that he may know how to avoid the dangers by the exercise of due care.¹⁰⁴

§ 4056. **This Duty Absolute in the Sense that it Cannot be Delegated.**¹⁰⁵

§ 4057. **Fellow Servant, Selected to Perform this Duty, Becomes a Vice-Principal.**¹⁰⁶

§ 4059. **Duty to Warn Servant with Respect to Latent Dangers Known to the Master but Not Obvious or Not Known to the Servant.**

—It is another statement of the doctrine of the main section to say, that it is the duty of the master to warn the servant of latent defects or hazards incident to an occupation that he knows, or ought to know, and which the servant from ignorance or inexperience is not capable of understanding and appreciating.¹⁰⁷ The fact that the appliances are in perfect order will not relieve the master from the duty of instruct-

160; *Crown Cotton Mills v. McNally*, 123 Ga. 35; s. c. 51 S. E. Rep. 13; *Yentsch v. Chloride Battery Co.*, 96 Md. 679; s. c. 54 Atl. Rep. 877; *Evans Laundry Co. v. Crawford*, 67 Neb. 153; s. c. 93 N. W. Rep. 177; 94 N. W. Rep. 814; *Gallman v. Union Hardwood Mfg. Co.*, 65 S. C. 192; s. c. 43 S. E. Rep. 524; *Galveston & C. R. Co. v. Manns*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 254.

¹⁰³ *Jensen v. Commodore Min. Co.*, 94 Minn. 53; s. c. 101 N. W. Rep. 944.

¹⁰⁴ *Illinois Steel Co. v. Ryska*, 102 Ill. App. 347; s. c. aff'd, 200 Ill. 280; 65 N. E. Rep. 734; *Welch v. Bath Ironworks*, 98 Me. 361; s. c. 57 Atl. Rep. 88.

¹⁰⁵ *Western Electric Co. v. Hanselmann*, 136 Fed. Rep. 564; s. c. 69 C. C. A. 346; *Simone v. Kirk*, 173 N. Y. 7; s. c. 65 N. E. Rep. 739; rev'g s. c. 67 N. Y. Supp. 1019. It is not enough to satisfy the rule of law under this head that the master has provided a competent person to give the warning, but the warning must be actually given: *Coffeyville Vitriified Brick & Co. v. Shanks*, 69 Kan. 306; 76 Pac. Rep. 856.

¹⁰⁶ See generally: *Rogers v. Cleve-*

land & C. R. Co., 211 Ill. 126; s. c. 71 N. E. Rep. 850; rev'g s. c. 109 Ill. App. 494; *McDonald v. Champion Iron & Co.*, 140 Mich. 401; s. c. 103 N. W. Rep. 829; 12 Det. Leg. N. 208; *Zellars v. Missouri Water & C. Co.*, 92 Mo. App. 107; *Harris v. Bal-four Quarry Co.*, 137 N. C. 204; s. c. 49 S. E. Rep. 95.

¹⁰⁷ *Crown Cotton Mills v. McNally*, 123 Ga. 35; s. c. 51 S. E. Rep. 13; *Pittsburg & C. R. Co. v. Hewitt*, 102 Ill. App. 428; s. c. aff'd, 202 Ill. 28; 66 N. E. Rep. 829; *Patterson v. Harrisburg Trust Co.*, 211 Pa. 173; s. c. 60 Atl. Rep. 265; *Crane v. Chicago & C. R. Co.*, 124 Iowa 81; s. c. 99 N. W. Rep. 169; *Brower v. Timreck*, 66 Kan. 770; s. c. 71 Pac. Rep. 581. The principle was enforced in a case where the plaintiff was put to work to remove with a stick a congestion of rags from a three-inch opening in front of a rapidly revolving drum, with a spiral line of spikes on it, without cautioning him of the danger or telling him of what was behind the opening, and one at work in front of the machine could not see what was behind it: *Joyce v. American Writing Paper Co.*, 184 Mass. 230; s. c. 68 N. E. Rep. 213.

ing an inexperienced servant when the danger is not obvious.¹⁰⁸ Actionable negligence was imputed to a master in one case where he had knowledge, when he employed a servant, that the latter was in danger of being injured by striking employ  s and did not warn him of this danger, and the servant had no knowledge of this fact, and was shot by striking employ  s after having been employed about eighteen days.¹⁰⁹

   4060. **Cases where the Duty to Warn and Instruct does Not Arise.**—The master is not required to warn a servant of dangers which cannot be anticipated,¹¹⁰ and, having a right to assume that his employ  s being competent will not be negligent, he need not inform them of possible or probable dangers in case they are negligent.¹¹¹ So a mine operator, furnishing a miner a guide to take him to his place of work, need not warn the miner of the dangers likely to be encountered if he wanders off the regular path in going to his work.¹¹² So it has been held that a contractor was not required to notify a carpenter employed by him of the danger of falling hammers negligently placed on ladders by other workmen.¹¹³

   4061. **No such Duty in Respect of Dangers Obvious to the Comprehension of the Servant.**¹¹⁴

¹⁰⁸ *Fletcher Bros. Co. v. Hyde*, 36 Ind. App. 96; s. c. 75 N. E. Rep. 9.

¹⁰⁹ *Holshouser v. Denver Gas & Co.*, 18 Colo. 431; s. c. 72 Pac. Rep. 289.

¹¹⁰ *Gay v. Southern R. Co.*, 101 Va. 466; s. c. 44 S. E. Rep. 707; *Diamond Rubber Co. v. McClurg*, 26 Ohio Cir. Ct. R. 481.

¹¹¹ *Klos v. Hudson River Ore. & Co.*, 77 App. Div. (N. Y.) 566; s. c. 79 N. Y. Supp. 156. A master exercising ordinary care in the selection of his employ  s is not required to anticipate that they may be negligent, and to warn them of the dangers that may arise by the negligence of another: *Crown Cotton Mills v. McNally*, 123 Ga. 35; s. c. 51 S. E. Rep. 13.

¹¹² *Smith v. Thomas Iron Co.*, 69 N. J. L. 11; s. c. 54 Atl. Rep. 562.

¹¹³ *Fay v. Wilmarth*, 183 Mass. 71; s. c. 66 N. E. Rep. 410.

¹¹⁴ In support of principle that the master is not bound to warn his servant against dangers which are plainly obvious, see these cases: *National Biscuit Co. v. Nolan*, 138 Fed. Rep. 6; *Roessler & Hasslacher*

Chemical Co. v. Peterson, 134 Fed. Rep. 789; s. c. 67 C. C. A. 295; *Dickenson v. Vernon*, 77 Conn. 537; s. c. 60 Atl. Rep. 270; *Crown Cotton Mills v. McNally*, 123 Ga. 35; s. c. 51 S. E. Rep. 13; *Electrical Installation Co. v. Kelly*, 110 Ill. App. 334 (danger from fan in rapid motion); *Reynolds v. Grace*, 115 Ill. App. 473; *Bryant v. Great Northern Paper Co.*, 100 Me. 171; s. c. 60 Atl. Rep. 797; *Arkland v. Taber-Prang Art Co.*, 184 Mass. 243; s. c. 68 N. E. Rep. 219 (danger of contact with band saw); *Buston v. Harvard Brewing Co.*, 183 Mass. 438; s. c. 67 N. E. Rep. 356 (danger from gear teeth); *Chmiel v. Thorndike Co.*, 182 Mass. 112; s. c. 65 N. E. Rep. 47 (danger from revolving knives); *Conner v. Draper Co.*, 182 Mass. 184; s. c. 65 N. E. Rep. 39; *Gavin v. Fall River Automatic Tel. Co.*, 185 Mass. 78; s. c. 69 N. E. Rep. 1055; *Harrington v. Union Cotton Mfg. Co.*, 182 Mass. 566; s. c. 66 N. E. Rep. 414 (danger from cog wheels in plain view); *Hofnauer v. R. H. White Co.*, 186 Mass. 47; s. c. 70 N. E. Rep. 1038; *Mee-*

§ 4062. **No Duty to Warn or Instruct Servants who Know and Appreciate the Danger.**—The law does not require the master to instruct the employé as to dangers incident to his employment if the servant is already fully possessed of this knowledge.¹¹⁵ The principle is illustrated by a case where the engineer in charge of a locomotive, which had been sent to where a bridge was burning, ran the locomotive onto the bridge, and the locomotive went through and the engineer sustained injuries. Here it was very properly held that the engineer could not claim that his employers were negligent in failing to put out signals as required by the rules of the company when any break or obstruction in the track is discovered, as this employé already knew of the danger.¹¹⁶

§ 4063. **No Duty to Warn or Instruct Servants who have had Ample Opportunity to Become Acquainted with the Danger.**¹¹⁷—Hav-

han v. Holyoke St. R. Co., 186 Mass. 511; s. c. 72 N. E. Rep. 61; Nye v. Dutton, 187 Mass. 549; s. c. 73 N. E. Rep. 654; Berlin v. William B. Mershon & Co., 132 Mich. 183; s. c. 93 N. W. Rep. 248; 9 Det. Leg. N. 575 (danger from uncovered cogs operating a planer); Erickson v. Cummer Mfg. Co., 140 Mich. 434; s. c. 103 N. W. Rep. 828; 12 Det. Leg. N. 194; Mushinsky v. Vincent, 135 Mich. 26; s. c. 97 N. W. Rep. 43; 10 Det. Leg. N. 658 (danger of injury from contact with circular saw working in small table); Herbert v. Mound City Boot & Co., 90 Mo. App. 305; Mueller v. La Prella Shoe Co., 109 Mo. App. 506; s. c. 84 S. W. Rep. 1010 (danger to intelligent operator of hand being caught in rollers of machine); Kiser v. Hot Springs Barytes Co., 131 N. C. 595; s. c. 42 S. E. Rep. 986 (danger from revolving knives); Cracraft v. Bessemer Limestone Co., 210 Pa. 15; s. c. 59 Atl. Rep. 432; Gallagher v. N. Snellenburg & Co., 210 Pa. 642; s. c. 60 Atl. Rep. 307; Donohoe v. Lonsdale Co., 25 R. I. 187; s. c. 55 Atl. Rep. 326; Durell v. Hartwell, Williams & Kingston, 26 R. I. 125; s. c. 58 Atl. Rep. 448 (danger to workman on scaffold, a board of which projected over elevator shaft); Paoline v. J. W. Bishop Co., 25 R. I. 298; 55 Atl. Rep. 752; Seery v. Gulf & C. R. Co., 34 Tex. Civ. App. 89; s. c. 77 S. W. Rep. 950; San Antonio Sewer Pipe Co. v. Noll, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 900 (danger

from splintered iron caused by striking dull chisel extra hard blow).

¹¹⁵ Grayson-McLeod Lumber Co. v. Carter, — Ark. —; s. c. 88 S. W. Rep. 597; Trakal v. Heusner Baking Co., 204 Ill. 179; s. c. 68 N. E. Rep. 399; aff'g s. c. 107 Ill. App. 327; O'Keeffe v. John P. Squire Co., 188 Mass. 210; s. c. 74 N. E. Rep. 340; Daniels v. New England Cotton Yarn Co., 188 Mass. 260; s. c. 74 N. E. Rep. 332; Wendler v. Red Wing Gas & C. Co., 92 Minn. 122; s. c. 99 N. W. Rep. 625; Livengood v. Joplin-Galena Consol. & Co., 179 Mo. 229; s. c. 77 S. W. Rep. 1077 (experienced miner need not be warned of dangers from unexploded blasts); Bair v. Heibel, 103 Mo. App. 621; s. c. 77 S. W. Rep. 1017; St. Jean v. J. H. Tolles & Co., 72 N. H. 587; s. c. 58 Atl. Rep. 506; Dillon v. National Coal Tar Co., 181 N. Y. 215; s. c. 73 N. E. Rep. 978; rev'g s. c. 88 App. Div. (N. Y.) 614; 84 N. Y. Supp. 1123; McManus v. Davitt, 94 App. Div. (N. Y.) 481; 88 N. Y. Supp. 55; Vyke v. Duncan Co., 88 App. Div. (N. Y.) 129; s. c. 84 N. Y. Supp. 398; Sandquist v. Independent Telephone Co., 38 Wash. 313; s. c. 80 Pac. Rep. 539.

¹¹⁶ Kath v. Wisconsin Cent. R. Co., 121 Wis. 503; s. c. 99 N. W. Rep. 217.

¹¹⁷ Weed v. Chicago & C. R. Co., 5 Neb. (unoff.) 623; s. c. 99 N. W. Rep. 827. A workman who has been employed for more than four months in a sawmill need not be

ing this principle in mind, one court has held that it is not the duty of an employer to instruct a workman, experienced in other similar work, of the danger incident to truing a wheel or sheave, which the workman proceeds to do in his own way upon a platform constructed under his direction and with a tool made by himself, having shortly before done a similar job successfully.¹¹⁸

§ 4064. **Extent of Obligation to Instruct Competent and Intelligent Servants.**¹¹⁹

§ 4066. **Making Changes Imposing Increased Danger upon Servants without Suitable Warning or Instruction.**—Generally speaking, the master commanding a servant to go outside his regular employment, which employment was not attended with special danger, to assist in the performance of work which is dangerous, is chargeable with negligence where he fails to instruct the servant as to the proper method of doing the work, and to warn him of the danger involved.¹²⁰

§ 4068. **No Duty to Give Warning of Dangers Arising in the Progress of the Work.**¹²¹

§ 4072. **Master, instead of Warning Servant, Lulling Him into Sense of Security.**¹²²

§ 4074. **No Duty to Instruct Adult Servant as to the Use of Simple Tools, Devices and Appliances.**—Where the servant understands the operation of a machine, and the mode of working it is simple, the master is not negligent in failing to instruct him as to its operation, and this particularly where the injury complained of was not due to a lack

instructed as to the danger of letting his hand come in contact with a visible circular saw in motion: *Cracraft v. Bessemer Limestone Co.*, 210 Pa. 15; s. c. 59 Atl. Rep. 432. A servant employed as an off-bearer, his duty being to remove the hooks from the log or cant after it has been placed on the carriage, is not entitled to notice when the carriage is about to start, where it is uniformly started as soon as the hooks are removed, and he has been engaged at the work a sufficient length of time to know such fact: *Olsen v. North Pacific Lumber Co.*, 119 Fed. Rep. 77; s. c. 55 C. C. A. 665.

¹¹⁸ *Brundige v. Dodge Mfg. Co.*, 183 Mass. 100; s. c. 66 N. E. Rep. 604.

¹¹⁹ According to the principle of the main section a master employ-

ing as engineer a machinist by trade, and a licensed engineer, is not bound to change a set-screw on a revolving shaft, or point it out to the employé, in order to relieve himself from liability for an injury to the employé by having his clothes caught in the set-screw: *Kennedy v. Merrimack Pav. Co.*, 185 Mass. 442; s. c. 70 N. E. Rep. 437.

¹²⁰ *Tennessee & C. R. Co. v. Jarrett*, 111 Tenn. 565; s. c. 82 S. W. Rep. 224.

¹²¹ *Campbell v. Illinois Cent. R. Co.*, 124 Iowa 302; s. c. 100 N. W. Rep. 30 (employé on steam shovel in gravel pit crushed by unexpected movement of train by engine and liability of master based on failure of conductor of train to warn him—master held not liable).

¹²² *Fletcher Bros. Co. v. Hyde*, 36 Ind. App. 96; s. c. 75 N. E. Rep. 9.

of knowledge as to how to operate the machine.¹²³ So it has been held that the proprietor of a steam laundry was not required to instruct a girl of average intelligence nineteen years of age that her fingers would get caught between the steam chest and the revolving roller of a steam mangle, if she put them where she saw the rollers catch and drag in the sheets and clothing that she was passing through the machine.¹²⁴

§ 4075. **Duty to Warn and Instruct with Respect to Dangers Attending Changes in Appliances and Devices.**¹²⁵

§ 4079. **What Presumption Master may Indulge as to the Knowledge, Discretion and Experience of the Servant and his Consequent Need of Instruction.**—The duty of a master to warn and instruct a servant as to the danger of his employment arises only when the servant is ignorant of the dangers and the master either knows, or ought to know of their existence.¹²⁶ A master may assume that one employed by him as a skilled and experienced workman on a certain kind of machine knew and appreciated the dangers incident to its operation.¹²⁷ It has been held that a servant who had worked five or six weeks about the premises and the machine in repairing which he was injured, and who knew the manner of repairing the same, having repaired similar parts before, could not be considered an inexperienced workman in the sense of imposing on his employer the duty of instructing him, or warning him of the dangers.¹²⁸

§ 4082. **Failure to Warn and Instruct must have been the Proximate Cause of the Injury.**¹²⁹—In a case where a railroad section hand was injured in attempting to round up a Texas steer which had escaped from a wreck, the failure of the railroad company to warn the plaintiff of the vicious character of the steer was held not the proximate cause of the injury, as a common carrier is not chargeable with notice that Texas cattle carried by it are dangerous and vicious, and liable to injure employes.¹³⁰ In another case where a servant attempting to

¹²³ *Mueller v. La Prelle Shoe Co.*, 109 Mo. App. 506; s. c. 84 S. W. Rep. 1010.

¹²⁴ *Gaudet v. Stansfield*, 182 Mass. 451; s. c. 65 N. E. Rep. 850.

¹²⁵ *Texarkana Table &c. Co. v. Webb*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 782 (master guilty of negligence in failing to warn inexperienced servant that knives of planing machine had been reset in his absence).

¹²⁶ *Punkowski v. New Castle Leather Co.*, — Del. —; s. c. 57 Atl. Rep. 559; *Tompkins v. Marine*

Engine &c. Co., 70 N. J. L. 330; s. c. 58 Atl. Rep. 393; *Murphy v. Rockwell Engineering Co.*, 70 N. J. L. 374; s. c. 57 Atl. Rep. 444.

¹²⁷ *Saucier v. New Hampshire Spinning Mills*, 72 N. H. 292; s. c. 56 Atl. Rep. 545.

¹²⁸ *Hettich v. Hillje*, 33 Tex. Civ. App. 571; s. c. 77 S. W. Rep. 641.

¹²⁹ *Fronk v. J. H. Evans City Steam Laundry*, — Neb. —; s. c. 96 N. W. Rep. 1053.

¹³⁰ *Clark v. Missouri &c. R. Co.*, 179 Mo. 66; s. c. 77 S. W. Rep. 882.

repair machine belting was injured by the starting of the machine, owing to the operator in charge of it not having properly fastened the lever controlling the machine, it was held that the injury was caused by the negligence of a fellow servant, and not by failure of the master to instruct the plaintiff.¹³¹

§ 4083. A Point of Pleading in an Action Grounded on Failure to Warn and Instruct.—The failure to instruct the servant to be of avail must be the subject of a distinct allegation. The mere allegation that the servant was fifteen years old, inexperienced in mechanical labor, and incompetent to judge of the danger incident to the operation of the machinery causing the injury, has been held insufficient to supply the place of the direct averment.¹³²

§ 4084. Points of Evidence in Actions Grounded on Failure to Warn and Instruct.—The burden of showing that the servant was directed to work on a certain machine, other than the one on which he was regularly employed, by one having authority, rests on the plaintiff.¹³³ In an action for the death of a servant, evidence that certain witnesses did not hear any instructions given to the deceased with reference to the manner in which his work should be done, where there was abundant opportunity to have given him instructions without the witnesses hearing it, was held insufficient to raise a presumption that no instructions were given.¹³⁴

§ 4086. Instructions to Juries with Respect to the Duty to Warn and Instruct.—An instruction has been approved which informed the jury that the defendant should cause the plaintiff to be instructed as to the dangers in operating the machine at which he was at work, and that a servant, after instruction, was bound to exercise that diligence which would be expected of a person of his age and capacity, and that, after such instructions were given and understood, the plaintiff was

¹³¹ Ward v. Connor, 182 Mass. 170; s. c. 64 N. E. Rep. 968.

¹³² Indiana Mfg. Co. v. Wells, 31 Ind. App. 460; s. c. 68 N. E. Rep. 319. A complaint was held not subject to demurrer for want of facts which alleged that plaintiff, being ordered to take a particular engine to a coal chute by the boss hostler, communicated his instructions to a fellow hostler then on the engine, and himself went ahead of the engine to flag and switch it, "as it was his duty to do," and while so engaged his foot was caught in a loosely covered trench, so that he fell toward the track, and was struck by

the engine and injured; that he did not know of the existence of the trench, and could not have seen the same by the exercise of ordinary care; and that defendant was guilty of negligence in not causing the trench to be carefully covered or guarded, and in not warning plaintiff of its existence, etc.: Baltimore & C. R. Co. v. Doty, 133 Fed. Rep. 866; s. c. 67 C. C. A. 38.

¹³³ McManus v. Davitt, 94 App. Div. (N. Y.) 481; s. c. 88 N. Y. Supp. 55.

¹³⁴ Carnes v. Guelph Patent Cask Co., 141 Mich. 23; sec. 104 N. W. Rep. 322; 12 Det. Leg. N. 331.

subject to all the duties and liabilities of any other employé, and must show the diligence to be expected of a young man of his age and experience.¹³⁵ Another instruction authorizing the jury to find for the plaintiff if he was inexperienced in working around moving machinery, and the master, knowing this, sent him into a place of danger without warning was held erroneous, as it failed to require the jury to find that the acts stated constituted negligence on the master's part, and that the servant was not guilty of contributory negligence.¹³⁶

§ 4091. **Duty to Warn and Instruct Children.**¹³⁷—In a case where the master's foreman saw an employé, a boy ten years old, cleaning a machine while it was in motion, and knowing it was dangerous work and that the boy was inexperienced, and with this knowledge permitted him to go on with the work without warning or advice, it was held that the foreman's conduct was such as to render the master liable for the servant's injuries received while thus employed.¹³⁸ But the master will rest under no obligation to instruct young or inexperienced servants unless he knows or ought to know that the servant is young or inexperienced.¹³⁹

§ 4092. **Duty to Warn and Instruct Children as to Open and Obvious Dangers.**¹⁴⁰—If, however, a minor, old enough to appreciate the danger of his employment, voluntarily encounters the risk of an obvious danger therein, and is injured through his own negligence, the

¹³⁵ *Vinson v. Morning News*, 118 Ga. 655; s. c. 45 S. E. Rep. 481.

¹³⁶ *Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36; s. c. 79 S. W. Rep. 869.

¹³⁷ That it is the duty of a master carefully to warn a youthful employé of the dangers incident to the work, see: *Karczewski v. Wilmington City R. Co.*, — Del. —; s. c. 54 Atl. Rep. 746; *Sachau v. J. K. Milner & Co.*, 123 Iowa 387; s. c. 98 N. W. Rep. 900; *E. Patterson & Son v. Cole*, 67 Kan. 441; s. c. 73 Pac. Rep. 54; *Evans Laundry Co. v. Crawford*, 67 Neb. 153; s. c. 93 N. W. Rep. 177; *Itiner Brick Co. v. Killian*, 67 Neb. 589; s. c. 93 N. W. Rep. 951; *Marcus v. C. D. Loane & Co.*, 133 N. C. 54; s. c. 45 S. E. Rep. 354; *Doyle v. Pittsburg Waste Co.*, 204 Pa. 618; s. c. 54 Atl. Rep. 363; *Horne v. La Crosse Box Co.*, 123 Wis. 399; s. c. 101 N. W. Rep. 935. Where, in an action by an employé for injuries sustained while cleaning

machinery, it was shown that the employer violated the statute regulating the cleaning of machinery by employés, by directing the employé, a young and inexperienced person, to clean machinery without instruction as to attending dangers, the jury were justified in finding the employer guilty of negligence: *Brower v. Locke*, 31 Ind. App. 353; s. c. 67 N. E. Rep. 1015.

¹³⁸ *Vanesler v. Moser Cigar & Co.*, 108 Mo. App. 621; s. c. 84 S. W. Rep. 201.

¹³⁹ *Ford v. Bodcaw Lumber Co.*, 73 Ark. 49; s. c. 83 S. W. Rep. 346.

¹⁴⁰ That it is the duty of the master to warn a child, though the danger is patent, where, by reason of his youth and inexperience, he does not know or appreciate his danger, see: *Ford v. Bodcaw Lumber Co.*, 73 Ark. 49; s. c. 83 S. W. Rep. 346; *Fletcher Bros. Co. v. Hyde*, 36 Ind. App. 96; s. c. 75 N. E. Rep. 9.

master will not be liable, whether he has instructed the servant or not.¹⁴¹

§ 4093. Such Instructions must be Graduated to the Youth, the Want of Knowledge, and the Inexperience of the Minor.—While the master is under no duty to warn a servant of dangers which are obvious and apparent to one of ordinary intelligence, yet, in determining what dangers are obvious and apparent, the youth and lack of experience of the servant must be considered. The law makes it the duty of the master, who employs a servant in a place of danger, to give him such instruction as is reasonably required by his youth, inexperience or want of capacity.¹⁴² The master is not bound to warn a minor servant concerning a danger incident to the operation of a machine where there is nothing that would charge an ordinarily prudent employer with notice of such danger.¹⁴³

§ 4094. Ordering Minor Servant into a Situation of Increased Danger without Giving Him Suitable Warning and Instruction.—It may be said generally, that an employer with knowledge of the dangers of a position, who assures an inexperienced servant of the safety of the employment and induces him to occupy the position assigned, will be liable for injuries sustained as a proximate result of the master's fault in this respect,¹⁴⁴ and this will be the case where a youthful employé is commanded to perform a dangerous service.¹⁴⁵ In a case where a boy fourteen and one-half years of age, who had been employed in a mercantile establishment as a cashboy, was thereafter promoted to do routine office work, which involved the operation of an elevator at the close of each day to remove the books of the concern from the office to the vault, it was held that the master was charged with the duty to instruct him in the proper management of the elevator.¹⁴⁶

§ 4096. Instances of Liability for Failing to Warn or Instruct Minor Employés.¹⁴⁷

¹⁴¹ *Fries v. American Lead Pencil Co.*, 141 Cal. 610; s. c. 75 Pac. Rep. 164; *Texas & C. R. Co. v. Sherman*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 887 (boy seventeen years old injured by lifting heavy piece of iron).

¹⁴² *Siegel & Co. v. Trcka*, 115 Ill. App. 56; s. c. aff'd, 218 Ill. 559; 75 N. E. Rep. 1053; *Shickle-Harrison & Co. v. Beck*, 112 Ill. App. 444; *Giebell v. Collins Co.*, 54 W. Va. 518; s. c. 46 S. E. Rep. 569.

¹⁴³ *Diehl v. Standard Oil Co.*, 70 N. J. L. 424; s. c. 57 Atl. Rep. 131.

¹⁴⁴ *Fletcher Bros. Co. v. Hyde*, 36 Ind. App. 96; s. c. 75 N. E. Rep. 9.

¹⁴⁵ *Noden v. Verlenden Bros.*, 211 Pa. 135; s. c. 60 Atl. Rep. 505.

¹⁴⁶ *Lowry v. Anderson Co.*, 96 App. Div. (N. Y.) 465; s. c. 89 N. Y. Supp. 107.

¹⁴⁷ A railroad company with knowledge that it was customary among call boys employed in its yards to ride on passing trains and that certain scales were erected so near the track as to injure a person hanging on the side of a passing freight car, was charged with actionable negli-

§ 4097. Circumstances under which a Minor Employé has been held to Need No Warning or Instruction.¹⁴⁸

§ 4099. Illustrative Cases of Failure to Warn and Instruct Minors where the Employer was Exonerated.—It was very properly held in one case that a boy between nineteen and twenty years of age who had worked on a farm for six years knew the danger of riding on the top of a load of sheafed grain driven over a rough road, and that the master was not negligent in failing to warn him of these dangers.¹⁴⁹

§ 4101. Duty to Instruct Inexperienced Servants as to the Safe Way of Doing their Work.¹⁵⁰

§ 4102. Duty to Warn and Instruct Unskilled Servants Assigned to New Duties.¹⁵¹—Similarly a master, employing inexperienced men and placing them in positions under foremen having the control of dangerous appliances, is under the obligation to notify the foremen of the fact of such inexperience, and caution them as to the necessity of exercising special care toward assuring the safety of such servants.¹⁵²

gence by reason of its failure to warn a call boy of the danger of being injured by such scales: *St. Louis &c. R. Co. v. Spivey*, 97 Tex. 143; s. c. 76 S. W. Rep. 748; rev'g s. c. 73 S. W. Rep. 973. In another case a cotton-mill employé, eleven years of age, was accustomed to leave his place of regular employment in the lap room, and, with the knowledge of his master's servants in charge, and without warning, assist his brother at the more dangerous carding machine. While attempting to throw a heavy belt therefrom, he was caught and killed. Here the master was held liable: *Henderson Cotton Mills v. Warren*, 24 Ky. L. Rep. 1030; s. c. 70 S. W. Rep. 658.

¹⁴⁸ *Northern Alabama Coal &c. Co. v. Beacham*, 140 Ala. 422; s. c. 37 South. Rep. 227 (boy employed four or five years in drilling holes for blasting with dynamite, and at different times put the charges of dynamite in the holes and exploded them, did not need to be instructed of the dangers).

¹⁴⁹ *Tucker v. Nat. Loan &c. Co.*, 35 Tex. Civ. App. 474; s. c. 80 S. W. Rep. 879.

¹⁵⁰ In support of the proposition that where an employer sets an employé to work at machinery with the operation of which the employé

is not acquainted, and there is a safe way and an unsafe way, the employer, if he has reason to know that the employé is unskilled, is required to give him instructions for operating the machine in the way by which he will avoid injury, see: *Wright v. Stanley*, 56 C. C. A. 234; s. c. 119 Fed. Rep. 330; *Pittsburg &c. R. Co. v. Hewitt*, 102 Ill. App. 428; s. c. aff'd, 202 Ill. 28; 66 N. E. Rep. 829; *James v. F. A. Ames & Co.*, 26 Ky. L. Rep. 498; s. c. 82 S. W. Rep. 229; *Bonnin v. Crowley*, 112 La. 1025; s. c. 36 South. Rep. 842; *Carter v. Fred W. Dubach Lumber Co.*, 113 La. 239; s. c. 36 South. Rep. 952; *Erickson v. Monson Consol. Slate Co.*, 100 Me. 107; s. c. 60 Atl. Rep. 708; *Tennessee &c. R. Co. v. Jarrett*, 111 Tenn. 565; s. c. 82 S. W. Rep. 224; *Jancko v. West Coast Mfg. &c. Co.*, 34 Wash. 556; s. c. 70 Pac. Rep. 78.

¹⁵¹ It is the duty of a farmer employing an inexperienced hand to see that he is not employed in a more dangerous position than that for which he was hired, and to warn him of the dangers when he sends him to other work: *Alabama Steel &c. Co. v. Wrenn*, 136 Ala. 475; s. c. 34 South. Rep. 970.

¹⁵² *Evans v. Louisiana Lumber Co.*, 111 La. 534; s. c. 35 South. Rep. 736.

§ 4106. **Distinctness and Sufficiency of Warning.**—It is the duty of an employer to convey his directions to perform any required duty in so plain and intelligent a manner that they may not be misunderstood.¹⁵³ It is enough if the warning is given in a tone of voice that can be heard by the employé to be affected by it.¹⁵⁴ Generally a master may assume that the English language is understood by employés, and unless he knows that a servant of foreign birth does not understand the English language sufficiently to comprehend his order or warning, it is not necessary that it should be given in a foreign language.¹⁵⁵ In the case of children, it is the duty of the master to warn them against dangers in language so plain that it cannot be misunderstood, and the master must be sure that they understand and appreciate the danger.¹⁵⁶ A servant employed in blasting who is told by the foreman in charge of the loading and shooting of blasts how to put the dynamite in the holes, and is warned to be careful, is sufficiently warned on the subject, and it is not necessary that he should be told not to attempt to force the dynamite into a hole too small to admit its entrance.¹⁵⁷ Railway employés are sufficiently warned of the destruction of a railroad trestle by fire by a notice of that fact giving the number of the bridge and the mile stones between which it is located, and such notice will relieve the company from liability for injuries sustained by running the train onto the trestle.¹⁵⁸

§ 4107. **Nature of Instructions—How Explicit.**—There is a holding that when an employer posts notices in a place where they can be read by female employés, cautioning them as to the proper apparel and mode of wearing their hair, to avoid the dangers of the work, he is not chargeable with negligence as to injuries occasioned by the failure to observe the rules merely because the attention of the injured employé was not called to the notices.¹⁵⁹

§ 4111. **Other Illustrations where there was No Duty to Warn or Instruct.**—A railroad company is not required expressly to warn its trainmen that the upright sides of a bridge of standard width are near enough to the track to be dangerous to persons leaning out an unusual distance from the sides of the train.¹⁶² It has been held that a

¹⁵³ *Small v. Brainerd Lumber Co.*, Mich. 286; s. c. 95 N. W. Rep. 72; 95 Minn. 95; s. c. 103 N. W. Rep. 726.

¹⁵⁴ *Lobstein v. Sajatovich*, 111 Ill. App. 654.

¹⁵⁵ *Lobstein v. Sajatovich*, 111 Ill. App. 654.

¹⁵⁶ *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590; s. c. 46 S. E. Rep. 908.

¹⁵⁷ *Kopf v. Monroe Stone Co.*, 133

Mich. 286; s. c. 95 N. W. Rep. 72; 10 Det. Leg. N. 185.

¹⁵⁸ *St. Louis & c. R. Co. v. Mize*, 71 Ark. 159; s. c. 71 S. W. Rep. 660.

¹⁵⁹ *Daniels v. New England Cotton Yarn Co.*, 188 Mass. 260; s. c. 74 N. E. Rep. 332.

¹⁶² *Cleveland & c. R. Co. v. Haas*, 35 Ind. App. 626; s. c. 74 N. E. Rep. 1003.

railroad company is under no obligation to warn a call boy employed to carry messages and do other errands around its yards and stations as to the danger from riding around the yards on the steps of a freight car, when his duties do not require him, and he is not expected to ride on such cars.¹⁶³ Another case holds that there is so such hazard incident to the occupation of drawing spikes from railroad ties with a claw-bar as to make it the duty of a railroad company to warn a section man of the danger to be apprehended from the head coming off the spike and thereby throwing the section man to the ground.¹⁶⁴ In still another case it was held, that a person of ordinary intelligence engaged in an ash pit in cleaning out ashes from engines which come onto it, cannot claim that the railroad company should warn him of the obvious dangers of coming out of the pit without looking to see if an engine is approaching. In such a case the railroad company has performed its whole duty by making provision for signals by the approaching engine.¹⁶⁵

§ 4116. Duty to Warn and Instruct Men Engaged in Loading and Unloading Vessels.¹⁶⁶

§ 4118. Duty to Warn and Instruct Servants Engaged about Electrical Appliances.¹⁶⁷

§ 4119. Duty to Warn and Instruct Concerning Dangerous Explosives.—The master employing laborers to work about premises where dynamite is used for blasting should acquaint the employes of the likelihood of danger from unexploded blasts, particularly where such laborers are unacquainted with the danger from this source.¹⁶⁸ Instructions to a servant when drilling to set his drill as far as he could from the old holes, and not to bother them, would seem to fulfill the master's duty in this regard.¹⁶⁹ An employer who furnished a servant

¹⁶³ *St. Louis &c. R. Co. v. Spivey*, 97 Tex. 143; s. c. 76 S. W. Rep. 748; rev'g s. c. 73 S. W. Rep. 973.

¹⁶⁴ *Parish v. Missouri &c. R. Co.* (Tex. Civ. App.), 76 S. W. Rep. 234.

¹⁶⁵ *Chicago &c. R. Co. v. Bell*, 209 Ill. 25; s. c. 70 N. E. Rep. 754.

¹⁶⁶ *The Anchoria*, 120 Fed. Rep. 1017; s. c. 56 C. C. A. 452; aff'g s. c. 113 Fed. Rep. 982 (rungs of stationary ladder on ship projected beyond side of ladder so that loading appliances were likely to catch on them—owner charged with negligence in failing to warn gangway man handling whip of this dangerous situation).

¹⁶⁷ *Shanks v. Citizens' General*

Electric Co. (Ky.), 76 S. W. Rep. 379; s. c. 25 Ky. L. Rep. 811 (foreman with knowledge of dangerous situation sent employe up a telephone pole to make repairs without warning him of the danger); *Cumberland Tel. &c. Co. v. Bills*, 128 Fed. Rep. 272; s. c. '62 C. C. A. 620 (line-man without knowledge was sent up decayed poles to place cross arms without warning him of the danger, the poles having been set eleven years).

¹⁶⁸ *Welch v. Bath Ironworks*, 98 Me. 361; s. c. 57 Atl. Rep. 88.

¹⁶⁹ *Erickson v. Monson Consol. Slate Co.*, 100 Me. 107; s. c. 60 Atl. Rep. 708.

assisting in making an excavation with a tent for sleeping on the premises, was charged with negligence where he failed to give such servant, while occupying the tent, timely warning to enable him to avoid the danger from the discharge of blasts in making this excavation.¹⁷⁰

§ 4122. Duty to Warn and Instruct Concerning the Dangers Attending Circular Saws and the Operations of Sawmills.¹⁷¹

§ 4123. Duty to Warn and Instruct Concerning Poisons and other Noxious Substances.—The principle finds further illustration in a case where the foreman of a factory put potash in a water cooler from which the employes drank and did not instruct them as to the adoption of precautionary methods to prevent injury.¹⁷²

§ 4124. Duty to Warn and Instruct Concerning the Dangers of Revolving Set-Screws.¹⁷³

§ 4125. Duty to Warn and Instruct Concerning the Danger of Getting Caught in Cog-Wheels, Rollers, etc.—The master will be charged with negligence where his instructions as to the operation of machinery are incomplete and insufficient. The principle is illustrated by a case where a laundry employé had her hand crushed in a mangle which originally had a metal guard to prevent the operator's hands from being drawn into the roller. This guard was removed and a guard roller was substituted; the plaintiff being instructed that, if she accidentally got her hand under it, it would rise up and stop. While working on the right-hand side of the machine, the plaintiff caught her hand under the roller and it stopped as she had been instructed it would; but when she was injured she was working on the other side of the machine, where the roller was not so arranged as to stop if the operator's hand was caught in it. Here it was held that the employé was not charged, as a matter of law, with notice of the difference in the action of the roller on the two sides of the machine.¹⁷⁴ In a case where the danger from certain cog-wheels attached to a crane in a

¹⁷⁰ *Orman v. Salvo*, 117 Fed. Rep. 233; s. c. 54 C. C. A. 265.

¹⁷¹ *Gracia v. C. N. Maestri Furniture Mfg. Co.*, 114 La. 371; s. c. 38 South. Rep. 275 (master liable where he placed boy of sixteen at work near circular saw without warning him of the danger); *Johnson v. Crookston Lumber Co.*, 95 Minn. 142; s. c. 103 N. W. Rep. 891 (master liable where he changed adjustment of saws in the absence

of minor operating machine and failed to inform him of the change).

¹⁷² *Geller v. Briscoe Mfg. Co.*, 136 Mich. 330; s. c. 99 N. W. Rep. 281; 11 Det. Leg. N. 31.

¹⁷³ That the master will be liable for injuries to inexperienced servant by failure to warn, see: *Mountain Copper Co. v. Pierce*, 136 Fed. Rep. 150; s. c. 69 C. C. A. 148.

¹⁷⁴ *United Laundry Co. v. Steele* (Ky.), 72 S. W. Rep. 305; s. c. 24 Ky. L. Rep. 1899.

steelmill could not be perceived by the employé on account of the darkness, it was held a question for the jury whether it was the master's duty to point out such danger to employés.¹⁷⁵

§ 4126. **Illustrations in Various Other Lines of Service.**—The piling of logs in high piles on a skidway is held by one court to be work of such a specially hazardous nature that it is the duty of the master to inform servants employed therein of the nature of the risk.¹⁷⁶ A Maryland court has declined to hold, as a matter of law, that the personal warning by the yardmaster of a car manufacturing company to employés at work under cars of the approach of other cars does not afford as much protection to such employés as the use of a blue flag customarily placed on a car under which employés are engaged in making repairs.¹⁷⁷

§ 4135. **General Nature of the Duty to Make and Publish Rules and Regulations.**¹⁷⁸—It follows from the statement of the master's duty under the main section that he is not required to make rules for the government of his servants and business where the business is not so large or complicated as to make his personal supervision impracticable.¹⁷⁹

§ 4136. **This Duty Absolute and Unalienable.**¹⁸⁰

§ 4139. **Limitations of this Duty.**—The failure to adopt and promulgate a particular rule will not charge the master with negligence, unless it appears that in the exercise of reasonable care he should have foreseen its necessity.¹⁸¹ The plaintiff is under the duty to show

¹⁷⁵ Shickle-Harrison &c. Co. v. Beck, 212 Ill. 268; s. c. 72 N. E. Rep. 423.

¹⁷⁶ Dell v. McGrath, 92 Minn. 187; s. c. 99 N. W. Rep. 629.

¹⁷⁷ State v. South Baltimore Carworks, 99 Md. 461; s. c. 58 Atl. Rep. 447.

¹⁷⁸ In support of the proposition that it is the duty of the master when the nature of the business requires it to make and promulgate rules for the protection of his servants, and to use due care and diligence after the making and promulgation of these rules to have them enforced, see: Chicago &c. R. Co. v. Bell, 111 Ill. App. 280; Moran v. Rockland &c. R., 99 Me. 127; s. c. 58 Atl. Rep. 676; Leduc v. Northern Pac. R. Co., 92 Minn. 287; s. c. 100 N. W. Rep. 108; O'Rourke v. Alphons Custodis Chimney Const. Co., 21 Pa. Super. Ct. 52; Boyle v. Union

Pac. R. Co., 25 Utah 420; s. c. 71 Pac. Rep. 988; Johnson v. Union Pac. Coal Co., 28 Utah 46; s. c. 76 Pac. Rep. 1089; Wright v. Southern R. Co., 101 Va. 36; s. c. 42 S. E. Rep. 913.

¹⁷⁹ Punkowski v. New Castle Leather Co., — Del. —; s. c. 57 Atl. Rep. 559.

¹⁸⁰ Merrill v. Oregon Short Line R. Co., 29 Utah 264; s. c. 81 Pac. Rep. 85.

¹⁸¹ Shaw v. New Year Gold Mines Co., 31 Mont. 138; s. c. 77 Pac. Rep. 515; Dooling v. Deutscher Verein, 97 App. Div. (N. Y.) 39; s. c. 89 N. Y. Supp. 580 (master excused where no previous accident in a long period had occurred from the use of a machine); Koszowski v. American Locomotive Co., 96 App. Div. (N. Y.) 40; s. c. 89 N. Y. Supp. 55. A master will not be deemed negligent in having failed to promulgate

that the rules or regulations that he claims should have been given were practicable, and if observed would have afforded reasonable protection.¹⁸² The law does not obligate the master to make rules as to how his servants should conduct themselves outside the scope of their employment,¹⁸³ nor does it require him to formulate and publish rules where the appliances furnished are simple in their construction and are entirely within the experience and comprehension of the men employed thereon;¹⁸⁴ or the danger is open and apparent to them.¹⁸⁵

§ 4142. **When such Rules and Regulations Become Immaterial.**¹⁸⁶

§ 4146. **Questions for Jury with Respect to this Subject.**¹⁸⁷

§ 4147. **Instructions to Juries with Reference to this Duty.**—Where there is no evidence that the proximate cause of the injury sued upon was the omission of the employer to promulgate rules, or that the adoption of rules would have prevented the injury, it is plainly erroneous for the court to charge that it was the duty of the master to adopt such rules.¹⁸⁸

§ 4149. **Evidence Bearing on the Question of Negligence in Failing to Establish Such Rules and Regulations.**—The plaintiff has the burden of proving that the company failed to make rules for his protection.¹⁸⁹

rules as to certain methods of work merely because a servant was injured on one occasion, it not being shown that any other persons engaged in the same line of business had deemed it necessary to promulgate such rules: *Johnson v. Prine Line*, 104 App. Div. (N. Y.) 157; s. c. 93 N. Y. Supp. 273.

¹⁸² *Koszowski v. American Locomotive Co.*, 96 App. Div. (N. Y.) 40; s. c. 89 N. Y. Supp. 55.

¹⁸³ *Moran v. Rockland &c. R.*, 99 Me. 127; s. c. 58 Atl. Rep. 676.

¹⁸⁴ *Wagner v. New York &c. R. Co.*, 76 App. Div. (N. Y.) 552; s. c. 78 N. Y. Supp. 696.

¹⁸⁵ *Austin v. Fisher Tanning Co.*, 96 App. Div. (N. Y.) 550; s. c. 89 N. Y. Supp. 137.

¹⁸⁶ The ordinary labor of unloading logs from flat cars is not extra-hazardous, so as to require persons engaged therein to formulate rules for the conduct of its employes performing labor: *Boyer v. Eastern R. Co.*, 87 Minn. 367; s. c. 92 N. W. Rep. 326.

¹⁸⁷ Generally speaking the question whether a master was negligent in making and promulgating

rules for the protection of his servants or in failing to use due care and diligence after the promulgation of a necessary rule to have it enforced is, under evidence from which reasonable men might differ as to whether the duty was performed, one of fact for the jury (*Johnson v. Union Pac. Coal Co.*, 28 Utah 46; s. c. 76 Pac. Rep. 1089). So it is a question for the jury whether rules promulgated have been abrogated by habitual disregard by employes with knowledge of the master (*Brady v. New York &c. R. Co.*, 184 Mass. 225; s. c. 68 N. E. Rep. 227; *DeVoe v. New York &c. R. Co.*, 174 N. Y. 1; s. c. 66 N. E. Rep. 568; rev'g s. c. 70 App. Div. (N. Y.) 495; 75 N. Y. Supp. 136). The question is for the jury where the rule is open to doubt as to its construction and meaning or its application to the duty to be performed by the employe (*Leduc v. Northern Pac. R. Co.*, 92 Minn. 287; s. c. 100 N. W. Rep. 108).

¹⁸⁸ *Griffin Wheel Co. v. Stanton*, 70 Kan. 762; s. c. 79 Pac. Rep. 651.

¹⁸⁹ *Smith v. Boston &c. R. Co.*, 73 N. H. 325; s. c. 61 Atl. Rep. 359.

§ 4152. **Principles to be Applied in Determining the Propriety and Sufficiency of Such Rules.**—Where the rules already promulgated by the master would have prevented the injuries if they had been observed, the master will not be charged with negligence in failing to make and promulgate other rules.¹⁹⁰ The jury will not be authorized to assume that some rule which occurs to them as desirable would be practicable, and would have prevented the injury, unless it is shown that other masters have adopted and used such rule or in some other way, that experience or practical use has proven its efficiency.¹⁹¹

§ 4153. **What Rules and Regulations have been held Good and Sufficient.**¹⁹²

§ 4155. **Reasonableness of Such Rules.**—The reasonableness and necessity of a rule may be shown by the mere fact of its adoption by the master so as to estop him from raising that question.¹⁹³ The question whether the rules are intelligible and reasonable is a question of law for the determination of the court.¹⁹⁴ A rule requiring brakemen of freight trains to inspect the steps of cars, and conductors to see that this duty is performed, has been held a reasonable regulation,¹⁹⁵ and not opposed to public policy.¹⁹⁶ But a rule of a mining operator forbidding miners from leaving a particular portion of the mine at a particular hour for any reason whatever has been held an unreasonable regulation.¹⁹⁷

¹⁹⁰ *Merchants' &c. Oil Co. v. Burns*, 96 Tex. 573; s. c. 74 S. W. Rep. 758; rev'g s. c. 72 S. W. Rep. 626; *Secombe v. Detroit Elec. R.*, 133 Mich. 170; s. c. 94 N. W. Rep. 747; 10 Det. Leg. N. 129. Thus where the rule of a railroad company provided that a hostler should remain on the engine while another employé crawled under and hauled the ashes out, the presence of the hostler on the engine alone was enough to prevent the engine from being started, and it was unnecessary that another rule should be promulgated requiring lights to be kept at each end of the engine during this time: *Lane v. New York &c. R. Co.*, 93 App. Div. (N. Y.) 40; s. c. 86 N. Y. Supp. 947.

¹⁹¹ *Ward v. Manhattan R. Co.*, 95 App. Div. (N. Y.) 437; s. c. 88 N. Y. Supp. 758; *Koszlowski v. American Locomotive Co.*, 96 App. Div. (N. Y.) 40; s. c. 89 N. Y. Supp. 55. See also *Hill v. Boston &c. R.*, 72 N. H. 518; s. c. 57 Atl. Rep. 924.

¹⁹² A rule that it would not be necessary for any engine or train occupying the main track inside of the yard limits to be protected by flagmen, except when on the time of a first-class train has been held explicit in meaning, and sufficient to protect a train on the main track within the yard limits against collision with a switching train in the yard: *Rosney v. Erie R. Co.*, 135 Fed. Rep. 311; s. c. 68 C. C. A. 155.

¹⁹³ *Wallace v. Boston &c. R. Co.*, 72 N. H. 504; s. c. 57 Atl. Rep. 913.

¹⁹⁴ *Leduc v. Northern Pac. R. Co.*, 92 Minn. 287; s. c. 100 N. W. Rep. 108. But see *Texas Cent. R. Co. v. Yarbrow*, 32 Tex. Civ. App. 246; s. c. 74 S. W. Rep. 357.

¹⁹⁵ *Scott v. Eastern R. Co.*, 90 Minn. 135; s. c. 95 N. W. Rep. 892.

¹⁹⁶ *Scott v. Eastern R. Co.*, 90 Minn. 135; s. c. 95 N. W. Rep. 892.

¹⁹⁷ *Junction Min. Co. v. Ench*, 111 Ill. App. 346.

§ 4159. Promulgation and Notice of such Rules and Regulations.

—It may be said generally that the rules of the master for the government of his employes are not obligatory as such on employes who do not know them and to whom they have not been promulgated.¹⁹⁸

§ 4163. Effect of the Habitual Violation of such Rules.¹⁹⁹

§ 4172. Interpretation of Railway Rules and Regulations.—A rule of a railroad company that while cars are being shoved over a crossing there shall be a lookout on the leading car, or a flagman at the crossing, is not satisfied by the mere presence of a brakeman at the crossing to give a signal to the engineer and to couple and to uncouple the train, as there is a presumption that he is fully engrossed with such duties.²⁰⁰ The mere fact that a rule of a railroad company makes it the duty of the station agent to have charge of all the company's property at stations, and among other things to keep the station and grounds in proper condition, know that all the switches and frogs are in a safe condition, and be responsible for care and distribution of switch lamps, has been held not to charge such station agent, as a matter of law, with more than a general knowledge of these conditions, as, manifestly, the work of constructing switches and supervising tracks clearly belongs to another department of the road.¹ A rule forbidding an employe to make couplings of cars by going between them, or otherwise than by a stick, has been held not to prohibit his going between a car and an engine to couple them where the coupler on the engine is five or six feet long and weighs one hundred twenty pounds; coupling with a stick being practically impossible.² Where the rules of a railway company provided a simple, direct, positive and special method

¹⁹⁸ Little v. Southern R. Co., 120 Ga. 347; s. c. 47 S. E. Rep. 953.

¹⁹⁹ That habitual disregard of rules by employes with knowledge of the master amounts to an abrogation of the rule, see: Merrill v. Oregon Short Line R. Co., 29 Utah 264; s. c. 81 Pac. Rep. 85 (master's knowledge of this disregard inferred from proof of habitual violation for one year); Wright v. Southern R. Co., 101 Va. 36; s. c. 42 S. E. Rep. 913; Leduc v. Northern Pac. R. Co., 92 Minn. 287; s. c. 100 N. W. Rep. 108. Evidence of a single witness that the engineer of a train did not recognize a flag requiring him to slow down his train, and that it was an every-day occurrence prior to the accident, was held not to show such a general violation of the rule as to charge

the railroad company with constructive notice thereof: Clark v. Manhattan R. Co., 77 App. Div. (N. Y.) 284; s. c. 79 N. Y. Supp. 220. Mere proof of habitual disregard of a rule is not enough; it must appear that the master either had actual knowledge of its violation, or, by the exercise of ordinary care could have known of this fact: Himrod Coal Co. v. Clingan, 114 Ill. App. 568.

²⁰⁰ Missouri & C. R. Co. v. Jones (Tex. Civ. App.), 75 S. W. Rep. 53.

¹ Wood v. New York & C. R. Co., 93 App. Div. (N. Y.) 53; s. c. 86 N. Y. Supp. 817.

² Fleming v. Southern R. Co., 131 N. C. 476; s. c. 42 S. E. Rep. 905; 132 N. C. 714; s. c. 44 S. E. Rep. 551.

for the annulment of a train order, this method is exclusive.³ A rule requiring the conductor of a street car to use "every means in his power to help get a car in motion" when it is blocked does not require that he should put himself in a position of danger for that purpose.⁴

§ 4170. **Illustrations of the Duty to Establish and Enforce Rules in Railway Service.**—It is, for example, the duty of a railroad company engaged in repairing its track,⁵ or cars on the track,⁶ to make suitable rules for the protection of the employés affected, and a failure to make such rules is evidence of negligence.

§ 4179. **General Principles of Liability of Mine Owners.**—Here as elsewhere in the relation of master and servant it is the duty of the mine owner to provide the miners with as reasonably safe places to work in as the nature of the employment will permit.⁷ This requires that he shall provide reasonably safe passageways and approaches to the place of operation, and exercise ordinary care to keep them in this condition.⁸ The rule as to the duty of the master to provide the employé a safe place to work does not apply in full force, of course, to places in the mine which are constantly being changed by the labor performed.⁹ Mining statutes, designed for the protection of the miners, do not displace or abrogate the common law on the subject. The mine owner is required to observe not only the duty imposed by statute but those also that exist by virtue of the common law.¹⁰

³ *Wallace v. Boston & C. R.*, 72 N. H. 504; s. c. 57 Atl. Rep. 913. A rule of a railroad company that, after orders have been signed by the trainmen, the signatures shall be telegraphed to the dispatcher, after which the dispatcher shall telegraph back the word "Complete," and that each operator receiving such response will "then write on each copy (of the message) the word 'Complete,' the time, and his name in full, and will then deliver a copy to each person included in the address," is not ambiguous, but prescribes the time when such messages shall be treated as becoming effective: *Wallace v. Boston & C. R. Co.*, 72 N. H. 504; s. c. 57 Atl. Rep. 913.

⁴ *Hayzel v. Columbia R. Co.*, 19 App. (D. C.) 359.

⁵ *Smith v. Boston & C. R. Co.*, 73 N. H. 325; s. c. 61 Atl. Rep. 359.

⁶ *Hill v. Boston & C. R. Co.*, 72 N. H. 518; s. c. 57 Atl. Rep. 924.

⁷ *Carter v. Baldwin*, 107 Mo. App. 217; s. c. 81 S. W. Rep. 204.

⁸ *Himrod Coal Co. v. Clingan*, 114

Ill. App. 568; *Henrietta Coal Co. v. Campbell*, 211 Ill. 216; s. c. 71 N. E. Rep. 863; aff'g s. c. 112 Ill. App. 452; *Garity v. Bullion-Beck & C. Min. Co.*, 27 Utah 534; s. c. 76 Pac. Rep. 556; *Williams v. Belmont Coal & C. Co.*, 55 W. Va. 84; s. c. 46 S. E. Rep. 802. Mere evidence to the effect that an entry is in a "fair" condition does not establish that its condition is "safe": *Junction Min. Co. v. Ench*, 111 Ill. App. 346. Whether these places are safe within the rule is a question for the jury, and it may not be taken from them by instructions; as, for example—that the owner was not required to keep his entry of uniform width and height: *Hamilton v. Mendota Coal & C. Co.*, 120 Iowa 147; s. c. 94 N. W. Rep. 282.

⁹ *Poorman Silver Mines of Colorado v. Devling*, — Colo. —; s. c. 81 Pac. Rep. 252; *Heald v. Wallace*, 109 Tenn. 346; s. c. 71 S. W. Rep. 80.

¹⁰ *Junction Min. Co. v. Ench*, 111 Ill. App. 346.

§ 4181. **Liability of Mine Owner for Injuries to Miners from Explosions of Fire-Damp.**—The purpose of a statute requiring the owner or operator of a mine to provide therein a good and sufficient amount of ventilation is to provide a reasonably safe place to work in, and that the ventilation should be such as to maintain the men reasonably safe from dangerous gases. The duty is a positive duty, and cannot be delegated so as to relieve the mine operator from liability for injuries caused by its neglect.¹¹ In a case where the mine owner failed to provide ventilation under a statute of this character, and an explosion occurred by reason of such negligence and the concurring negligence of a fellow servant in going, with an open lamp, into a gaseous chamber which had been marked, the mine owner was held liable for the death of a miner in such explosion.¹²

§ 4183. **Statutory Duty to Provide Suitable Ventilation in Mines.**—The Arkansas statute providing that air shall be circulated in mines to the face of every working place throughout the mine, so that it shall be free from standing gas is construed to mean that the air must be carried to the extremest point where the pick falls, and that the entire mine shall be free from gas.¹³ A statute requiring the presence of an attendant at mine doors has been held to refer solely to ventilation and not to the safety of persons using the gangways.¹⁴

§ 4184. **Liability under the Illinois Miners' Act.**—The word "willful" in the statute is construed by the courts of that State to include conscious omission or failure to comply with the statute,¹⁵ and a wrongful or evil intent is not necessary to give a right of action thereunder.¹⁶ Another provision of the coal-mine law requires all mine managers to obtain certificates of competency from a State board of examiners, and prohibits mine owners from employing any person as manager who does not hold such certificate.¹⁷ This statute is construed not to exempt mine owners from liability for the defaults of their managers and this construction is held not to render it uncon-

¹¹ *Schmalstieg v. Leavenworth Coal Co.*, 65 Kan. 753; s. c. 70 Pac. Rep. 888; 59 L. R. A. 707. Testimony of experienced miners that about the time of the death of a miner from black damp the chute in which the miner worked contained bad air, and was insufficiently ventilated, and that complaint thereof was made to the managers before the accident, is pertinent notice to the operators of such conditions: *Czarecki v. Seattle & C. R. & C. Co.*, 30 Wash. 288; s. c. 70 Pac. Rep. 750.

¹² *Russell v. Dayton Coal & C. Co.*, 109 Tenn. 43; s. c. 70 S. W. Rep. 1.

¹³ *Western Coal & C. Co. v. Jones*, 75 Ark. 76; s. c. 87 S. W. Rep. 440.

¹⁴ *Allen v. Kingston Coal Co.*, 212 Pa. 54; s. c. 61 Atl. Rep. 572.

¹⁵ *Marquette & C. Coal Co. v. Dielle*, 110 Ill. App. 684; *Riverton Coal Co. v. Shepherd*, 111 Ill. App. 294.

¹⁶ *Fulton v. Wilmington Star Min. Co.*, 133 Fed. Rep. 193; s. c. 66 C. C. A. 247; 68 L. R. A. 168.

¹⁷ *Illinois Laws 1899*, pp. 308, 309, §§ 7, 8.

stitutional.¹⁸ Another statute provides for ventilation, automatic doors, etc., and requires that at all principal doorways through which cars are hauled, an attendant shall be employed to open and close "said doors when trips of cars are passing to and from the workings."¹⁹ This statute is held to impose a duty on the mine owners to maintain attendants at principal doors, not only to assist in ventilation, but to protect miners passing through the doorway from injury.²⁰ A door intended to be maintained in a mine as long as coal remains therein to be mined and removed is, regardless of the amount of coal in the entry closed by the door, held to be a "permanent door," within the meaning of a statute requiring permanent doors to be so adjusted as to close automatically.²¹ This statute was not enacted solely for the purpose of securing proper ventilation in the mine, but also for the protection of miners using the doors.²²

§ 4188. Liability under the Indiana Statute.—The Indiana statute requiring examination of mines every alternate day to see that they are properly secured by props, and that all loose coal is carefully secured, is held not to make the owner of a mine an insurer of the safety of the work, but only to render a failure to comply with the statute actionable negligence.²³

§ 4191. Liability for Injuries Caused by the Falling of the Roof of the Mine.²⁴—Speaking generally, a mine owner is not liable for injuries to a miner from the dangerous condition of the roof of the mine unless he knew, or ought to have known, of such dangerous condition²⁵ long enough before the injury to have repaired it.²⁶

§ 4194. Duty to Keep a Supply of Timbers for Propping and Shoring Up.—In one jurisdiction, at least, the failure of the owner of a mine to furnish props and timbers when called for by the workmen is negligence *per se*, rendering him liable for injuries thereby resulting

¹⁸ *Fulton v. Wilmington Star Min. Co.*, 133 Fed. Rep. 193; s. c. 66 C. C. A. 247; 68 L. R. A. 168.

¹⁹ Illinois Hurd's Rev. St. 1901, p. 1202.

²⁰ *Himrod Coal Co. v. Stevens*, 203 Ill. 115; s. c. 67 N. E. Rep. 389; aff'g s. c. 104 Ill. App. 639.

²¹ *Madison Coal Co. v. Hayes*, 215 Ill. 625; s. c. 74 N. E. Rep. 755; aff'g s. c. 116 Ill. App. 94.

²² *Madison Coal Co. v. Hayes*, 215 Ill. 625; s. c. 74 N. E. Rep. 755; aff'g s. c. 116 Ill. App. 94.

²³ *J. Wooley Coal Co. v. Bracken*, 30 Ind. App. 624; s. c. 66 N. E. Rep. 775.

²⁴ The fact that the roof of the mine was not supported by props at the point where it fell, and that the material overhead was shelly, full of seams, cracks, etc., were held sufficient to establish negligence on the part of the mine owner in failing either to inspect properly or support the roof: *Wilson v. Alpine Coal Co.*, 118 Ky. 463; s. c. 81 S. W. Rep. 278; 26 Ky. L. Rep. 337.

²⁵ *East Jellico Coal Co. v. Golden*, 25 Ky. L. Rep. 2056; s. c. 79 S. W. Rep. 291.

²⁶ *Abbott v. Marion Min. Co.*, 112 Mo. App. 550; s. c. 87 S. W. Rep. 110.

to workmen.²⁷ It has been held that a statute making it the duty of the mine owner to keep a sufficient supply of timber when required so that the workmen may at all times be able "to properly secure the workings from caving in" is not satisfied by furnishing what may be deemed as ordinarily sufficient timber. The term "properly secure" does not mean reasonably safe or absolutely safe, but such security as a reasonable person would afford, commensurate with the threatened danger.²⁸ The word "required" in the Missouri statute making it the duty of the owner or operator of a mine to keep sufficient props so that the workmen may at all times be able to secure "said workings from caving in, and send down all such props when required" is held to mean "needed," and it is the duty of such owner or operator, through his foreman, to know that such props are needed, and to supply them without waiting for a request by the workmen.²⁹ The failure of the Ohio statute on this subject to define the degree of care required of the owner in providing timber is held to leave the question to be determined by the principles of the common law.³⁰ The burden of proving that the injury complained of resulted from the mine operator's failure to furnish the miner with props is on the plaintiff.³¹ A shortage of props on the day of the accident is not proved by evidence of a shortage prior thereto, and such evidence is irrelevant where the miner did not complain of a shortage before the time of the accident.³²

§ 4198. Objects Falling Down Shaft of Mine.³³

§ 4200. Caving in of the Shaft.³⁴

§ 4201. Duty of Mine-Owner to Give Warnings of Danger.—In a case where a servant employed in a coal mine in hauling cars loaded with coal had no knowledge of the location of an incline which necessitated the use of a sprag acting as a brake, and was ordered to proceed on the assurance that the master would accompany him and show him

²⁷ Green v. Western American Co., 30 Wash. 87; s. c. 70 Pac. Rep. 310.

²⁸ McDaniels v. Royle Min. Co., 110 Mo. App. 706; s. c. 85 S. W. Rep. 679.

²⁹ Bowerman v. Lackawanna Min. Co., 98 Mo. App. 308; s. c. 71 S. W. Rep. 1062.

³⁰ Cecil v. American Sheet Steel Co., 129 Fed. Rep. 542; s. c. 64 C. C. A. 72.

³¹ Wojtylak v. Kansas &c. Coal Co., 188 Mo. 260; s. c. 87 S. W. Rep. 506.

³² Wojtylak v. Kansas &c. Coal Co., 188 Mo. 260; s. c. 87 S. W. Rep. 506.

³³ Johnson v. Union Pac. Coal Co., 28 Utah 46; s. c. 76 Pac. Rep. 1089

(a question for the jury under the circumstances).

³⁴ Where a passageway of the statutory width has been blocked by reason of a cave-in, and this condition has existed for a long time and it might have been cleared away in a very short time, it is no defense to an action for injuries the result of this negligence that the mine was in the early stages of development and the statute ought not to be rigidly enforced in such a case: Chicago-Coulterville Coal Co. v. Fidelity &c. Co. of New York, 130 Fed. Rep. 957.

where to sprag, the failure of the master to give the assistance promised was held actionable negligence.³⁵

§ 4211. **Negligence with Respect to Unexploded Blasts.**—This duty refers to a detail of the work and may be delegated³⁶ to the operator of the drill and his helper.³⁷ The master will be held to have performed his duty where he has made a careful examination, without revealing the location of one of these blasts, and an accident occasioned by a workman striking a blast thereafter, will be charged to a mistake and not a neglect of duty.³⁸ It is not necessary to charge the master with negligence with regard to these unexploded blasts that he should have willfully concealed from the miner the fact of their existence. It is sufficient if he has failed to exercise reasonable care to acquaint himself with the fact that the blasts have not been exploded.³⁹

§ 4212. **Proximate and Remote Cause of Injuries in and About Mines.**⁴⁰

§ 4214. **Negligence with Respect to the Construction or Repair of the Cage in which Miners are Lowered and Raised.**—The Iowa statute requiring the maintenance of safety gates at the opening of a mine shaft, and requiring that cages operated in the shaft shall be provided with a safety covering, is held to mean that the shaft opening shall be guarded so as to prevent an involuntary entrance thereto, and not to mean that there should be an absolute and complete covering of the entire opening.⁴¹ The Missouri statute with respect to the construction and operation of the cage is held to have been enacted for the protection of persons conveyed up and down the shaft, and to be with-

³⁵ *Collingwood v. Illinois & Co.*, 125 Iowa 537; s. c. 101 N. W. Rep. 283. See also *Momence Stone Co. v. Turrell*, 205 Ill. 515; s. c. 68 N. E. Rep. 1078; 106 Ill. App. 160.

³⁶ *Poorman Silver Mines of Colorado v. Devling*, — Colo. —; s. c. 81 Pac. Rep. 252.

³⁷ *Livengood v. Joplin-Galena Consol. Lead & Co.*, 179 Mo. 229; s. c. 77 S. W. Rep. 1077.

³⁸ *Harris v. Balfour Quarry Co.*, 131 N. C. 553; s. c. 42 S. E. Rep. 973.

³⁹ *Bane v. Irwin*, 172 Mo. 306; s. c. 72 S. W. Rep. 522.

⁴⁰ The proximate cause of injury to a miner at the bottom of a shaft from the reversal of hoisting machinery and resulting fall of a bucket in consequence of a fellow servant's negligence is such negli-

gence, and not his employer's failure to supply a brake, which would have checked the fall: *Luman v. Golden Ancient Channel Min. Co.*, 140 Cal. 700; s. c. 74 Pac. Rep. 307. Thus a mine owner was held not liable for failure to comply with the statute making it his duty to maintain an ambulance at his mine, where there was no evidence that this failure was the cause of the death of the miner, except the evidence of a woman who dressed the miner's wounds, and who could give no reason for believing that she could have saved his life if he could have been removed to his home immediately: *Davis v. Pennsylvania Coal Co.*, 209 Pa. 153; s. c. 58 Atl. Rep. 271.

⁴¹ *Jacobson v. Smith*, 123 Iowa 263; s. c. 98 N. W. Rep. 773.

out application to a hoister whose business it is to run the hoisting apparatus.⁴²

§ 4215. Various Negligences for which Mine-Owner has been held Liable.—It has been held gross negligence on the part of a mine-owner to permit heavily loaded cars to be sent down the incline of a passageway in a mine without light or attendant, or brake or signal of any kind, and with nothing to retard their speed, except sprags in the wheels.⁴³

§ 4220. Liability of Ship or Shipowner for Injury to Seamen through Defective Marine Appliances.⁴⁴

§ 4222. Liability of Ships and Shipowners to Stevedores.—In one case of injuries to a stevedore by reason of the break of a cable at a splice, the master of the vessel was held guilty of negligence in permitting the use of a cable which instead of having been carefully stowed in oil between voyages had been permitted to remain on deck exposed to the weather during several voyages to West India ports, which tended to weaken the cable, and the only inspection was a casual external inspection.⁴⁵ In another case, where the plaintiff was employed in loading into a steamship from a barge lying alongside, and was scalded by a stream of hot water discharged from an unguarded opening in the side of the ship, it was held that the master was not relieved from liability for a failure to furnish the man a safe place in which to work merely because shields for the opening were accessible to his foreman, nor because he had been employed on the same work and knew that hot water was occasionally thus discharged.⁴⁶

⁴² *Barron v. Missouri Lead & Co.*, 172 Mo. 228; s. c. 72 S. W. Rep. 534.

⁴³ *Spring Valley Coal Co. v. Chiventone*, 115 Ill. App. 558; s. c. aff'd, 214 Ill. 314; 73 N. E. Rep. 420.

⁴⁴ It is the duty of a shipowner to keep his vessel in such condition that the loading appliances may be reasonably used without being liable to catch on obstructions and thus endanger a gangway man handling a whip: *The Anchoria*, 120 Fed. Rep. 1017; s. c. 56 C. C. A. 452; aff'g s. c. 113 Fed. Rep. 982. A shipowner contracting for repairs owes an active duty to the shipmen on board to see that they are not subjected to danger by reason of the negligent manner in which the work is done, and he will be liable for their death or injury resulting from failure to per-

form this duty: *In re Michigan S. Co.*, 133 Fed. Rep. 577.

⁴⁵ *The King Gruffydd*, 131 Fed. Rep. 189; s. c. 65 C. C. A. 495. In this case a stevedore was injured during the raising of a skid weighing something more than a ton from a lighter, by the breaking of a wire cable known as a "topping lift," and it appeared that such lifts, when in apparent good condition, as was the one in question when selected, were capable of lifting twenty tons. It was held that the servant who selected such lift was not guilty of negligence in selecting it, instead of selecting a chain span, which was used for heavier loads: *The King Gruffydd*, 131 Fed. Rep. 189; s. c. 65 C. C. A. 495.

⁴⁶ *Corrigan v. Oceanic Steam Nav. Co.*, 47 Misc. (N. Y.) 368; s. c. 94 N. Y. Supp. 19.

§ 4225. Liability of Stevedore for Injuries to his Servant in Consequence of Using Defective Appliances Belonging to the Ship.⁴⁷

§ 4228. Defective Gang-Planks, Staging, etc.—It has been held that an employer who had constructed a hand-rail along a log-deck to assist employes in passing up and down the inclined passage, sufficient for the purpose for which it was intended, was not liable because it gave way when an employé fell against it—this being an unanticipated use.⁴⁸

§ 4230. Defective or Insufficient Ropes.—In further illustration of the main section is a case where a tug was held liable for injury to an employé thereon from the breaking of its hawser by the swell of a passing steamer bringing an additional strain on the line, it being over a year old, and in a bad condition, as would have been disclosed by a careful inspection, but not by the casual inspection it received.⁴⁹

§ 4243. Degree of Care Required of Railway Companies for the Safety of their Employés.⁵⁰

§ 4250. Duty to Maintain Appliances in a Safe Condition.—The general duty of a railroad company to use reasonable care to protect its employes from injury while engaged in work on its trains includes an obligation to use reasonable care in furnishing suitable machinery, keeping it in repair, and in inspecting it to discover defects.⁵¹ The law does not require of a railroad company, any more than any other

⁴⁷ Stevedores were charged with negligence in not furnishing a longshoreman, hired to stow freight in the hold of a steamer, a safe place to work in, where they left the thwart-ship beam across the hatchway, without securing it in place, and the rope with which the freight was being lowered came in contact, in its play, with the beam, throwing it into the hold, as they, in the exercise of due care, should have seen might happen, and which would not have happened if the beam had been secured in the usual manner: *Duggan v. Phelps*, 82 App. Div. (N. Y.) 509; s. c. 81 N. Y. Supp. 916. Where, however, the stevedore does not furnish the machinery, and has no control over the place where the longshoreman works, there can be no recovery for his death caused by a defective hatch, on the ground that it was the stevedore's duty to furnish proper appliances and a safe place

to work: *Hyde v. Booth*, 188 Mass. 290; s. c. 74 N. E. Rep. 337.

⁴⁸ *Decker v. Stimson Mill Co.*, 31 Wash. 522; s. c. 72 Pac. Rep. 98.

⁴⁹ *The Columbia*, 124 Fed. Rep. 745.

⁵⁰ An employé in the performance of his duties is in no sense to be regarded as a trespasser, hence there was entire propriety in refusing an instruction in an action for injuries to a railroad employé that the railroad company owes no duty to one on its tracks, though it be a watchman whose duty is to watch over the track, except not to injure him in a wanton and willful manner: *Scott v. Seaboard Air Line R. Co.*, 67 S. C. 136; s. c. 45 S. E. Rep. 129.

⁵¹ *Newton v. New York & C. R. Co.*, 96 App. Div. (N. Y.) 81; s. c. 89 N. Y. Supp. 23; *Richey v. Southern R. Co.*, 69 S. C. 387; s. c. 48 S. E. Rep. 285.

employer, that it should do impracticable things for the protection of its servants. Thus an alleged defect in the sill of the tender of a locomotive cannot be treated as negligence contributing to an injury in a collision, as a requirement that such sill should be strong enough to resist the force of a collision would be impracticable.⁵²

§ 4253. Rule as to "Safe Place to Work" Applies to Railroad Companies.—Generally speaking, a railroad company owes to its employes the duty to provide and maintain its tracks, switches, and grounds in a safe and suitable condition for conducting the business in which its servants are engaged, and to use every precaution which a reasonably prudent man would exercise under like circumstances, and not to expose such servants in the discharge of their duties to perils and dangers against which it could guard by the exercise of reasonable care.⁵³ This rule imposes the duty only to exercise reasonable watchfulness and care in inspecting the track and in keeping it in a reasonably safe condition.⁵⁴ The company will not be liable for the consequences of mere errors of judgment in the construction and maintenance of the track unless these errors themselves were the result of negligent or willful ignorance or inattention.⁵⁵ The doctrine of "safe place to work" does not render the railroad company responsible for damages which necessarily inhere in the work, as, for example, the work of removing a landslide from a track at night.⁵⁶ The obligation to exercise care for the safety of employes is owed to employes accustomed to ride to and from their work on hand-cars as well as the employes using the weightier form of vehicle.⁵⁷ It is the holding of an Illinois case that an ordinance requiring railroads to maintain gates at street crossings may be invoked by employes crossing one of the tracks at a crossing, no matter where they came on the street, whether within or without the gates.⁵⁸

§ 4263. Care Required of Construction Companies.⁵⁹

⁵² *Brommer v. Philadelphia & C. R. Co.*, 205 Pa. 432; s. c. 54 Atl. Rep. 1092.

⁵³ *Illinois Terminal R. Co. v. Thompson*, 112 Ill. App. 463; s. c. aff'd, 210 Ill. 226; 71 N. E. Rep. 328. See also *Hamilton v. Michigan Cent. R. Co.*, 135 Mich. 95; s. c. 97 N. W. Rep. 392; 10 Det. Leg. N. 711; *Smith v. Boston & C. R. Co.*, 73 N. H. 325; s. c. 61 Atl. Rep. 359; *Van Blarcom v. Central R. Co.*, — N. J. L. —; s. c. 60 Atl. Rep. 182; *Sims v. Southern R. Co.*, 66 S. C. 520; s. c. 45 S. E. Rep. 90.

⁵⁴ *Culver v. South Haven & C. R. Co.*, 138 Mich. 443; s. c. 101 N. W.

Rep. 663; 11 Det. Leg. N. 642; *Southern Kansas R. Co. v. Sage*, 98 Tex. 438; s. c. 84 S. W. Rep. 814; rev'g s. c. 80 S. W. Rep. 1038.

⁵⁵ *O'Neill v. Chicago & C. R. Co.*, 66 Neb. 638; s. c. 92 N. W. Rep. 731; 60 L. R. A. 443.

⁵⁶ *Florence & C. R. Co. v. Whipps*, 138 Fed. Rep. 13.

⁵⁷ *Texas & C. R. Co. v. Kelly*, 34 Tex. Civ. App. 21; s. c. 80 S. W. Rep. 1073.

⁵⁸ *Chicago & A. R. Co. v. Wise*, 206 Ill. 453; s. c. 69 N. E. Rep. 500; aff'g s. c. 106 Ill. App. 174.

⁵⁹ Where the usual and ordinary way of moving rails in constructing

§ 4267. Failure to Build a Bumper at the End of an Inclined Track.⁶⁰

§ 4268. Objects Falling upon the Track: Snow-Slides, Gravel-Slides, Falling Rock, Stick of Wood Falling from Tender.⁶¹

§ 4270. Sidetracks Dangerously Near Main Track.—In one case the Supreme Court of the United States refused to declare as a matter of law, that a railroad company had satisfied the requirement to use due care to provide a reasonably safe place for the use of switchmen in the performance of their duties, where the company located scales at a place where the tracks were only the standard distance apart, and left a space of less than two feet for the free movement of a switchman, encumbered with his lantern, between the side of the freight car and the scale box, and this especially where there was no necessity for the location of the scales at this place.⁶²

§ 4271. Defects in Railway Tracks Dangerous to the Feet of Employés.⁶³

§ 4275. Construction and Safety of Logging-Railroads.—The fact that lumber railroads are of necessity crudely constructed does not relieve the master from the duty to exercise reasonable care to maintain such a railroad in a safe condition for operatives thereof.⁶⁴ In one case it was held that negligent construction and maintenance of the road was shown by evidence that the track was constructed of rails of different sizes, the joints being from two and a half to four inches apart, and the rail on the side in the direction the engine toppled was three or four inches lower than the one on the other side, and the track was shaky.⁶⁵

a railroad track is by hand power alone, or by horse power alone, and the combination of the two forces is unusual and unsafe, the use of the combination is negligence: *Kane v. Falk Co.*, 93 Mo. App. 209.

⁶⁰ *Pennsylvania R. Co. v. Jones*, 123 Fed. Rep. 753.

⁶¹ It was held not error to use the words "reasonable care," instead of "ordinary care," in an instruction setting out the care required of a railroad company's servants in the inspection of the cut through which the track ran and in which a landslide occurred: *Louisville & C. R. Co. v. Pointer*, 113 Ky. 952; s. c. 69 S. W. Rep. 1108; 24 Ky. L. Rep. 772.

⁶² *Texas & P. R. Co. v. Swearingen*,

196 U. S. 51; s. c. 25 Sup. Ct. Rep. 164; 49 L. Ed. 382; aff'g s. c. 122 Fed. Rep. 193; 59 C. C. A. 31.

⁶³ *De Cair v. Manistee & C. R. Co.*, 133 Mich. 578; s. c. 95 N. W. Rep. 726; 10 Det. Leg. N. 328 (ditch across track filled with snow—company liable).

⁶⁴ *Demko v. Carbon Hill Coal Co.*, 136 Fed. Rep. 162; s. c. 69 C. C. A. 74 (a less degree of care than required of commercial roads); *Fulton v. Crosby & Beckley Co.*, 57 W. Va. 91; s. c. 49 S. E. Rep. 1012; *Fuller v. Tremont Lumber Co.*, 114 La. 266; s. c. 38 South. Rep. 164.

⁶⁵ *Hoelter v. McDonald*, 82 App. Div. (N. Y.) 423; s. c. 81 N. Y. Supp. 616.

§ 4280. **Liability of Railroad Companies for Injuries to Employés from Objects too Near their Tracks.**—A railroad company will be charged with actionable negligence where it maintains a post or other structure in dangerous proximity to the track, and employés free from negligence are injured by contact with such objects.⁶⁶ Where it is necessary for the railroad company to maintain a structure in dangerous proximity to its tracks, it is its duty to warn employés of its existence and location and the danger to be apprehended therefrom.⁶⁷ Again a railroad company, maintaining a structure at a safe distance from the track and passing cars, may be imputed with negligence in using cars of an extra width, thereby bringing the structure nearer to an employé whose duty requires him to ride on the side of the car.⁶⁸ Where the object has been allowed to remain in dangerous proximity to tracks for a long time, the company cannot escape liability for injury caused thereby on the ground that it did not participate in its construction.⁶⁹

§ 4282. **Accepting the Risk of Such Dangers, and Contributory Negligence with Respect thereto.**—A railway brakeman or switchman assumes all the ordinary risks of the business, and his employers owe him no duty with reference to structures erected for a proper purpose at a reasonable distance from the track except to see that they do not expose him to unnecessary danger by being left in an unsafe or improper position.⁷⁰

§ 4293. **Mail-Cranes.**—A railroad company will be held to have performed its duty in this regard where it has placed a mail-crane at the distance such cranes are placed on the particular road in question and other roads, and it is shown that cranes could not be operated efficiently if placed at a greater distance from the track.⁷¹ A railroad company owes no duty to an employé familiar with the road to place lights on mail-cranes.⁷²

§ 4299a. **Stock Gaps.**—A railroad company will be charged with negligence where it fails to use reasonable care in maintaining stock

⁶⁶ South Side Elevated R. Co. v. Nesvig, 214 Ill. 463; s. c. 73 N. E. Rep. 749; rev'g s. c. 114 Ill. App. 355 (electric light pole); Galveston &c. R. Co. v. Brown, 33 Tex. Civ. App. 589; s. c. 77 S. W. Rep. 832; Galveston &c. R. Co. v. Mortson, 31 Tex. Civ. App. 142; s. c. 71 S. W. Rep. 770 (warehouse dangerously near track); Day v. Dominion Iron & Stone Co., 36 N. S. 113.

⁶⁷ Mobile &c. R. Co. v. Vallowe, 214 Ill. 124; s. c. 73 N. E. Rep. 416.

⁶⁸ Norfolk &c. R. Co. v. Cheatwood, 103 Va. 356; s. c. 49 S. E. Rep. 489.

⁶⁹ South Side Elevated R. Co. v. Nesvig, 214 Ill. 463; s. c. 73 N. E. Rep. 749; rev'g s. c. 114 Ill. App. 355.

⁷⁰ Fearn v. New York &c. R. Co., 186 Mass. 529; s. c. 72 N. E. Rep. 68.

⁷¹ Kenney v. Meddaugh, 118 Fed. Rep. 209; s. c. 55 C. C. A. 115.

⁷² Kenney v. Meddaugh, 118 Fed. Rep. 209; s. c. 55 C. C. A. 115.

gaps on its right of way, and by reason of undue narrowing of the way the trainmen are endangered in the performance of their duties.⁷³

§ 4302. **Telegraph Poles.**—The maintenance of telegraph poles in a space between tracks in a switching yard so that the top of a passing freight car is only from ten to fourteen inches distant from the pole, which condition existed for some four years, with notice to the company, was held to tend to show negligence.⁷⁴ In another case it was held that a street railway company was not chargeable with negligence in permitting telephone poles to be erected on land not owned or controlled by it so near the track as to be dangerous to employes operating cars.⁷⁵

§ 4305. **Water-Tank, Water-Spout, Water-Plug.**⁷⁶

§ 4309. **Liability of Railway Companies to their Employes for Injuries through Unsafe Bridges.**—It is clear that a street railroad company which uses a public bridge for its tracks will be held to have adopted the bridge as one of its appliances, and if it knows or should know that it is in a defective condition and knowingly permits its cars to be run over the same, it will be liable to an employe injured by reason of such dangers who does not know, and by ordinary care could not know the dangerous condition thereof.⁷⁷

§ 4311. **Railroad Company not an Insurer, but Liable only for Failing to Exercise Ordinary Care.**⁷⁸

⁷³ Northern Alabama R. Co. v. Mansell, 138 Ala. 548; s. c. 36 South. Rep. 459.

⁷⁴ Illinois Terminal R. Co. v. Thompson, 210 Ill. 226; s. c. 71 N. E. Rep. 328; aff'g s. c. 112 Ill. App. 463.

⁷⁵ Chattanooga Electric R. Co. v. Moore, 113 Tenn. 531; s. c. 82 S. W. Rep. 478.

⁷⁶ A railroad company will be charged with negligence, as a matter of law, where it maintains an iron spout so attached to a water tank as to be a constant menace to the lives and limbs of brakemen on its trains, where it might readily have been so constructed and hung as to be safe: Choctaw & C. R. Co. v. McDade, 191 U. S. 64; s. c. 24 Sup. Ct. Rep. 24; 48 L. Ed. 96; aff'g s. c. 112 Fed. Rep. 888; 50 C. C. A. 591. In a case where a brakeman, whose duties required him to be on top of the cars, while reclining on the top of a moving car with his feet hanging over the side, was

suddenly warned by the conductor to "look out," and, raising on his elbow, was caught about his neck and jerked from the car by a rope hanging in a loop from a water pipe which projected over the car, it was held that the railroad company was negligent in permitting the pipe to project over the car, and in having the rope hang from the pipe in a loop: Lindsay v. Norfolk & C. R. Co., 132 N. C. 59; s. c. 43 S. E. Rep. 511.

⁷⁷ Indianapolis v. Cauley, 164 Ind. 304; s. c. 73 N. E. Rep. 691. A railroad company was held liable where the pile bridge it erected was not reasonably safe because of the high, swift water in case of heavy rains, the floating logs, and the insufficiency of the earth to support the piles, and on account of this want of care the bridge gave way under a train and injured an employe: Copeland v. Wabash R. Co., 175 Mo. 650; s. c. 75 S. W. Rep. 106.

⁷⁸ In a case where a bridge employe was engaged with others in

§ 4315. **Bridges Too Low or Too Near the Track.**—A railroad company was held to have satisfied the rule of reasonable care where its bridge, of standard width, allowed a free space of over two feet between its widest cars and the side of the bridge, and hence was not liable for injuries to a brakeman who leaned out of a car an unusual distance and was struck by the bridge.⁷⁹ In another case, where the space between the cars and the outer edge of a trestle was only nine inches, a railroad company was charged with negligence in moving a construction train across the trestle while an employé was thereon.⁸⁰

§ 4317. **Duty of Company to Adopt "Whipping-Straps" or "Tell-Tales" to Warn Trainmen of Approach to a Dangerous Bridge.**—A railroad company required to maintain tell-tales in a proper condition cannot, when sued for an injury caused by looped tell-tales, avail itself of a custom among railroad employés to look out for such tell-tales and untie them when they are looped. It is the duty of a railroad company to see that they are in a proper condition and cannot shift this duty to an injured employé's fellow servants.⁸¹ Negligence is not conclusively presumed against a railroad company by reason of the discovery that there is an opening in the tell-tales, particularly where there is no evidence as to how long the opening had existed, or that the injured employé had passed through this opening.⁸² A brakeman will not be presumed to have been thrown off his guard or deceived by the absence of tell-tales where it is not alleged that he had any knowledge of tell-tales or that he knew what they were intended for, or that they were in common use on railroads as a means of warning, or that he knew the railroad company had erected or pretended to erect any warning device at the bridge causing his injuries.⁸³ The question of the sufficiency of these warning devices is for the jury.⁸⁴

§ 4320. **Liability under Statute Requiring Railroad Companies to Fence their Tracks.**—It seems a proper rule that the duty of a rail-

the general work of constructing a bridge, and during a temporary intermission in his employment he voluntarily took a position on an abutment and was injured by contact with a derrick in use at the time to move a stone, it was held that it was not the master's duty to have a representative present to see that the place the employé selected was a safe place for him while not at work: *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689; s. c. 63 L. R. A. 460; rev'g s. c. 66 N. E. Rep. 1016.

⁷⁹ *Cleveland & C. R. Co. v. Haas*, 35

Ind. App. 626; s. c. 74 N. E. Rep. 1003.

⁸⁰ *Dean v. Oregon R. & C. Co.*, 38 Wash. 565; s. c. 80 Pac. Rep. 842.

⁸¹ *McGarity v. New York & C. R. Co.*, 25 R. I. 269; s. c. 55 Atl. Rep. 718.

⁸² *Quinlan v. New York & C. R. Co.*, 89 App. Div. (N. Y.) 266; 85 N. Y. Supp. 814; s. c. aff'd, 181 N. Y. 523; 73 N. E. Rep. 1130.

⁸³ *Hollingsworth v. Chicago & C. R. Co.*, 160 Ind. 259; s. c. 65 N. E. Rep. 750.

⁸⁴ *Hedrick v. Southern R. Co.*, 136 N. C. 510; s. c. 48 S. E. Rep. 830.

road company to exercise reasonable care to keep its track free from obstructions of cattle or otherwise is not affected by the failure of the legislature to impose on the railroad company the duty to guard against cattle by the erection of fences.⁸⁵ But there is a holding that a special statute requiring railroads in a certain county to fence their rights of way, and making them liable for cattle killed by reason of failure so to fence, does not make a railroad company liable for injuries to an employé caused by the derailling of a locomotive as a result of cattle getting on the tracks through a failure on the part of the railroad company to fence. The court concludes that only a general statute could have this effect.⁸⁶

§ 4326. Whether Use of Open or Unblocked Frogs is Negligence in the Absence of Statute.—It is the doctrine of one case that it is not negligence to use unblocked frogs in a railroad freight yard, though the feet of employés coupling cars are liable to be caught, if unblocked frogs are generally in use in the same section of the country, and it is an open question whether they are not the better kind.⁸⁷

§ 4333. Absence of Butt-post at the end of a Stub-switch.⁸⁸

§ 4335. Care of Snow and Ice in Switch-Yards.—"The mere falling of snow or formation of ice is not in itself evidence of negligence on part of the company; but if by reason of the structures or improvements placed upon the yards, or by reason of the method of caring for or maintaining such yard, or by reason of public travel across the same, such snow or ice accumulates in heaps or ridges in places where brakemen are required to go in performing the work required of them, thereby exposing them to danger of slipping beneath the wheels of moving cars, and such obstructions are allowed to remain an unreasonable length of time without effort to remove them, it cannot then be said, as a matter of law, that such company is not negligent."⁸⁹

§ 4346. Liability of Railway Companies to their Employés for Furnishing Defective Locomotive-Engines, etc.—It is the duty of a railroad company to use ordinary or reasonable care to see that the engine and tender furnished an engineer for use are reasonably safe,

⁸⁵ Mendizabal v. New York & C. R. Co., 89 App. Div. (N. Y.) 386; s. c. 85 N. Y. Supp. 896.

⁸⁶ Snyder v. Pennsylvania R. Co., 205 Pa. 619; s. c. 55 Atl. Rep. 778.

⁸⁷ Kilpatrick v. Choctaw & C. R. Co., 195 U. S. 624; s. c. 25 Sup. Ct. Rep. 789; 49 L. Ed. 349; aff'g s. c. 121 Fed. Rep. 11; 57 C. C. A. 253.

⁸⁸ Train employés do not assume the risk of injury from the failure

of the railroad company to place a bumper or other obstruction at the open end of a switch which terminates on a trestle some feet above the ground: Pennsylvania R. Co. v. Jones, 59 C. C. A. 87; s. c. 123 Fed. Rep. 753.

⁸⁹ Weaver, J., in Sankey v. Chicago & C. R. Co., 118 Iowa 39; s. c. 91 N. W. Rep. 820.

and also to use ordinary diligence to keep them in a reasonably safe condition,⁹⁰ but the railroad company is not an insurer against dangers attending the operation of the locomotive which are ordinarily incident to the service.⁹¹ A railroad company is not to be charged with negligence in substituting a stub pilot in the place of a long pilot previously used, when this step is necessary in order to equip the engine with an automatic coupler as required by the Federal statute, although these pilots are less able to throw cattle from the track, so as to render the railroad company liable for injuries to one employed on the engine through its being overturned in a collision with cattle on the track.⁹²

§ 4357. Various Other Defects in Engines, etc., for which Railway Companies have been held Liable to their Servants.—It is held in one case that the absence of a brake from an engine, the presence of which would have prevented a collision with an animal on the track, was the proximate cause of the resulting derailment.⁹³ In another case where a railroad company permitted an engine to start on a trip without any chimney for its headlight, in consequence of which the headlight could not be used, and a collision resulted, in which the conductor of another train was killed, it was held that the negligence was that of the company itself and not that of a fellow servant.⁹⁴

⁹⁰ *Texas &c. R. Co. v. Hartnett*, 33 Tex. Civ. App. 103; s. c. 75 S. W. Rep. 809. In one case a locomotive engineer, having noticed that the cover of an "arm hole" on the locomotive boiler had become loosened, called the fact to the attention of the foreman of the repair shop, who promised that it would be repaired. The promise was not fulfilled, and on the next trip, while the engine was in motion, the engineer went out on the running board to fasten the cover. It suddenly fell, causing him to involuntarily reach for it, and he lost his balance and was injured. It was held that it could not be said that the facts did not furnish evidence from which failure to repair might be found to constitute negligence on the part of the master: *Olney v. Boston &c. R.*, 71 N. H. 427; s. c. 52 Atl. Rep. 1097. A railroad company is required to exercise ordinary care in the inspection and keeping in repair of an engine for use by a fireman, which duty extends to a step between his seat and the deck of the cab: *Fry*

v. Great Northern R. Co., 95 Minn. 87; s. c. 103 N. W. Rep. 733.

⁹¹ *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140; s. c. 71 N. E. Rep. 435; aff'g s. c. 109 Ill. App. 468. Where the defective and unsafe condition of the engine is alleged the defendant may introduce evidence to prove that the engine and boiler were new and of approved manufacture, as tending to show both their reasonably safe condition at the time of an accident and that the railroad company had used reasonable care in providing safe machinery for the use of its employees: *Illinois Cent. R. Co. v. Prickett*, 109 Ill. App. 468; s. c. aff'd, 210 Ill. 140; 71 N. E. Rep. 435.

⁹² *Briggs v. Chicago &c. R. Co.*, 125 Fed. Rep. 745; s. c. 60 C. C. A. 513.

⁹³ *Choctaw &c. R. Co. v. Holloway*, 191 U. S. 334; s. c. 24 Sup. Ct. Rep. 102; 48 L. Ed. 207; aff'g s. c. 114 Fed. Rep. 458; 52 C. C. A. 260.

⁹⁴ *Sutter v. New York &c. R. Co.*, 79 App. Div. (N. Y.) 362; s. c. 79 N. Y. Supp. 1106.

§ 4360. **General Nature of the Liability of Railway Companies to their Employés for Furnishing Defective Cars.**⁹⁵

§ 4368. **Evidence of Negligence, Proximate Cause, Instructions, and other Questions Relating to the Use of Defective Cars.**⁹⁶

§ 4373. **Duty of a Railway Company in Respect of Cars Received from Another Company.**—In one case a railroad company using a freight car belonging to another railroad company as a passway between a car of its own being unloaded and its freight depot, was held liable for injuries to a servant caused by defects in the foreign car.⁹⁷

§ 4378. **Nature and Extent of the Inspection Required.**—Generally speaking, the degree of care to be exercised in the inspection of foreign cars is that known as ordinary or reasonable care, and for injuries resulting to employés from defects which would be disclosed by a reasonable and careful inspection the company is liable; but not latent defects which cannot be discovered by an inspection of this character.

§ 4384. **Both the Sending and the Receiving Company may be Liable.**⁹⁸

§ 4393. **Liability of Railway Companies to their Employés for Injuries from Defective Brakes, Brake-Beams, Chains, etc.**—In one case a yard brakeman, whose duty it was to board defective cars as they were sent from the main track onto the repair track and bring them

⁹⁵ A railroad company transferring a car used for the shipment of hotel supplies from the passenger to the freight service should provide the car with necessary appliances ordinarily used on cars in the freight service to enable the employés, whose duties require them to pass over one car to another while the train is in motion, to do so without unnecessary risk or danger: *Boyle v. Union Pac. R. Co.*, 25 Utah 420; s. c. 71 Pac. Rep. 988. A railroad company is charged with the duty to keep a step on a car used by servants in suitable repair and to see that it is of sufficient strength: *Smith v. Thomson-Houston Electric Co.*, 188 Mass. 371; s. c. 74 N. E. Rep. 664. A rule making it the duty of brakemen of freight trains to inspect the steps of cars making up the train is held not to violate the principle requiring the master to exercise reasonable care to furnish safe appliances: *Scott v.*

Eastern R. Co., 90 Minn. 135; s. c. 95 N. W. Rep. 892.

⁹⁶ The mere fact of injury to a section hand by contact with the projecting step of a caboose is not evidence that the railroad company should have apprehended that the projecting step would directly endanger the safety of its employés: *Turner v. Detroit Southern R. Co.*, 137 Mich. 142; s. c. 100 N. W. Rep. 268; 11 Det. Leg. N. 206.

⁹⁷ *Foster v. New York & C. R. Co.*, 187 Mass. 21; s. c. 72 N. E. Rep. 331.

⁹⁸ *Belt R. Co. v. Confrey*, 111 Ill. App. 473. See also *International & C. R. Co. v. Reeves*, 35 Tex. Civ. App. 162; s. c. 79 S. W. Rep. 1099.

⁹⁹ *Strauss v. New York & C. R. Co.*, 91 App. Div. (N. Y.) 583; s. c. 87 N. Y. Supp. 67; *Missouri & C. R. Co. v. Merrill*, 65 Kan. 436; s. c. 70 Pac. Rep. 358; 59 L. R. A. 711 (the delivery company not liable where receiving company inspected the car).

to a stop, was injured by stepping on a defective brake beam. It was the duty of an inspector to examine trains as they came into the yards and mark the defective cars with signs to indicate the defect. In this case the car causing the injury was marked for defective bumper bolts only. It was held that the inspection was solely for the purpose of taking defective cars out of the trains, and that the company owed no duty to this brakeman as to the manner in which this inspection should be made, or the fullness of the marks indicating the defects.¹⁰⁰

§ 4406. Liability of Railway Companies for Furnishing Defective Arrangements for Coupling and Uncoupling Cars.—Although negligence *per se* will not be imputed to a railroad company for failure to equip engines with the latest devices in coupling, still the jury may consider the practicability of these later devices and their effect on the safety of employes in determining whether reasonable care had been exercised in the equipment of the locomotive.¹⁰¹

§ 4412. Use of Cars with Buffers of Unequal Height.—The Interstate Commerce Commission has promulgated a rule that the maximum variation from the standard height of drawbars to be allowed between the drawbars of empty and loaded cars engaged in interstate commerce shall be three inches. Under this rule it has been held unnecessary for a plaintiff, injured by reason of its violation, to show knowledge on the part of the defendant that it had not complied with the rule.¹⁰² The rule does not require that the draft line should be even, but that the centers of the drawbars should be of a standard height.¹⁰³ The failure of a railroad company to comply with this rule will authorize a recovery for death or injury only where that was the proximate cause of the death or injury.¹⁰⁴

§ 4416. Failing to Equip Cars with Automatic Self-Couplers.¹⁰⁵

¹⁰⁰ Gerstner v. New York & C. R. Co., 81 App. Div. (N. Y.) 562; s. c. 80 N. Y. Supp. 1063; s. c. aff'd, 178 N. Y. 627; 71 N. E. Rep. 1131.

¹⁰¹ Bryce v. Burlington & C. R. Co., 119 Iowa 274; s. c. 93 N. W. Rep. 275. In a case where an un instructed employé was crushed between cars, one of which was equipped with an old style Miller hook coupler not generally used, and the other car was equipped with an old style skeleton link and pin coupler, making the coupling between the two cars more than usually dangerous, the railroad company was held liable for the death of a brakeman crushed while attempting to make

the coupling, on the ground of negligence: Northern Pac. R. Co. v. Tynan, 119 Fed. Rep. 288; s. c. 51 C. C. A. 192.

¹⁰² Neal v. St. Louis & C. R. Co., 71 Ark. 445; s. c. 78 S. W. Rep. 220.

¹⁰³ Neal v. St. Louis & C. R. Co., 71 Ark. 445; s. c. 78 S. W. Rep. 220.

¹⁰⁴ Neal v. St. Louis & C. R. Co., 71 Ark. 445; s. c. 78 S. W. Rep. 220.

¹⁰⁵ Evidence merely of a defect in the couplers is not sufficient to sustain an averment of the complaint that the cars were not equipped with automatic couplers: Kansas City & C. R. Co. v. Flippe, 138 Ala. 487; s. c. 138 South. Rep. 457.

§ 4417. **Federal Statute Requiring Use of Automatic Car-Couplings.**—The well-known rule of interpretation that statutes in derogation of the common law are to be construed strictly is held by the Supreme Court of the United States not to demand that this statute should be so construed as to defeat the obvious object of Congress to make some change in the existing law on the subject.¹⁰⁶ A car is engaged in the transportation of interstate commerce if it has come into a State from a point without the State,¹⁰⁷ or when its movement is a necessary step in interstate transportation, although not actually so employed at the time injuries are received,¹⁰⁸ as, for example, where the injury occurs in the making up of a train for the purpose of moving interstate traffic.¹⁰⁹ But a dining-car being switched and turned preparatory to attachment to a train, though interstate, is not then employed in interstate transportation.¹¹⁰ The rule has been held not to apply to a narrow gauge railroad located wholly within the confines of a State, and refusing to ship goods and merchandise under through bills of lading.¹¹¹ The fact that the car was employed in the transportation of interstate commerce must be shown.¹¹² The failure to adopt these devices commanded by the act of Congress imputes the delinquent railroad company with negligence *per se*,¹¹³ and the defenses of assumption of risk¹¹⁴ and contributory negligence¹¹⁵ cannot be urged. The automatic couplers intended by the statute are couplers which will both couple and can be uncoupled without the necessity of men going between the cars,¹¹⁶ even to prepare the coupler for the

¹⁰⁶ *Johnson v. Southern Pac. Co.*, 196 U. S. 1; s. c. 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; rev'g s. c. 117 Fed. Rep. 462; 54 C. C. A. 508.

¹⁰⁷ *Winkler v. Philadelphia & R. R. Co.*, — Del. —; s. c. 53 Atl. Rep. 90.

¹⁰⁸ *Winkler v. Philadelphia & R. R. Co.*, — Del. —; s. c. 53 Atl. Rep. 90. Cars loaded with articles shipped to other States, and started, whether in yards, on side tracks, or in trains, are used in moving interstate commerce within the act; but when vacant, and on side tracks in repair shops, or in trains which are not loaded with or in use to move articles of interstate commerce, are not within the meaning of the act: *Johnson v. Southern Pac. Co.*, 117 Fed. Rep. 462; s. c. 54 C. C. A. 508.

¹⁰⁹ *United States v. Southern R. Co.*, 135 Fed. Rep. 122; *Mobile & C. R. Co. v. Bromberg*, 141 Ala. 258; s. c. 37 South. Rep. 395.

¹¹⁰ *Johnson v. Southern Pac. Co.*,

117 Fed. Rep. 462; s. c. 54 C. C. A. 508.

¹¹¹ *United States v. Geddes*, 131 Fed. Rep. 452; s. c. 65 C. C. A. 320.

¹¹² *Rosney v. Erie R. Co.*, 135 Fed. Rep. 311; s. c. 68 C. C. A. 155.

¹¹³ *Philadelphia & R. R. Co. v. Winkler*, — Del. —; s. c. 56 Atl. Rep. 112; *Southern R. Co. v. Carson*, 194 U. S. 136; s. c. 24 Sup. Ct. Rep. 609; 48 L. Ed. 907.

¹¹⁴ *Chicago & C. R. Co. v. Voelker*, 129 Fed. Rep. 522; s. c. 65 C. C. A. 226; rev'g s. c. 116 Fed. Rep. 867; *Kansas City & C. R. Co. v. Flippo*, 138 Ala. 487; s. c. 35 South. Rep. 457.

¹¹⁵ *Fleming v. Southern R. Co.*, 131 N. C. 476; s. c. 42 S. E. Rep. 905; s. c. 132 N. C. 714; 44 S. E. Rep. 551; *Elmore v. Sea-Board Air Line R. Co.*, 132 N. C. 865; s. c. 44 S. E. Rep. 620.

¹¹⁶ *Philadelphia & C. R. Co. v. Winkler*, — Del. —; s. c. 56 Atl. Rep. 112; *Winkler v. Philadelphia*

impact.¹¹⁷ The law is not satisfied by the use of automatic couplers of different types which do not couple with each other,¹¹⁸ nor couplers that have been permitted to become and remain defective so they cannot be worked by the lever.¹¹⁹ The authorities generally hold that a locomotive is a "car" within the meaning of the statute and must be equipped with a brake.¹²⁰ It is not necessary for the complaint in an action for injuries caused by the violation of this act to allege in what manner the failure to comply with the act caused the injury.¹²¹

§ 4418. Construction of Other Statutes Relating to Coupling-Devices.¹²²

§ 4435. Contributory Negligence in Making Couplings.—In a case where it was sought to charge an injured car coupler with negligence in attempting to make a coupling on a curve, it was held proper to admit evidence that another person had made a coupling on the curve in question by going between the cars on the inside of the curve without being injured.¹²³

§ 4436. Instructions to Jury in Cases of Injuries from Making Couplings.¹²⁴

& R. R. Co., — Del. —; s. c. 53 Atl. Rep. 90; *Johnson v. Southern Pac. Co.*, 196 U. S. 1; s. c. 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; rev'g s. c. 117 Fed. Rep. 462; 54 C. C. A. 508; *United States v. Southern R. Co.*, 135 Fed. Rep. 122.

¹¹⁷ *Chicago &c. R. Co. v. Voelker*, 129 Fed. Rep. 522; s. c. 65 C. C. A. 226; rev'g s. c. 116 Fed. Rep. 867.

¹¹⁸ *Johnson v. Southern Pac. Co.*, 196 U. S. 1; s. c. 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; rev'g s. c. 117 Fed. Rep. 462; 54 C. C. A. 508.

¹¹⁹ *Chicago &c. R. Co. v. Voelker*, 129 Fed. Rep. 522; s. c. 65 C. C. A. 226; rev'g s. c. 116 Fed. Rep. 867.

¹²⁰ *Philadelphia &c. R. Co. v. Winkler*, — Del. —; s. c. 56 Atl. Rep. 112 (tender); *Johnson v. Southern Pac. Co.*, 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; rev'g s. c. 117 Fed. Rep. 462; 54 C. C. A. 508; *Fleming v. Southern R. Co.*, 131 N. C. 476; s. c. 42 S. E. Rep. 905; s. c. 132 N. C. 714; 44 S. E. Rep. 551. *Contra Larabee v. New York &c. R. Co.*, 182 Mass. 348; s. c. 66 N. E. Rep. 1032.

¹²¹ *Mobile &c. R. Co. v. Bromberg*, 141 Ala. 258; s. c. 37 South. Rep. 395.

¹²² In Massachusetts it is held that

a freight car which is being taken to a repair shop to be repaired is not within the meaning of the statute of that State prohibiting a railroad company, in "moving traffic," from hauling a car not equipped with an automatic coupler: *Taylor v. Boston &c. R. Co.*, 188 Mass. 390; 74 N. E. Rep. 591. The Michigan statute is held not to require the placing of such couplers on the tenders of locomotives: *Blanchard v. Detroit &c. R. Co.*, 139 Mich. 694; s. c. 103 N. W. Rep. 170; 12 Det. Leg. N. 30.

¹²³ *Mobile &c. R. Co. v. Bromberg*, 141 Ala. 258; s. c. 37 South. Rep. 395.

¹²⁴ In a case where the defendant alleged that the car coupler's failure to use a coupling stick was responsible for his injuries, an instruction asked, by the plaintiff, that if the defendant company agreed to furnish a coupling stick, and failed to do so, it cannot complain of a failure to use a stick, was properly denied, as it left out of consideration whether the failure to furnish such stick was due to the negligence of the defendant or the plaintiff: *Binion v. Georgia Southern &c. R. Co.*, 118 Ga. 282; s. c. 45

§ 4438. Suffering Unlocked and Unblocked Car to Stand on a Descending Grade.¹²⁵

§ 4445. Duty of Railway Company to Exercise Care to the End of Providing Safe Hand-Cars for their Employés to Use is an Absolute and Unassignable Duty.¹²⁶—It is held that the duty of the railroad company in this regard was not incorrectly set forth in an instruction that it was the defendant's duty to provide a reasonably safe hand-car, and that it was required to know that the car was kept in a reasonably safe condition, and such duty could not be avoided by intrusting its performance to the foreman, and that it was its duty to take reasonable precautions to discover defects in the appliances.¹²⁷ There is authority that a railroad company negligently furnishing its servants a defective push-car which would not hold an ordinary load is liable for injuries to a servant by reason of its breaking down though the servant himself overloaded the car.¹²⁸ Where the negligence complained of consists in furnishing a defective car the question whether or not the company built the car becomes immaterial.¹²⁹

§ 4447. Instances where there was no such Liability.¹³⁰

S. E. Rep. 276. An instruction in an action for injuries to a fireman by being thrown from his cab by the impact in coupling cars that if it was the conductor's duty to know the location of the cars he was about to couple to, and he did not know such location, yet if, under the circumstances, the conductor believed, and was entitled to believe, that the brakeman would be with his lantern at the end of the car to which it was expected to couple, and, if the brakeman had been there, the accident would not have happened, the plaintiff could not recover, was held properly refused, as predicated on the concurring negligence of the conductor, a vice-principal, and of the brakeman, a fellow servant: *Virginia &c. R. Co. v. Bailey*, 103 Va. 205; s. c. 49 S. E. Rep. 33.

¹²⁵ In a case where several cars were left on a siding on a down grade, and on the uncoupling of two of the cars by the brakeman of a later train the rest of the cars started of their own weight and injured him, it was held a question for the jury whether the negligence of the crew of the earlier train in not properly setting the brakes of cars left on the siding was the proximate

cause of the injury: *Louisville &c. R. Co. v. Ewing*, 117 Ky. 624; s. c. 78 S. W. Rep. 460; 25 Ky. L. Rep. 1712.

¹²⁶ A complaint has been held to state a good cause of action which alleged that the plaintiff's intestate was in the employ of the defendant railroad, and that, when requested by his superior, his duty required him to assist in clearing wrecks; that, in obedience to such a request, he started for a wreck on a hand-car; that it jumped the track, by reason of defects therein, throwing him on the road bed; and that before he could escape a heavy truck, following with men for the wreck, which did not have brakes of any kind, ran over and killed him: *King v. Covington &c. R. Co. (Ky.)*, 72 S. W. Rep. 757; s. c. 24 Ky. L. Rep. 1942.

¹²⁷ *Chicago &c. R. Co. v. Tackett*, —Ind. App. —; s. c. 71 N. E. Rep. 524.

¹²⁸ *Mitchell v. Wabash R. Co.*, 97 Mo. App. 411; s. c. 76 S. W. Rep. 647.

¹²⁹ *Mitchell v. Wabash R. Co.*, 97 Mo. App. 411; s. c. 76 S. W. Rep. 647.

¹³⁰ In an action for injuries to a trackman caused by the breaking

§ 4448. **Liability for Injuries to Employés in Operating Hand-Cars.**¹³¹—In one case a railroad bridge builder rode on a hand-car with others and the remainder of the crew followed on a second car. The cars were allowed to coast down a grade being some three hundred feet apart and running about ten miles an hour. The first car struck a mule, and the bridge builder, to avoid injury, jumped from the rear of the car and was struck by the second car. The men in charge of the second car made no attempt to stop their car until too late to avoid the accident. It was held that the railroad company was chargeable with negligence, either in failing to stop the second car in time, if that were possible, or if it were not, in operating the two cars on so steep a grade so close together, and without retaining control of the brakes on the second car.¹³² In another case a section-hand was riding on a hand-car, when he was injured owing to his hand-car being run into by a following hand-car. The evidence showed that the second car had several times during the journey run into the car on which the plaintiff was riding, and that it was not shown that any effort had been made to avoid so doing by the use of a brake or otherwise. Here it was held that the negligence of those in charge of the second car, and not the master's failure to equip the second car with a sufficient brake, was the proximate cause of the injury.¹³³ Again, negligence may consist in compelling an inexperienced section-hand to mount a rapidly moving hand-car.¹³⁴

§ 4450. Rules and Regulations.¹³⁵

of a handle bar on a hand-car, evidence was held insufficient to establish defendant's negligence which showed that the handle, made of hickory, broke at a point where it was covered with iron, and after being broken it appeared to be slightly unsound; that the car was used every day by the plaintiff and his foreman, who was a careful man, and though the bar was under constant observation and inspection no defect was discovered therein, and a careful examination would not necessarily have revealed the defect, which could have been determined only by cutting into the wood or breaking it: *Howard v. Missouri Pac. R. Co.*, 173 Mo. 524; s. c. 73 S. W. Rep. 467.

¹³¹ Cases sustaining recoveries for injuries due to negligence in lifting hand-cars from the track: *Illinois Cent. R. Co. v. McIntosh*, 118 Ky. 145; s. c. 80 S. W. Rep. 496; 81 S. W. Rep. 270; 26 Ky. L. Rep. 347;

Missouri &c. R. Co. v. Smith, 31 Tex. Civ. App. 332; s. c. 72 S. W. Rep. 418.

¹³² *Middlesborough R. Co. v. Stalard* (Ky.), 72 S. W. Rep. 17; s. c. 24 Ky. L. Rep. 1666.

¹³³ *Baltimore &c. R. Co. v. Henderson*, 31 Ind. App. 441; s. c. 68 N. E. Rep. 308.

¹³⁴ *Galveston &c. R. Co. v. Puente*, 30 Tex. Civ. App. 246; s. c. 70 S. W. Rep. 362.

¹³⁵ A rule that engine men must not leave their engines with steam on except in charge of an employé, and that when an engine is placed on a siding or elsewhere to stand the throttle must be fastened shut, the reverse lever fixed on the center, and the tender brakes shut tight, is plainly without application to an engine when under the direct and immediate control of the engineer who has brought it to a temporary stop on the main track. In such a rule the words "or else-

§ 4456. **Double Track—Running a Train on the Wrong Track.**—A railroad company is not to be charged with negligence, as a matter of law, by the mere giving and the obedience by employes of an order directing out-bound trains to take the in-bound track.¹³⁶

§ 4458. **Locomotive or Train Starting with a Sudden Jerk.**¹³⁷

§ 4459. **Stopping Suddenly and Without Warning.**¹³⁸—It was held in one case that the negligence of a train dispatcher which resulted in the threatened collision to avoid which an emergency stop of one train was made at the signal of the trainmen, whereby the brakeman was thrown off and killed, was the proximate cause of the injury.¹³⁹ In another case where a brakeman, stepping from one car to another while they were being pushed by an engine, was thrown to the ground by their separation, on the engine being checked, the cars not being coupled, it was held that the act of the engineer might be negligence if improperly done, irrespective of the cars being uncoupled, but if otherwise properly done could not be held negligent by reason of the fact that they were uncoupled, if that fact was not known to him.¹⁴⁰

§ 4464. **Pushing Cars too Suddenly Against Other Cars.**¹⁴¹

§ 4466. **Failure to have Lookout on Rear Car of Train.**¹⁴²—There is a holding that a railroad company operating cars in a yard is not under all the circumstances bound to maintain a lookout on the fore part of every car that is moved when reasonable precaution is taken

where" are construed to refer to things of the same kind as the word "siding": *Cleveland &c. R. Co. v. Bergschicker*, 162 Ind. 108; s. c. 69 N. E. Rep. 1000.

¹³⁶ *Sanks v. Chicago &c. R. Co.*, 112 Ill. App. 385.

¹³⁷ *Whisenant v. Southern R. Co.*, 137 N. C. 349; s. c. 49 S. E. Rep. 559 (sudden jerk while train was slackening speed as if to stop to let off laborers).

¹³⁸ *Allen v. Chicago &c. R. Co.*, 126 Iowa 213; s. c. 101 N. W. Rep. 863 (example of complaint charging negligence in the improper operation of train and sudden stop thereof, and not negligence in the act of stopping the train considered by itself).

¹³⁹ *Phinney v. Illinois Cent. R. Co.*, 122 Iowa 488; s. c. 98 N. W. Rep. 358.

¹⁴⁰ *St. Louis &c. R. Co. v. Pope*, 98

Tex. 535; s. c. 86 S. W. Rep. 5; rev'g s. c. 82 S. W. Rep. 360.

¹⁴¹ *Dillon v. Iowa Cent. R. Co.*, 118 Iowa 645; s. c. 92 N. W. Rep. 855 (company not liable for injuries to engineer between cars on a call of nature caused by sudden backing of train); *Peoples v. North Carolina R. Co.*, 137 N. C. 96; s. c. 49 S. E. Rep. 87 (actionable negligence in kicking cars down an incline, causing them to collide with stationary cars on the track).

¹⁴² The question of the actionable negligence of a railroad company was held one for the jury, where the evidence tended to show that the decedent was killed while attempting to mount a shifting engine, with his back to approaching box cars, which gave no warning of their approach, and which were not manned with a lookout: *Peoples v. North Carolina R. Co.*, 137 N. C. 96; s. c. 49 S. E. Rep. 87.

to guard against injury except as to persons guilty of contributory negligence.¹⁴³

§ 4468. **Other Statutory Precautions—"Lookout on Engine," etc.**¹⁴⁴

§ 4475. **Running Down Hand-Cars and Push-Cars.**—It is the view of one court that the operatives of a railroad train are not required to be on the lookout at a remote point on the track for an employé of the road riding on a railroad tricycle with the consent of his foreman.¹⁴⁵

§ 4478. **Running Down Track-Repairers at Work on the Track.**¹⁴⁶

§ 4481. **Right of Engineer to Assume that Section-Men will be on the Lookout and get out of the Way.**—Generally speaking, the operatives of a train seeing a section-man near the track, but not in a position of peril at the time, are authorized to assume that he will not do anything thereafter toward placing himself in a position of danger, and they are not required to stop the train or check the speed.¹⁴⁷ However, the rule that one seen upon the track by the engineer will be presumed to intend to leave it in time to avoid being run down cannot be held, as a matter of law, to apply to a push-car that section-men are attempting to remove from the track in order to avoid a collision.¹⁴⁸

§ 4488. **Duty to Provide Sufficient Signals of Danger.**—The noise of an approaching train is not sufficient warning to employes at work on the track to justify the omission to give other warnings,¹⁴⁹ the bell of a switch engine should be rung continuously while the engine is at work in railroad yards.¹⁵⁰ Where it is apparent to the engineer that his signals to a workman on the track are not heard he should reduce the speed, and stop his engine, if necessary to avoid inflicting injury.¹⁵¹

¹⁴³ *Lewis v. Vicksburg &c. R. Co.*, 114 La. 161; s. c. 38 South. Rep. 92.

¹⁴⁴ A statute requiring railroad companies to maintain telegraph offices along its line not more than ten miles apart can be invoked in case of accident only where a compliance with the act would have avoided its occurrence: *Driver v. Southern R. Co.*, 103 Va. 650; s. c. 49 S. E. Rep. 1000.

¹⁴⁵ *Jacob v. Chesapeake &c. R. Co.* (Ky.), 72 S. W. Rep. 308; 24 Ky. L. Rep. 1879.

¹⁴⁶ *Missouri &c. R. Co. v. Jones*, 35 Tex. Civ. App. 584; s. c. 80 S. W. Rep. 852 (instruction not open to the construction that it required

the operatives of the engine when approaching a place where the track was commonly used by employes to stop the engine to avoid injuring such employes).

¹⁴⁷ *Helm v. Missouri Pac. R. Co.*, 185 Mo. 212; s. c. 84 S. W. Rep. 5.

¹⁴⁸ *International &c. R. Co. v. McVey* (Tex. Civ. App.), 81 S. W. Rep. 991; s. c. 83 S. W. Rep. 34.

¹⁴⁹ *Southern R. Co. v. Otis* (Ky.), 78 S. W. Rep. 480; s. c. 25 Ky. L. Rep. 1686.

¹⁵⁰ *Smith v. Atlanta &c. R. Co.*, 132 N. C. 819; s. c. 44 S. E. Rep. 663.

¹⁵¹ *Kelley v. Chicago &c. R. Co.*, 118 Iowa 387; s. c. 92 N. W. Rep. 45.

Statutes making it the duty of locomotives to sound signals on approaching highway crossings are construed to protect servants of the railroad company at work on the track near highway crossings.¹⁵²

§ 4490. **Duty of Giving Signals to Car-Inspectors and Car-Repairers.**¹⁵³

§ 4492. **Sending Back Flagmen to Warn Following Train.**—Generally speaking, a railroad company is liable for injuries caused by the failure of a standing train to send back a flagman, as required by a rule of the company, to warn a following train, and it has been held that this rule applies, although the failure to send back a flagman was not the sole cause of the injury, but merely concurred with other causes to produce the same.¹⁵⁴

§ 4497. **Negligence in not Waiting for the Proper Signal.**—An engineer is guilty of a gross form of negligence where he backs his train without having received any signal to do so, and another servant is injured by reason of this act;¹⁵⁵ and it is not necessary to charge the engineer with negligence that he should have known of the presence of the employé between the cars.¹⁵⁶

§ 4501. **Absence of Headlight.**—A railroad company will not be imputed with negligence in operating an engine at night without a headlight where a torch or other light is used in place of the headlight, and this substitute furnishes as good or better light than the headlight.¹⁵⁷

§ 4502. **Absence of other Lights on Trains or Cars.**—A railroad company may be imputed with actionable negligence where it fails to display lights in the cupola of a caboose attached to a standing train, and as a proximate result of this failure the train is run into by a following train and employés thereon are injured.¹⁵⁸

¹⁵² *Illinois Cent. R. Co. v. McIntosh*, 118 Ky. 145; s. c. 80 S. W. Rep. 496; 26 Ky. L. Rep. 14, 347; 81 S. W. Rep. 270; *International & C. R. Co. v. Tisdale*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 1063; *International & C. R. Co. v. McVey* (Tex. Civ. App.), 81 S. W. Rep. 991; s. c. 83 S. W. Rep. 34.

¹⁵³ *Louisville & C. R. Co. v. Lowe*, 118 Ky. 260; s. c. 80 S. W. Rep. 768; 25 Ky. L. Rep. 2317 (railroad company liable for injury to assistant car inspector caused by failure to maintain lookout on backing engine).

¹⁵⁴ *San Antonio & C. R. Co. v. Lester*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 401.

¹⁵⁵ *Black v. Missouri Pac. R. Co.*, 172 Mo. 177; s. c. 72 S. W. Rep. 559; *Southern R. Co. v. Otis*, 78 S. W. Rep. 480; s. c. 25 Ky. L. Rep. 1686.

¹⁵⁶ *Galveston & C. R. Co. v. Courtney*, 30 Tex. Civ. App. 544; s. c. 71 S. W. Rep. 307.

¹⁵⁷ *Sloss-Sheffield Steel & C. Co. v. Mobley*, 139 Ala. 425; s. c. 36 South. Rep. 181.

¹⁵⁸ *San Antonio & C. R. Co. v. Lester*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 401.

§ 4508. **Excessive Speed.**—Where it was shown that the usual speed of cars at a certain point is about six miles an hour, evidence that a car occasioning an injury was running ten or fifteen miles an hour was held to show an unusual speed, and whether it was dangerous or not was held a question of fact for the determination of the jury.¹⁵⁹ A railroad company was held liable for the death of an employé killed in a collision between a freight train and the hand-car on which he was riding, where it was shown that the train was running at an excessive rate of speed, and the engineer failed to sound the whistle at a curve near which the accident occurred, as required by the rules, and this neglect to signal was the more reprehensible because the engineer had been cautioned to look out for the hand-car.¹⁶⁰ There is a holding that it is not negligence *per se* for a conductor of a freight train, while engaged in switching cars at a station, to order an experienced brakeman to board and stop a car moving at a speed of from four to six miles an hour.¹⁶¹

§ 4510. **City Ordinances Limiting Rate of Speed.**—The fact that an engineer was running at a speed greater than allowed by a municipal ordinance is evidence of negligence,¹⁶² but the railroad company will not be liable on this ground unless the violation of the ordinance was the proximate cause of the injury.¹⁶³

§ 4512. **Injuries to Employés in Collisions.**—Generally speaking, the mere fact of a collision between trains of itself raises a presumption of negligence on the part of the railroad company sufficient to take the case to the jury.¹⁶⁴

§ 4516. **Instructions in such Cases which have been Approved.**—An instruction that, if it was negligence for the plaintiff and his crew to run their engine on a certain track without knowing whether the same was obstructed, the jury should find for the defendant, was held not open to the objection that it charged the plaintiff with the negligence of his crew.¹⁶⁵ Where the plaintiff's case was based upon the

¹⁵⁹ *International &c. R. Co. v. Reeves*, 35 Tex. Civ. App. 162; s. c. 79 S. W. Rep. 1099.

¹⁶⁰ *International &c. R. Co. v. Jacobs*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 288.

¹⁶¹ *Weed v. Chicago &c. R. Co.*, 5 Neb. (unoff.) 623; s. c. 99 N. W. Rep. 827.

¹⁶² *Smith v. Atlanta &c. R. Co.*, 132 N. C. 819; s. c. 44 S. E. Rep. 663. But see *Louisville &c. R. Co. v. Hairston*, 122 Ga. 372; s. c. 50 S. E. Rep. 120, where it is held that vio-

lation of the ordinance is not of itself an act of negligence which would give an employé riding on an engine a cause of action.

¹⁶³ *Martin v. Chicago &c. R. Co.*, 118 Iowa 148; s. c. 91 N. W. Rep. 1034; 59 L. R. A. 698.

¹⁶⁴ *Stewart v. Raleigh &c. R. Co.*, 137 N. C. 687; s. c. 50 S. E. Rep. 312.

¹⁶⁵ *Missouri &c. R. Co. v. Purdy*, 98 Tex. 557; s. c. 86 S. W. Rep. 321; rev'g s. c. 83 S. W. Rep. 37.

negligence of the company both in running its train at an excessively high speed and in permitting a rock to remain upon the track, an instruction was properly refused which told the jury to find for the defendant if the derailment would not have occurred but for the rock.¹⁶⁶

§ 4520. **Injuries to Railway Employés in Making the "Flying Switch."**—The process of shifting cars by the use of "flying switches"¹⁶⁷ and "kicks"¹⁶⁸ does not charge the railroad company with negligence as a matter of law.

§ 4525. **Escape of Cars Left Standing on the Track.**—The mere fact that there was no derailing switch at a siding does not impute the railroad company with negligence *per se* in an action for the death of a servant owing to the cars escaping to the main track from a siding,¹⁶⁹ but the question is one of fact for the determination of the jury.¹⁷⁰ In another case where the railroad company, without any inspection, placed a car with a defective brake on a siding not provided with a derailing switch, and the car escaped, it was the view of the court that it could not be said, as a matter of law, that the acts of the railroad company were not wantonly reckless.¹⁷¹ Another court has held that the railroad company would not be liable if the escape of the cars from the siding was due, not to any insufficiency in their brakes which had been set, but to the brakes having been tampered with.¹⁷² The rule of a railroad company providing that conductors must see that brakes are set on cars they leave on grade sidings, and, when practicable, couple all such cars together, etc., has been construed to require cars apparently in contact with each other to be coupled when on a grade siding, but not to prohibit the leaving of an open space between two sets of cars on the same siding.¹⁷³

§ 4529. **Running into Misplaced Switches, or Switches Improperly Set.**¹⁷⁴

¹⁶⁶ El Paso &c. R. Co. v. Whatley, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 306.

¹⁶⁷ Carr v. St. Clair Tunnel Co., 131 Mich. 592; s. c. 92 N. W. Rep. 110; 9 Det. Leg. N. 455.

¹⁶⁸ Alabama Great Southern R. Co. v. Ellis, 137 Ala. 560; s. c. 34 South. Rep. 829 (question for jury); Florida Cent. &c. R. Co. v. Mooney, 45 Fla. 286; s. c. 33 South. Rep. 1010; Gulf &c. R. Co. v. Hill, 29 Tex. Civ. App. 12; s. c. 70 S. W. Rep. 103.

¹⁶⁹ Jones v. Kansas City &c. R. Co., 178 Mo. 528; s. c. 77 S. W. Rep. 890.

¹⁷⁰ Jones v. Kansas City &c. R. Co., 178 Mo. 528; s. c. 77 S. W. Rep. 890.

¹⁷¹ Boyd v. Seaboard Air Line R. Co., 67 S. C. 218; s. c. 45 S. E. Rep. 136. See also Cooper v. New York &c. R. Co., 84 App. Div. (N. Y.) 42; s. c. 82 N. Y. Supp. 98.

¹⁷² Norfolk &c. R. Co. v. Cromer, 101 Va. 667; s. c. 44 S. E. Rep. 898.

¹⁷³ St. Louis &c. R. Co. v. Pope (Tex. Civ. App.), 82 S. W. Rep. 360; s. c. rev'd, 98 Tex. 535; 86 S. W. Rep. 5.

¹⁷⁴ It is a question for the jury whether there was negligence in

§ 4533. **Liability of Railway Company to Employés for Furnishing Defective Appliances for Loading and Unloading.**¹⁷⁵—Where the railroad company has furnished safe appliances for this purpose its duty is performed and it will not be liable for injuries caused by the failure of the employé to use such appliances.¹⁷⁶

§ 4534. **Negligence in Loading Cars.**—Here the railroad company will be liable where its negligence was the proximate cause of the employé's injury and it is not essential to the injured employé's right of recovery that the defendant should have anticipated the injury in the form it was inflicted.¹⁷⁷ It is not negligence, as a matter of law, to require employés to load material on a slowly moving car.¹⁷⁸ A railroad company will be liable for injuries to an employé caused by overloading cars beyond their estimated capacity where this overloading was, or by the exercise of ordinary care, could have been known to the agent of the railroad company charged with the duty to see that cars were properly loaded, and the fact of overloading was not known to the employé.¹⁷⁹

§ 4538. **Injuries in the Operation of Loading and Unloading Railway Cars.**—In a case where a servant of a railroad company was unloading a car of lumber that was tilted to one side and was injured by the sliding of the lumber after another employé had knocked out the stakes on the lower side, a non-suit was held proper on the ground that, if the lumber fell from the mere action of physical forces, the conditions were obvious to the employé, and, if it fell because of the removal of the stakes, the negligence was that of a fellow servant.¹⁸⁰ In another case the railroad company was held liable for injuries to an employé at the side of a track struck by construction material thrown from the car while the train was running at a negligent rate

leaving open a switch to a side track, into which the train on which plaintiff was a baggage agent ran, injuring him, where there was evidence that a switchman of another train opened it, and left it open after his train had picked up cars from the side track: *Dover v. Mississippi River &c. R.*, 100 Mo. App. 330; s. c. 73 S. W. Rep. 298.

¹⁷⁵ That a railroad company is charged with the duty to furnish reasonably safe appliances for loading or transferring freight, see: *Foster v. New York &c. R. Co.*, 187 Mass. 21; s. c. 72 N. E. Rep. 331;

Murphy v. New York &c. R. Co., 187 Mass. 18; s. c. 72 N. E. Rep. 330.

¹⁷⁶ *Hayes v. New York &c. R. Co.*, 187 Mass. 182; s. c. 72 N. E. Rep. 841.

¹⁷⁷ *El Paso &c. R. Co. v. McComas* (Tex. Civ. App.), 72 S. W. Rep. 629.

¹⁷⁸ *La Barre v. Grand Trunk Western R. Co.*, 133 Mich. 192; s. c. 94 N. W. Rep. 735; 10 Det. Leg. N. 146 (whether employés should have been warned a question for jury).

¹⁷⁹ *Louisville &c. R. Co. v. Chandler* (Ky.), 70 S. W. 666; s. c. 24 Ky. L. Rep. 998; 72 S. W. Rep. 805.

¹⁸⁰ *Schultz v. Chicago &c. R. Co.*, 116 Wis. 31; s. c. 92 N. W. Rep. 377.

of speed making it impossible for the men engaged in unloading to take proper note of conditions at the side of the track.¹⁸¹

§ 4543. Liability in Case of Miscellaneous Injuries to Railway Employés.¹⁸²

§ 4550. Other Injuries to Railway Employés—Company Liable.—Other cases hold the railroad company liable for injuries under these circumstances:—Where an employé crossing a bridge ahead of a train discovered an obstruction on the track, and in an effort to remove it and regain a place of safety upon an abutment, was thrown from the bridge and suffered injuries, and it appeared that the engineer, by the exercise of ordinary care, could have discovered the dangerous position of the employé and averted the accident;¹⁸³ where laborers were directed to undertake the removal of a log jam around a railroad trestle on a dark night, without providing lights for the men, and by reason of this neglect an employé was injured;¹⁸⁴ where an employé going to his employment through a switch yard in the night time was run over by an engine backing on the track without warning or signals;¹⁸⁵ where a trackman crossing a bridge to a toolhouse with his tools was run over by a hand-car that was three hundred sixty yards from him when he entered the bridge, and was stationary, and started immediately thereafter and at the time of the collision was running at the rate of eight miles an hour, and he was all the time in the direct view of the operatives of the hand-car;¹⁸⁶ where a section-man on the side of the track was struck by a stone thrown from the tender by a careless fireman.¹⁸⁷

§ 4551. Other Injuries to Railway Employés—Company Exonerated.¹⁸⁸

§ 4553. Defective Street Railway Cars and Appliances.—Recent decisions hold that a street railroad company is negligent where it fails to sand its tracks on steep grades;¹⁸⁹ that knowledge of a de-

¹⁸¹ St. Louis &c. R. Co. v. Arnold, 32 Tex. Civ. App. 272; s. c. 74 S. W. Rep. 819.

¹⁸² Gauges v. Fitchburg R. Co., 185 Mass. 76; s. c. 69 N. E. Rep. 1063 (not negligence *per se* to use old railroad spikes).

¹⁸³ Gulf &c. R. Co. v. Roane (Tex. Civ. App.), 75 S. W. Rep. 845; s. c. rev'd, 33 Tex. Civ. App. 299; 76 S. W. Rep. 771.

¹⁸⁴ Stewart v. Texas &c. R. Co., 113 La. 525; s. c. 37 South. Rep. 129.

¹⁸⁵ Chicago &c. R. Co. v. Cunning-

ham, 33 Ind. App. 145; s. c. 69 N. E. Rep. 304.

¹⁸⁶ Chicago &c. R. Co. v. Long, 74 S. W. Rep. 59; 97 Tex. 69; s. c. 75 S. W. Rep. 483.

¹⁸⁷ Swartz v. Great Northern R. Co., 93 Minn. 339; s. c. 101 N. W. Rep. 504.

¹⁸⁸ Duree v. Chicago &c. R. Co., 118 Iowa 640; s. c. 92 N. W. Rep. 890 (section hand struck in eye by cinder from passing locomotive).

¹⁸⁹ Union Traction Co. v. Buckland, 34 Ind. App. 420; s. c. 72 N. E. Rep.

fective track is presumed where the condition has existed for more than a month;¹⁹⁰ that it is negligence to place a pole so near the track that it endangers the safety of a conductor passing along the running-board to collect fares;¹⁹¹ that it is negligence to construct double tracks so close that when cars pass a conductor, standing on the running-board to collect fares, will be struck by the other car;¹⁹² that it is negligence to equip a car with a brake so defective that the speed of the car cannot be controlled at places where the grade is heavy;¹⁹³ that a street railroad company is not required to keep a light burning at a curve in the track to warn motormen to reduce the speed of their cars before turning the curve.¹⁹⁴

§ 4558. **Action under Statute or at Common Law.**—The New York courts hold that the Employer's Liability Act of that State did not abolish the employé's common-law right of action against the employer for negligence. The new remedy is merely cumulative, and the allegations in support of either remedy are the same except as to the service of notice.¹⁹⁵ Where the complaint states a cause of action in both ways it is held that the plaintiff will not be required to elect before the time for the trial on which cause of action he will rely for the recovery.¹⁹⁶ There is an Indiana holding that a complaint in an action for injuries to a brakeman because of a misplaced switch that alleged negligence in the defendant's failure to provide the switch stand with a signal light, and but for this failure the injury might have been averted, notwithstanding other conditions of the switching appliances, was not to be regarded as stating a common-law liability, but as proceeding under a statute of that State requiring every steam railroad therein to place and maintain on each switch a signal light so attached that it will indicate safety when the switch is set to the main track and danger when it is otherwise set.¹⁹⁷

158. In such a case it was held that a complaint alleging that defendant was in the habit of roughing the rails on a grade by sanding them, but on a certain date negligently failed to do so, or to take any means or precaution to prevent the cars from slipping, sufficiently averred defendant's dereliction of duty, without further stating what other means could have been used to make the track safe: *Union Traction Co. v. Buckland*, 34 Ind. App. 420; s. c. 72 N. E. Rep. 158.

¹⁹⁰ *Houts v. St. Louis Transit Co.*, 108 Mo. App. 686; s. c. 84 S. W. Rep. 161.

¹⁹¹ *Withee v. Somerset Traction Co.*, 98 Me. 61; s. c. 56 Atl. Rep. 204.

¹⁹² *True v. Niagara Gorge R. Co.*, 70 App. Div. (N. Y.) 383; s. c. 75 N. Y. Supp. 216; s. c. aff'd, 175 N. Y. 487; 67 N. E. Rep. 1090.

¹⁹³ *Terre Haute Elec. Co. v. Kiely*, 35 Ind. App. 180; s. c. 72 N. E. Rep. 658.

¹⁹⁴ *Godfrey v. St. Louis Transit Co.*, 107 Mo. App. 193; 81 S. W. Rep. 1230.

¹⁹⁵ *Monigan v. Erie R. Co.*, 99 App. Div. (N. Y.) 603; s. c. 91 N. Y. Supp. 657.

¹⁹⁶ *Monigan v. Erie R. Co.*, 99 App. Div. (N. Y.) 603; s. c. 91 N. Y. Supp. 657.

¹⁹⁷ *Toledo &c. R. Co. v. Bond*, 35 Ind. App. 142; s. c. 72 N. E. Rep. 647.

§ 4559. "Ways, Works, Machinery, or Plant," what are.—Pieces of timber commonly used by blast furnace companies to chock hot pots and hold them in position on inclined tracks on slag piles while they cool are held a part of a steel plant under a statute making the master liable for defects in the condition of the ways, etc., or plant connected with or used in the business of the master.¹⁹⁸ Another case holds an employer not liable for injuries to an employé caused by the fall of a casting which the employé was preparing to attach to an elevator gate, since this appliance did not become a part of the "ways, works or machinery," until it was attached.¹⁹⁹

§ 4567. "Locomotive-Engine, Car, or Train," what is.²⁰⁰

§ 4571. Notice of Time, Place, and Cause of Injury.—It is the general rule that statutes of this character make the giving of notice of the extent, time, place, and cause of the injury a condition precedent to the bringing of an action under the statute.¹ Such statutes intend an actual service of the notice; the mere service of the complaint in an action within the time required is not everywhere regarded as sufficient.² Where the statutory right of action is not exclusive but cumulative, or an action is brought under a statute not requiring the service of notice, then the plaintiff is under no obligations to comply with the statutory requirement of notice, and need not plead or prove this fact.³ Under the New York Employer's Liability Statute the notice must be given within a hundred twenty days unless in the case of the death of the servant without his having given the notice, in which event the notice is to be given by the executor or administrator within sixty days after his appointment. This statute is construed to require the administrator to give the notice within the time fixed—sixty days after his appointment. It is not sufficient that the notice is given within one hundred twenty days after the injuries are received if sixty days after the appointment shall have elapsed.*

¹⁹⁸ Sloss-Sheffield Steel &c. Co. v. Mobley, 139 Ala. 425; s. c. 36 South. Rep. 181.

¹⁹⁹ Nye v. Dutton, 187 Mass. 549; s. c. 73 N. E. Rep. 654.

²⁰⁰ Jarvis v. Hitch, 161 Ind. 217; s. c. 67 N. E. Rep. 1057 (whether pile driver, including a steam engine placed on a flat car is a locomotive, a question for the court).

¹ Grasso v. Holbrook Contracting Co., 102 App. Div. (N. Y.) 49; s. c. 92 N. Y. Supp. 101; Stahl v. Schoonmaker, 84 N. Y. Supp. 239; Lange v. Union Pac. R. Co., 126 Fed. Rep. 338; 62 C. C. A. 48.

² Johnson v. Roach, 83 App. Div. (N. Y.) 351; s. c. 82 N. Y. Supp. 203; 13 N. Y. Ann. Cas. 86.

³ Gmaehle v. Rosenberg, 178 N. Y. 147; s. c. 70 N. E. Rep. 411; Gmaehle v. Rosenberg, 40 Misc. (N. Y.) 267; s. c. 81 N. Y. Supp. 930; Rosin v. Lidgerwood Mfg. Co., 89 App. Div. (N. Y.) 245; s. c. 86 N. Y. Supp. 49; Schermerhorn v. Glens Falls Portland Cement Co., 94 App. Div. (N. Y.) 600; s. c. 88 N. Y. Supp. 407; Williams v. Roblin, 94 App. Div. (N. Y.) 177; s. c. 87 N. Y. Supp. 1006.

* Randall v. Holbrook Contracting

The Massachusetts statute allows the notice to be signed by another person if the signature is authorized by the injured person.⁵ There is a fatal variance between the notice describing one person or corporation as the injured servant's employer and evidence on the trial that he was employed by a different person or corporation.⁶

§ 4572. **A Question of Pleading.**—A complainant who seeks to base his action for injuries on any provision of the Employer's Liability Act must, by positive and direct averment of facts, show that the action falls within the particular provision on which he relies.⁷ The case announcing this rule holds that the complaint need not allege specifically that a certain act or line of conduct was a duty imposed on the defendant by law.⁸ Service of notice should be clearly alleged and a complaint defective in this regard is insufficient.⁹

§ 4599. **Doctrine that Violation of Statutes Regulating the Employment of Children is Negligence per se.**¹⁰

§ 4600. **Doctrine that Violation of such Statutes is not Negligence per se.**¹¹

Co., 95 App. Div. (N. Y.) 336; s. c. 88 N. Y. Supp. 681. *Contra*, Hoehn v. Lautz, 94 App. Div. (N. Y.) 14; 87 N. Y. Supp. 921.

⁵ Greenstein v. Chick, 187 Mass. 157; s. c. 72 N. E. Rep. 955.

⁶ McLaughlin v. Interurban St. R. Co., 101 App. Div. (N. Y.) 134; s. c. 91 N. Y. Supp. 883.

⁷ Chicago & C. R. Co. v. Barnes, 164 Ind. 143; s. c. 73 N. E. Rep. 91; rev'g s. c. 68 N. E. Rep. 166.

⁸ Chicago & C. R. Co. v. Barnes, 164 Ind. 143; s. c. 73 N. E. Rep. 91; rev'g s. c. 68 N. E. Rep. 166.

⁹ Crosby v. Lehigh Valley R. Co., 128 Fed. Rep. 193; Gmaehle v. Rosenberg, 80 App. Div. (N. Y.) 541; s. c. 80 N. Y. Supp. 705; s. c. aff'd, 83 App. Div. (N. Y.) 339; 82 N. Y.

Supp. 366; Johnson v. Roach, 83 App. Div. (N. Y.) 351; s. c. 82 N. Y. Supp. 203; 13 N. Y. Ann. Cas. 86.

¹⁰ Perry v. Tozer, 90 Minn. 431; s. c. 97 N. W. Rep. 137 (employment of child between fourteen and sixteen years of age in a saw mill); Gallenkamp v. Garvin Mach. Co., 91 App. Div. (N. Y.) 141; s. c. 86 N. Y. Supp. 378 (child under sixteen employed in attending conveyor). See *ante*, § 3857.

¹¹ Young v. Eugene Dietzgen Co., 72 App. Div. 618; s. c. 76 N. Y. Supp. 123; s. c. aff'd, 176 N. Y. 590; 68 N. E. Rep. 1126 (errand boy, not employed to run elevator, sent on errand intruded himself on elevator and was injured while attempting to run it). See *ante*, § 385.

PART TWO.

ASSUMPTION OF RISK BY THE SERVANT.

[§§ 4609-4841.]

§ 4609. **Special Statements of the Doctrine.**—It is one statement of the doctrine to say that the risks which the servant assumes are, first, those which are ordinarily connected with the particular work in which the servant is engaged, and with which it will be assumed he is acquainted; and second, those risks which are manifest to the observation, whether they arise from the nature of the business, the manner in which it is conducted, or the use of improper or defective appliances.²¹ Again, it is said that a servant by his contract of employment assumes only the natural and ordinary risks and dangers incident thereto, and such other unusual or extraordinary risks, due to defects in appliances and equipment, of which he knows, or which are so obvious that he will be presumed to have known of them.²² But the fact that the servant assumes the usual and ordinary risks attendant on his employment does not relieve the master from the obligation to exercise reasonable care for his safety.²³ The defense of assumption of risk is alike available whether the risk assumed is great or small, whether the danger from it is imminent or remote, and whether the servant was guilty of contributory negligence in assuming the risk or in exposing himself to the danger.²⁴ The master is not bound to use reasonable care to prevent him from assuming the risks of his employment.²⁵ The defendant has the burden of showing assumption of risk,²⁶ and he must so clearly prove it that no reasonable inference can be drawn to the contrary.²⁷ Whether the risk has been assumed in a given case is usually a question of fact for the jury and becomes one of law only when the evidence is such that but one conclusion could be reached by all reasonable minds.²⁸

²¹ *Hightower v. Gray*, 36 Tex. Civ. App. 674; s. c. 83 S. W. Rep. 254.

²² *Leach v. Oregon Short Line R. Co.*, 29 Utah 285; s. c. 81 Pac. Rep. 90.

²³ *Depuy v. Chicago & C. R. Co.*, 110 Mo. App. 110; s. c. 84 S. W. Rep. 103.

²⁴ *St. Louis Cordage Co. v. Miller*, 126 Fed. Rep. 495; s. c. 61 C. C. A. 477; 63 L. R. A. 551.

²⁵ *Gallman v. Union Hardwood Mfg. Co.*, 65 S. C. 192; s. c. 43 S. E. Rep. 524.

²⁶ *Hunt v. Dexter Sulphite Pulp & C. Co.*, 100 App. Div. (N. Y.) 119; s. c. 91 N. Y. Supp. 279.

²⁷ *Revolinsky v. Adams Coal Co.*, 118 Wis. 324; s. c. 95 N. W. Rep. 122.

²⁸ *Chicago & C. R. Co. v. Bell*, 111 Ill. App. 280; *Montgomery Coal Co.*

§ 4611. **Distinction Between Acceptance of the Risk and Contributory Negligence.**—The defenses of assumption of risk and contributory negligence are fundamentally inconsistent with each other. They do not rest upon the same principles, and the existence of one of them necessarily excludes the existence of the other. Assumption of risk rests in contract, contributory negligence in tort. A servant who assumes the risks of his employment cannot recover for injuries received therein, though he has exercised the highest degree of care.²⁹ And where it is evident that the risk was one assumed by the injured servant the issue of contributory negligence should not be submitted to the jury.³⁰ An instruction that if the plaintiff “has proved the injury complained of was caused by some one or more of the specifications of negligence set out in the complaint, he may recover if he himself was without fault,” was held not bad for failure to observe the distinction between contributory negligence and assumption of risk, where none of the acts of negligence charged involved any question of assumption of risk.³¹

§ 4613. **Servant Assumes Risks Ordinarily Incident to the Employment.**³²—The word “usual” in a statement of the doctrine that the

v. Barringer, 109 Ill. App. 185; Avery v. Nordyke & Co., 34 Ind. App. 541; s. c. 70 N. E. Rep. 888; Carter v. Baldwin, 107 Mo. App. 217; s. c. 81 S. W. Rep. 204.

²⁹ St. Louis Cordage Co. v. Miller, 126 Fed. Rep. 495; s. c. 61 C. C. A. 477; 63 L. R. A. 551; Bradburn v. Wabash R. Co., 134 Mich. 575; s. c. 96 N. W. Rep. 929; 10 Det. Leg. N. 592; Ball v. Gussenhoven, 29 Mont. 321; s. c. 74 Pac. Rep. 871; McCabe v. Montana Cent. R. Co., 30 Mont. 323; s. c. 76 Pac. Rep. 701; Pittsburgh & R. Co. v. Stone, 24 Ohio Cir. Ct. R. 192.

³⁰ Hettich v. Hillje, 33 Tex. Civ. App. 571; s. c. 77 S. W. Rep. 641.

³¹ Clear Creek Stone Co. v. Dearmin, 160 Ind. 162; s. c. 66 N. E. Rep. 609.

³² See generally: Deye v. Lodge & Co. Tool Co., 137 Fed. Rep. 480; Stauble v. Potomac Elec. Power Co., 21 App. (D. C.) 160; Wrightsville & R. Co. v. Lattimore, 118 Ga. 581; s. c. 45 S. E. Rep. 453; Cichowicz v. International Packing Co., 206 Ill. 346; s. c. 68 N. E. Rep. 1083; aff'g s. c. 107 Ill. App. 234; Illinois Cent. R. Co. v. Prickett, 210 Ill. 140; s. c. 71 N. E. Rep. 435; aff'g s. c. 109 Ill. App. 468; Illinois Terminal R.

Co. v. Thompson, 112 Ill. App. 463; s. c. aff'd, 210 Ill. 226; 71 N. E. Rep. 328; Malott v. Hood, 201 Ill. 202; s. c. 66 N. E. Rep. 247; aff'g s. c. 99 Ill. App. 360; Baltimore & R. Co. v. Greer, 103 Ill. App. 448; Deering Harvester Co. v. Hefferman, 107 Ill. App. 636; Bedford Quarries Co. v. Turner, — Ind. App. —; s. c. 75 N. E. Rep. 25; Chicago Veneer Co. v. Walden (Ky.), 82 S. W. Rep. 294; Erickson v. Monson Consol. Slate Co., 100 Me. 107; s. c. 60 Atl. Rep. 708; Breeze v. MacKinnon Mfg. Co., 140 Mich. 372; s. c. 103 N. W. Rep. 908; 12 Det. Leg. N. 195 (servant at work on boiler at side of railroad track assumed risk of injury from passing trains); Blundell v. William A. Miller Elevator Mfg. Co., 189 Mo. 552; s. c. 88 S. W. Rep. 103; Benedict v. Chicago Great Western R. Co., 104 Mo. App. 218; s. c. 78 S. W. Rep. 60; Smith v. Hammond Packing Co., 111 Mo. App. 13; s. c. 85 S. W. Rep. 625; Evans Laundry Co. v. Crawford, 67 Neb. 153; s. c. 93 N. W. Rep. 177; 94 N. W. Rep. 814; Marks v. Harriet Cotton Mills, 135 N. C. 287; s. c. 47 S. E. Rep. 432; Simmons v. Southern Traction Co., 207 Pa. 589; s. c. 57 Atl. Rep. 45; Rosemand v. Southern

servant assumes such risks as are ordinary and usual is defined as that which is common, frequent, customary. "Ordinary" is that which is often recurring.³³

§ 4614. **Servant Accepting the Risk of Master's Negligence.**—It is a doctrine of a strong array of courts that a servant has a right to presume that the master has exercised reasonable care for his safety in the work required of him. Under this view the servant is not required to assume the risk of being injured by his master's negligence. In other words, the master's negligence is not recognized as a risk incident to the servant's employment. The risks the servant assumes are all the risks and hazards ordinarily incident to the employment, and such as are liable to arise from defects which are patent and obvious to a person of his experience and understanding, but not risks due to the failure of the master or a vice-principal of the master to exercise reasonable care and prudence, and where his negligence is the proximate cause of the injury to the servant the master is liable.³⁴ The doc-

R., 66 S. C. 91; s. c. 44 S. E. Rep. 574; Texas &c. R. Co. v. Kelly, 98 Tex. 123; s. c. 80 S. W. Rep. 79; Gulf &c. R. Co. v. Wilder, 33 Tex. Civ. App. 72; s. c. 75 S. W. Rep. 546; Big Stone Gap Iron Co. v. Ketron, 102 Va. 23; s. c. 45 S. E. Rep. 740; Towle v. Stimson Mill Co., 33 Wash. 305; s. c. 74 Pac. Rep. 471; Richards v. Riverside Iron Works, 56 W. Va. 510; s. c. 49 S. E. Rep. 437. A servant assumes only such incident risks as are usual and ordinary, and which remain so incident after he has used reasonable care to remove them, or, if the risks are extraordinary, he assumes only such as were obvious and exposed him to danger so imminent that an ordinarily prudent person would not have remained in the employment: Chicago &c. R. Co. v. Bell, 111 Ill. App. 280. The master is not liable to the servant for injuries which result from dangers which are ordinarily incident to the employment, and which are known and understood by the servant: Heusner Baking Co. v. Trakal, 107 Ill. App. 327; s. c. aff'd, Trakal v. Heusner Baking Co., 204 Ill. 179; s. c. 68 N. E. Rep. 399.

³³ Chicago City R. Co. v. Leach, 104 Ill. App. 30.

³⁴ Alabama Great Southern R. Co. v. Brooks, 135 Ala. 401; s. c. 33 South. Rep. 181; Kansas City &c. R. Co. v. Thornhill, 141 Ala. 215; s. c. 37 South. Rep. 412; Bunker Hill &c.

Mining &c. Co. v. Jones, 130 Fed. Rep. 813; Chicago Hair &c. Co. v. Mueller, 106 Ill. App. 21; s. c. aff'd, 203 Ill. 558; 68 N. E. Rep. 51; Chicago &c. R. Co. v. Howell, 109 Ill. App. 546; s. c. aff'd, 208 Ill. 155; 70 N. E. Rep. 15; D. Sinclair Co. v. Waddill, 200 Ill. 17; s. c. 65 N. E. Rep. 437; aff'g s. c. 99 Ill. App. 334; Illinois Terminal R. Co. v. Thompson, 112 Ill. App. 463; s. c. aff'd, 210 Ill. 226; 71 N. E. Rep. 328; Mobile &c. R. Co. v. Vallowe, 115 Ill. App. 621; s. c. aff'd, 214 Ill. 124; 73 N. E. Rep. 416; National Enameling &c. Co. v. Fagan, 115 Ill. App. 590; Montgomery Coal Co. v. Barringer, 109 Ill. App. 185; Riverton Coal Co. v. Shepherd, 111 Ill. App. 294; Mace v. H. A. Boedker & Co., 127 Iowa 721; s. c. 104 N. W. Rep. 475; Sankey v. Chicago &c. R. Co., 118 Iowa 39; s. c. 91 N. W. Rep. 820; McGinn v. McCormick, 109 La. 396; s. c. 33 South. Rep. 382; Moses v. Grant Lumber Co., 114 La. 933; s. c. 38 South. Rep. 684; Mahoney v. Bay State Pink Granite Co., 184 Mass. 287; s. c. 68 N. E. Rep. 234; Pierce v. Arnold Print Works, 182 Mass. 260; s. c. 65 N. E. Rep. 368; Wagner v. Boston Elevated R. Co., 188 Mass. 437; s. c. 74 N. E. Rep. 919; Blundell v. William A. Miller Elevator Mfg. Co., 189 Mo. 552; s. c. 88 S. W. Rep. 103; Curtis v. McNair, 173 Mo. 270; s. c. 73 S. W. Rep. 167; Depuy v. Chicago &c. R. Co., 110 Mo. App.

trine is sometimes thus stated: The risks the servant assumes are only such risks as remain incident to the employment after the master has exercised reasonable care to provide reasonably safe instrumentalities and a reasonably safe place wherein the servant may perform the work he is hired to do.³⁵

§ 4615. **Risks of Employments Involving Unusual or Extraordinary Hazards.**—Though a servant entering into a contract of employment assumes the natural and ordinary risks of the employment or business in which he engages, he does not assume extraordinary risks or risks not necessarily incident to his employment, unless these risks are known to him or should be known to him by the exercise of ordinary diligence, and he voluntarily continues in the employment after this actual or constructive knowledge.³⁶ The ordinary risks of a particular business include those which are a part of the natural and ordinary method of conducting the business, even though they might fairly be called extraordinary with reference to a different business, or a different department of the same business. A servant entering into a hazardous employment assumes the usual risk incident to that employment.³⁷ In a case where a bridge worker at the time of his injury was in the position assigned him which was ordinarily safe, and the superintendent increased the hazard, without warning to such employé, by ordering a derrick to be operated while a train was crossing

110; s. c. 84 S. W. Rep. 103; Nash v. Dowling, 93 Mo. App. 156; Shore v. American Bridge Co., 111 Mo. App. 278; s. c. 86 S. W. Rep. 905; Warren v. Chicago & C. Ry. Co., 113 Mo. App. 498; s. c. 87 S. W. Rep. 585; Zellars v. Missouri Water & C. Co., 92 Mo. App. 107; Zongker v. People's Union Mercantile Co., 110 Mo. App. 382; s. c. 86 S. W. Rep. 486; Hyland v. Southern Bell Tel. & C. Co., 70 S. C. 315; s. c. 49 S. E. Rep. 879; St. Louis & C. R. Co. v. Rea, — Tex. —; s. c. 87 S. W. Rep. 324; rev'g s. c. 84 S. W. Rep. 428; St. Louis & C. R. Co. v. Vestal, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 790; International & C. R. Co. v. McVey (Tex. Civ. App.), 81 S. W. Rep. 991; s. c. 83 S. W. Rep. 34; Ray v. Pecos & C. R. Co., — Tex. Civ. App. —; s. c. 88 S. W. Rep. 466; Hone v. Mammoth Min. Co., 27 Utah 168; s. c. 75 Pac. Rep. 381; Merrill v. Oregon Short Line R. Co., 29 Utah 264; s. c. 81 Pac. Rep. 85.

³⁵Barnett & Record Co. v. Schlapka, 110 Ill. App. 672; s. c. aff'd, 208 Ill. 426; 70 N. E. Rep. 343. See also Hansell-Elcock Foundry Co. v.

Clark, 214 Ill. 399; s. c. 73 N. E. Rep. 787; aff'g s. c. 115 Ill. App. 209; Emporia v. Kowalski, 66 Kan. 64; s. c. 71 Pac. Rep. 232.

³⁶Chicago Hair & C. Co. v. Mueller, 106 Ill. App. 21; s. c. aff'd, 203 Ill. 558; 68 N. E. Rep. 51; Illinois Terminal R. Co. v. Thompson, 210 Ill. 226; s. c. 71 N. E. Rep. 328; aff'g s. c. 112 Ill. App. 463; Pittsburg & C. R. Co. v. Hewitt, 102 Ill. App. 428; s. c. aff'd, 202 Ill. 28; 66 N. E. Rep. 829; Republic Iron & C. Co. v. Ohler, 161 Ind. 393; s. c. 68 N. E. Rep. 901; McCabe v. Montana Cent. R. Co., 30 Mont. 323; s. c. 76 Pac. Rep. 701; Jones v. American Warehouse Co., 138 N. C. 546; s. c. 51 S. E. Rep. 106; 49 S. E. Rep. 355; Garity v. Bullion-Beck & C. Min. Co., 27 Utah 534; s. c. 76 Pac. Rep. 556.

³⁷Chicago & C. R. Co. v. Wild, 109 Ill. App. 38; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356; s. c. 75 Pac. Rep. 537; 63 L. R. A. 145; Bedford Quarries Co. v. Turner, — Ind. App. —; s. c. 75 N. E. Rep. 25 (moving heavy blocks of stone with derrick).

the bridge in process of construction, and on which he was employed, and the train struck a stone which was being elevated, by which the employé was struck, it was held that this risk was an extraordinary risk under the rule and not one which the employé assumed.³⁸

§ 4616. **Accepts Risks of Danger from Defect in Something for the Condition of which He Himself is Responsible.**³⁹

§ 4620. **Doctrine that Risk of Injury from the Non-Compliance with Statutes is Assumed and Protection of the Statute Waived by the Servant.**⁴⁰

§ 4621. **Contrary Doctrine that the Servant does Not Accept the Risk and Waive the Protection of the Statute by Remaining in the Service.**⁴¹—Under the doctrine of the main section it has been held by one court that a city ordinance limiting the rate of speed of railroad trains within city limits is for the protection of the employés

³⁸ Southern Indiana R. Co. v. Harrell, 161 Ind. 689; s. c. 68 N. E. Rep. 262; rev'g s. c. 66 N. E. Rep. 1016.

³⁹ The principle of the main section is illustrated by a case where an iron riveter of mature age was given ample opportunity to inspect the materials of which the scaffold on which he was working was constructed, the scaffold being of simple construction and built of material such as is ordinarily provided for similar use. After some time it became necessary to place additional platform thereon with the employé's knowledge. Thereafter the employé and his fellow workman, to facilitate the moving of a scaffold, hammered the hangers supporting the scaffold, which they were warned not to do, and one of the uprights to which a hanger was bolted split, and the scaffold fell, causing the injuries sued upon. It was held this was a risk assumed by the employé: Hughes v. Schnavel, 20 Colo. App. 306; s. c. 78 Pac. Rep. 623.

⁴⁰ On the general proposition that statutes enacted for the protection of servants do not impliedly abrogate the doctrine of assumed risk, see: Nottage v. Sawmill Phoenix, 133 Fed. Rep. 979; Glenmont Lumber Co. v. Roy, 126 Fed. Rep. 524; s. c. 61 C. C. A. 506; St. Louis Cordage Co. v. Miller, 126 Fed. Rep. 495; s. c. 61 C. C. A. 477; 63 L. R. A. 551; Bryce v. Burlington & C. R. Co.,

119 Iowa 274; s. c. 93 N. W. Rep. 275; Johns v. Cleveland & C. R. Co., 23 Ohio Cir. Ct. R. 442 (statute compelling railroad companies to block guard rails).

⁴¹ That the employé does not assume the risk arising from the employer's violation of a statute for the servant's protection, see: Diamond Block Co. v. Cuthbertson, — Ind. —; s. c. 73 N. E. Rep. 818; aff'g s. c. 67 N. E. Rep. 558; 73 N. E. Rep. 132 (unsupported roof of mine); Davis v. Mercer Lumber Co., 164 Ind. 413; s. c. 73 N. E. Rep. 899; Brower v. Locke, 31 Ind. App. 353; s. c. 67 N. E. Rep. 1015; Espenlaub v. Ellis, 34 Ind. App. 163; s. c. 72 N. E. Rep. 527 (it is not necessary for plaintiff to allege that he had no knowledge of the unguarded condition of the machinery, or of the danger he encountered, or that he could not, in the exercise of ordinary care, have had knowledge of such condition); McGinty v. Waterman, 93 Minn. 242; s. c. 101 N. W. Rep. 300 (unguarded machinery); Blair v. Heibel, 103 Mo. App. 621; s. c. 77 S. W. Rep. 1017; Sipes v. Michigan Starch Co., 137 Mich. 253; s. c. 100 N. W. Rep. 447; 11 Det. Leg. N. 287 (failure of master to comply with statute requiring setscrews to be covered); Harrill v. South Carolina & C. Co., 135 N. C. 601; s. c. 47 S. E. Rep. 730; Southern R. Co. v. Carson, 194 U. S. 136; s. c. 48 L. Ed. 907; 24 Sup. Ct. Rep. 609.

of the railroad walking along the tracks, as well as those having occasion to go on or across the tracks, and hence a railroad employé does not assume the risk of the failure of the company to observe the requirements of such ordinance, unless he continues in the railroad's employment with knowledge that the ordinance is habitually violated.⁴²

§ 4623. Operation of Other Statutes upon the Question of Servant Accepting the Risk.—North Carolina has a statute which provides that any "servant or employé of a railroad company" who shall suffer injury in the course of his employment by any defect in machinery shall be entitled to maintain an action against such company.⁴³ This statute has been construed to deprive railroad companies of the defense of assumption of risk and to cover all forms of railroad employment.⁴⁴

§ 4624. Servant Proceeding in Violation of Known Rules Accepts Risks.—Thus an employé shown to be familiar with and to have repeatedly observed a rule directing those in charge of a train within the yard limits to be on guard for a train ahead, instead of requiring each crew to protect its train in the rear from approaching trains, was held to have assumed the risk of this method of train operation.⁴⁵

§ 4625. Risk of Injury in Consequence of Defective Rules or the Absence of Rules.—The New York Employer's Liability Act, providing that an employé shall be presumed to have assented to the necessary risks of his employment and no others, and defining what such risks include, and making the question of an employé's understanding of such risk a question for the jury, is held to be of general application to all actions by servants against masters for negligence, and hence to apply to an action for damages for negligence in failing to make proper rules and regulations for the safety of employés.⁴⁶ An employé in a coal mine does not assume the risk of injury from the omission of the mine owner to establish the code of elevator signals required by the Indiana statute.⁴⁷

⁴² *Camp v. Chicago Great Western R. Co.*, 124 Iowa 238; s. c. 99 N. W. Rep. 735.

⁴³ *North Carolina Priv. Laws* 1897, c. 56.

⁴⁴ *Mott v. Southern R. Co.*, 131 N. C. 234; s. c. 42 S. E. Rep. 601. Defense unavailable in action by employé for injuries from defective sand drier: *Walker v. Carolina*

Cent. R. Co., 135 N. C. 738; s. c. 47 S. E. Rep. 675.

⁴⁵ *Fields v. New York & C. R. Co.*, 86 App. Div. (N. Y.) 148; s. c. 83 N. Y. Supp. 535.

⁴⁶ *Ward v. Manhattan Ry. Co.*, 95 App. Div. (N. Y.) 437; s. c. 88 N. Y. Supp. 758.

⁴⁷ *Island Coal Co. v. Swaggerty*, 159 Ind. 664; s. c. 65 N. E. Rep. 1026; 62 N. E. Rep. 1026.

§ 4626. Risk of Injury from Failing to Obey Rules which have been Abandoned or Revoked.⁴⁸

§ 4627. Does Not Assume Risk of Danger which is Questionable or Debatable, etc.—A servant employed in a particular line of work does not ordinarily assume the risk incident to the failure of the master to employ an adequate force to assist where the probability of injury attending the task is such that the judgments of prudent men might differ on the certainty of its happening, especially in cases where the master, notwithstanding objection, insists that the work be proceeded with, or assures the servant that the force is adequate.⁴⁹

§ 4628. Assumes Risk of an Unusual and Extra-Hazardous Method of Performing Work.⁵⁰

§ 4629. Assumes Risk of Injury from Voluntarily Adopting a Dangerous Instead of a Safe Method.—Generally speaking, an employé with a choice between two methods of doing the same work who chooses the more dangerous, will be held to have assumed the risk involved in that choice.⁵¹ And where there are several methods of carrying the order to perform a dangerous service into effect, varying in degree as to attending danger, the servant will be held to have as-

⁴⁸ The fact that a rule forbidding riding on freight trains around railroad yards established for the government of railroad employes has been abrogated by its habitual disregard to the knowledge of the company does not authorize one whose duties do not call upon him to ride on freight trains to do so: *Southwestern R. Co. v. Spivey*, 97 Tex. 143; s. c. 76 S. W. Rep. 748; rev'g s. c. 73 S. W. Rep. 973.

⁴⁹ *Illinois Cent. R. Co. v. Langan*, 116 Ky. 318; s. c. 76 S. W. Rep. 32; 25 Ky. L. Rep. 500.

⁵⁰ Thus, in a case where a platform on which the plaintiff was engaged to work in removing cotton was not dangerous, except as it became so from time to time when cotton was thrown onto it from the third floor of the building above, it was held that the hazard was a temporary danger of the business, which the plaintiff assumed: *Fortin v. Manville Co.*, 128 Fed. Rep. 642.

⁵¹ *Cichowicz v. International Packing Co.*, 206 Ill. 346; s. c. 68 N. E. Rep. 1083; aff'g s. c. 107 Ill. App. 234; *Illinois Steel Co. v. McNulty*, 105 Ill. App. 594; *Foster v. Lake St. Elevated R. Co.*, 108 Ill. App. 113;

Leard v. International Paper Co., 100 Me. 59; s. c. 60 Atl. Rep. 700; *Palmer v. Kinloch Tel. Co.*, 91 Mo. App. 106; *Zeigenmeyer v. Charles Goetz Lime & Co.*, 113 Mo. App. 330; s. c. 38 S. W. Rep. 139; *Karch v. Kipp*, 90 N. Y. Supp. 404; *Mullins v. Manhattan Brass Co.*, 47 Misc. (N. Y.) 138; s. c. 93 N. Y. Supp. 635; *Carbury v. Eastern Nnt & Co.*, 27 R. I. 116; s. c. 60 Atl. Rep. 773. A servant was engaged with others in lowering a heavy boiler into a cellar over inclined beams by means of a wire rope connected with the boiler, and thence around a wooden post, the loose end being held by the men, who let it slip gradually. In the lowering the rope cut into the post and stopped, and plaintiff was directed to slacken it with his hands. It was obvious that as soon as the rope was slackened it would slip forward. By the order plaintiff was left to act in a safe and proper manner. The rope slipped, and caught plaintiff's hands. It was held that plaintiff assumed the risk of the method he chose to do the work, the general danger of which was obvious: *Lodi v. Maloney*, 184 Mass. 240; s. c. 68 N. E. Rep. 229.

sumed the risk where he selects the most dangerous of these methods.⁵² Thus a farm hand who fails to use a stick furnished him for the purpose of safely cleaning the rollers of a corn shredder, but chooses the more dangerous method of using his hand for that purpose, will be held to have assumed the risk of the increased danger which this method involves, and cannot recover for injuries, the result of the reckless act.⁵³ Under the doctrine of this section the question of the master's negligence in failing to provide his servant with a reasonably safe place to work will not arise where it is clearly shown that the servant himself selected the place at which he performed the work for convenience sake, without any order or suggestion from his foreman, and the work could have been done elsewhere without incurring the danger incident to its performance in the place selected.⁵⁴

§ 4630. Assumption of Risk where the Servant is Ordered to Perform a Dangerous Duty.—It may be said generally that where the danger to be incurred from obeying orders of a superior is so plain that no prudent person would obey, or when the thing ordered to be done is what the servant, with full knowledge of the perils ordinarily incident thereto, was employed to do, and the servant obeys, and receives injuries in doing the perilous work, the doctrine of assumption of risk will preclude a recovery.⁵⁵ But the employé will not be charged

⁵² *Weed v. Chicago &c. R. Co.*, 5 Neb. (unoff.) 623; s. c. 99 N. W. Rep. 827. See also *Floyd v. Colorado Fuel &c. Co.*, 18 Colo. App. 153; s. c. 70 Pac. Rep. 452.

⁵³ *Frink v. Potts*, 105 Ill. App. 92.

⁵⁴ *Hettich v. Hillje*, 33 Tex. Civ. App. 571; s. c. 77 S. W. Rep. 641.

⁵⁵ *Southern R. Co. v. Logan*, 138 Fed. Rep. 725; *Anderson v. Seropian*, 147 Cal. 201; s. c. 81 Pac. Rep. 521; *Greeley v. Foster*, 32 Colo. 292; s. c. 75 Pac. Rep. 351; *Dickenson v. Vernon*, 77 Conn. 537; s. c. 60 Atl. Rep. 270 (obeyed through fear of losing employment—risk assumed); *Punkowski v. New Castle Leather Co.*, — Del. —; s. c. 57 Atl. Rep. 559; *Barnett & Record Co. v. Schlapka*, 208 Ill. 426; s. c. 70 N. E. Rep. 343; aff'g s. c. 110 Ill. App. 672; *Chicago Hair &c. Co. v. Mueller*, 106 Ill. App. 21; s. c. aff'd, 203 Ill. 558; 68 N. E. Rep. 51; *Cobb Chocolate Co. v. Knudson*, 207 Ill. 452; s. c. 69 N. E. Rep. 816; aff'g s. c. 107 Ill. App. 668; *Henrietta Coal Co. v. Campbell*, 211 Ill. 216; s. c. 71 N. E. Rep. 863; aff'g s. c. 112 Ill. App. 452; *Illinois Steel Co. v. Ryska*, 200 Ill. 280; s. c.

65 N. E. Rep. 734; aff'g s. c. 102 Ill. App. 347; *Illinois Steel Co. v. Wierzbicky*, 206 Ill. 201; s. c. 68 N. E. Rep. 1101; aff'g s. c. 107 Ill. App. 69; *Pressed Steel Car Co. v. Herath*, 207 Ill. 576; s. c. 69 N. E. Rep. 959; *Slack v. Harris*, 200 Ill. 96; s. c. 65 N. E. Rep. 669; aff'g s. c. 101 Ill. App. 527; *Kapaczynski v. Wells &c. Co.*, 110 Ill. App. 477; *Perry-Matthews-Buskirk Stone Co. v. Speer*, 36 Ind. App. 81; s. c. 73 N. E. Rep. 933; *Wurtenberger v. Metropolitan St. R. Co.*, 68 Kan. 642; s. c. 75 Pac. Rep. 1049; *Illinois Cent. R. Co. v. Keebler*, 84 S. W. Rep. 1167; s. c. 27 Ky. L. Rep. 305; *Lord v. Wakefield*, 185 Mass. 214; s. c. 70 N. E. Rep. 123; *Truly v. J. E. North Lumber Co.*, 83 Miss. 430; s. c. 36 South. Rep. 4; *Schiglizzo v. Dunn*, 211 Pa. 253; s. c. 60 Atl. Rep. 724; *International &c. R. Co. v. Tisdale*, 36 Tex. Civ. App. 174; s. c. 81 S. W. Rep. 347. The employé assumes the risk of injury from known danger if he undertakes or continues to expose himself thereto, except where he acts under peremptory orders from the master under circumstances not

with having assumed the risk involved in obeying an order of a superior where there is nothing to show that the employé by the exercise of ordinary care, could have known of the peril to which he was exposing himself by obeying such order.⁵⁶ In one case a servant was denied a recovery for an injury caused by following a pair of wheels and axle weighing one thousand five hundred pounds up an incline, instead of walking by the side, as was the usual method, although he was ordered to do so by the foreman in charge of the work, as such requirement was so unreasonable as not to justify obedience.⁵⁷

§ 4632. Assumes Risk of Inevitable or Inscrutable Accidents.⁵⁸

§ 4633. Rule as to Assumption of Risk does not Apply where Relation of Master and Servant does not Exist.—The rule does not apply to a convict leased out by the State to an employer, since he does not engage in the service of his own free will.⁵⁹

§ 4634. Effect of Express Contract Between Master and Servant, by which the Servant Assumes the Risk.⁶⁰

§ 4640. Proviso that the Servant has the Knowledge or the Means of Knowledge of the Danger.—The doctrine of assumption of risk is effective only where the servant has knowledge of the danger,⁶¹ and

admitting of delay or reflection: *Hettich v. Hillje*, 33 Tex. Civ. App. 571; s. c. 77 S. W. Rep. 641. Where a scaffold is necessary to sustain workmen and a heavy pipe to be put in place, the ordinary workman is not able to judge of the sufficiency of the appliances for such purpose; and, if the master directs him to go upon the scaffold to assist in handling the pipe, there is an implied agreement that the same is reasonably safe for that purpose: *Hagerty v. Evans*, 87 Minn. 435; s. c. 92 N. W. Rep. 399.

⁵⁶ *Stewart v. Texas & C. R. Co.*, 113 La. 525; s. c. 37 South. Rep. 129; *Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36; s. c. 79 S. W. Rep. 869; *Eichholz v. Niagara Falls & C. Power Co.*, 68 App. Div. (N. Y.) 441; s. c. 73 N. Y. Supp. 842; s. c. aff'd, 174 N. Y. 519; 66 N. E. Rep. 1107.

⁵⁷ *Zentz v. Chappell*, 103 Mo. App. 208; s. c. 77 S. W. Rep. 86.

⁵⁸ *Kinzel v. Atlanta & C. R. Co.*, 137 Fed. Rep. 489 (engineer killed by landslide).

⁵⁹ *Simonds v. Georgia Iron & Coal Co.*, 133 Fed. Rep. 776; s. c. aff'd, 133 Fed. Rep. 1019; 66 C. C. A. 458.

⁶⁰ In Indiana an employé cannot contract to assume the risk of non-compliance with a statute: *La Porte Carriage Co. v. Sullender*, — Ind. App. —; s. c. 71 N. E. Rep. 922.

⁶¹ *Sink v. The Sikes Co.*, 134 Fed. Rep. 144; *Western & C. R. Co. v. Moran*, 116 Ga. 441; s. c. 42 S. E. Rep. 737; *Illinois Terminal R. Co. v. Thompson*, 112 Ill. App. 463; s. c. aff'd, 210 Ill. 226; 71 N. E. Rep. 328; *Bates Mach. Co. v. Crowley*, 115 Ill. App. 540; *Illinois Steel Co. v. Downey*, 103 Ill. App. 101; *Harte v. Fraser*, 104 Ill. App. 201; *Indianapolis v. Cauley*, 164 Ind. 304; s. c. 73 N. E. Rep. 691 (street railway track repairer without knowledge did not assume risk of defects in bridge over which he rode); *Robertson v. Ford*, 164 Ind. 538; s. c. 74 N. E. Rep. 1; *Southern Indiana R. Co. v. Moore*, 34 Ind. App. 154; s. c. 72 N. E. Rep. 479 (instruction on assumed risk erroneous for omission of element of actual knowledge of a servant); *Brooks v. W. T. Joyce Co.*, 127 Iowa 266; s. c. 103 N. W. Rep. 91; *Welton v. Genesee Lumber Co.*, 114 La. 842; s. c. 38 South. Rep. 580; *Erickson v.*

in some jurisdictions an appreciation,⁶² though not necessarily a full appreciation of the danger,⁶³ or the dangers are so apparent and obvious as to impute him with such knowledge.⁶⁴ The servant, by his

Monson Consol. Slate Co., 100 Me. 107; s. c. 60 Atl. Rep. 708; Moylon v. D. S. McDonald Co., 188 Mass. 499; s. c. 74 N. E. Rep. 929; Nelson v. Kelso, 91 Minn. 77; s. c. 97 N. W. Rep. 459; New Omaha Electric Light Co. v. Dent, — Neb. —; s. c. 103 N. W. Rep. 1091; aff'g s. c. 94 N. W. Rep. 819; Vykess v. Duncan Co., 88 App. Div. (N. Y.) 129; s. c. 84 N. Y. Supp. 398 (laborer familiar with the nature of pulp held to have assumed risk of danger from its falling down); Erie R. Co. v. McCormick, 69 Ohio St. 45; s. c. 68 N. E. Rep. 571; Masterson v. Eldridge, 208 Pa. 242; s. c. 57 Atl. Rep. 515 (buzz saw injury); Owens v. Thomas Kent Mfg. Co., 211 Pa. 406; s. c. 60 Atl. Rep. 987; Charming v. Toxaway Mills, 70 S. C. 470; s. c. 50 S. E. Rep. 186; St. Louis & C. R. Co. v. Rea, — Tex. —; s. c. 87 S. W. Rep. 324; rev'g s. c. 84 S. W. Rep. 324; Robinson v. Ft. Worth & C. R. Co., — Tex. —; s. c. 87 S. W. Rep. 667; aff'g s. c. 84 S. W. Rep. 410; Galveston & C. R. Co. v. Pendleton, 30 Tex. Civ. App. 431; s. c. 70 S. W. Rep. 996; Galveston & C. R. Co. v. Walker (Tex. Civ. App.), 76 S. W. Rep. 228; Williams v. Belmont Coal & C. Co., 55 W. Va. 84; s. c. 46 S. E. Rep. 802. A servant in a cotton seed oil mill who was aware of the fact that a conveyor box was open, and of the danger in working with the hammer just above the revolving screw, and who was not so working under the pressure of a peremptory order from the foreman, assumed the risk, and any negligence in having the conveyor uncovered was immaterial: Hettich v. Hillje, 33 Tex. Civ. App. 571; s. c. 77 S. W. Rep. 641. Where a gravel pit foreman had full knowledge that cars were usually moved past a steam shovel as they were being loaded by an engine when the engine was not otherwise engaged, and with such knowledge went between two cars, and was caught between the bumpers by the engine striking the further car, he assumed the risk of such injury: Campbell v. Illinois Cent. R. Co., 124 Iowa 302; s. c. 100 N. W. Rep. 30. An instruction that

if plaintiff was entirely familiar with all the circumstances and conditions surrounding the place of accident, etc., he assumed the risk or was guilty of contributory negligence, should have omitted the word "entirely" preceding the word "familiar": Consumers' Cotton Oil Co. v. Jonte, 36 Tex. Civ. App. 18; s. c. 80 S. W. Rep. 847. An employé assumes the risk of injuries caused by the breaking of a belt, where the contract of employment was made with the knowledge or understanding that such belts were apt to, and did often, break, unless the employé has called the attention of the employer's representative to a defect in the belt, and the latter has failed to supply him with a new belt, or to have the old one repaired: Taylor v. Withington & C. Mfg. Co., 136 Mich. 652; s. c. 99 N. W. Rep. 873; 11 Det. Leg. N. 152.

⁶²Henrietta Coal Co. v. Campbell, 112 Ill. App. 452; s. c. aff'd, 211 Ill. 216; 71 N. E. Rep. 863; Illinois Steel Co. v. Wierzbicky, 107 Ill. App. 69; s. c. aff'd, 206 Ill. 201; 68 N. E. Rep. 1101; Omaha Packing Co. v. Murray, 112 Ill. App. 233; Cardwell v. Chicago & C. R. Co., 90 Mo. App. 31; Young v. O'Brien, 36 Wash. 570; s. c. 79 Pac. Rep. 211.

⁶³Morrow v. Gaffney Mfg. Co., 70 S. C. 242; s. c. 49 S. E. Rep. 573; Ohio River & C. R. Co. v. Edwards, 111 Tenn. 31; s. c. 76 S. W. Rep. 897.

⁶⁴Glenmont Lumber Co. v. Roy, 126 Fed. Rep. 524; s. c. 61 C. C. A. 506; Cobb Chocolate Co. v. Knudson, 207 Ill. 452; s. c. 69 N. E. Rep. 816; aff'g s. c. 107 Ill. App. 668; Electrical Installation Co. v. Kelly, 110 Ill. App. 334 (swiftly revolving fan); Ward v. Daniels, 114 Ill. App. 374; Atchison & C. R. Co. v. Bancord, 66 Kan. 81; s. c. 71 Pac. Rep. 253; Buey v. Chess & Wymond Co., 84 S. W. Rep. 563; s. c. 27 Ky. L. Rep. 198; Archambault v. Archambault, 184 Mass. 274; s. c. 68 N. E. Rep. 199 (fall of insufficiently propped stone on which injured servant was employed); Arkland v. Taber-Prang Art Co., 184 Mass. 243; s. c. 68 N. E. Rep. 219; Minnie v. Mueller, 140 Mich. 3; s. c. 103 N. W. Rep. 524;

contract of employment, impliedly agrees to assume these risks.⁶⁵ A servant, with knowledge that the place at which he is required to work is unsafe, cannot rely on the statement of a fellow servant that it is safe, or will be made safe, without assuming the extra risk.⁶⁶

§ 4641. Does Not Assume the Risk of Unknown, Unseen, Latent or Obscure Dangers.⁶⁷

12 Det. Leg. N. 75; *Cole v. St. Louis Transit Co.*, 183 Mo. 81; s. c. 81 S. W. Rep. 1138; *Kleine v. S. E. Freunds Sons Shoe & Co.*, 91 Mo. App. 102; *Burns v. Delaware & C. Tel. & C. Co.*, 70 N. J. L. 745; s. c. 59 Atl. Rep. 220, 592; 67 L. R. A. 956; *Langlois v. Dunn Worsted Mills*, 25 R. I. 645; s. c. 57 Atl. Rep. 910; *Smith v. Naushon Co.*, 26 R. I. 578; s. c. 60 Atl. Rep. 242; *Galveston & C. R. Co. v. McAdams*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 1076; *Hightower v. Gray*, 36 Tex. Civ. App. 674; s. c. 83 S. W. Rep. 254; *Beltz v. American Mill Co.*, 37 Wash. 399; s. c. 79 Pac. Rep. 981; *Choctaw & C. R. Co. v. McDade*, 191 U. S. 64; s. c. 48 L. Ed. 96; 24 Sup. Ct. Rep. 24; aff'g s. c. 112 Fed. Rep. 888; 50 C. C. A. 591. An instruction was held proper that told the jury that if the servant knew, or by the exercise of ordinary care could have known, at the time of the injury, that the machine which he was repairing was not provided with a belt shifter, and that the belt was therefore liable to slip from the loose to the tight pulley, and the plaintiff's act in attempting to repair the machine was so obviously dangerous that he knew he was taking extra risk, then he assumed such risk: *Pressly v. Dover Yarn Mills*, 138 N. C. 410; s. c. 51 S. E. Rep. 69.

⁶⁵ *Chisholm v. Donovan*, 188 Mass. 378; s. c. 74 N. E. Rep. 652; *McDonald v. Champion Iron & C. Co.*, 140 Mich. 401; s. c. 103 N. W. Rep. 829; 12 Det. Leg. N. 208.

⁶⁶ *Purkey v. Southern Coal & C. Co.*, 57 W. Va. 595; s. c. 50 S. E. Rep. 755.

⁶⁷ In support of the principle indicated, see generally: *Crawford v. American Steel & C. Co.*, 123 Fed. Rep. 275; *Osborne v. Alabama Steel & C. Co.*, 135 Ala. 571; s. c. 33 South. Rep. 687; *Southern R. Co. v. Howell*, 135 Ala. 639; s. c. 34 South. Rep. 6 (instruction properly refused be-

cause evidence did not show that danger was obvious to or understood by injured servant); *Steele v. Georgia Iron & C. Co.*, 121 Ga. 459; s. c. 49 S. E. Rep. 291 (matter sufficiently covered by allegation that defects were unknown to employé and that he had no means of knowing them, but that the defendants well knew them); *Chicago & C. R. Co. v. Howell*, 109 Ill. App. 546; s. c. aff'd, 208 Ill. 155; 70 N. E. Rep. 15 (court not required to instruct jury on assumption of risk where declaration alleges that plaintiff did not know and had not the means of knowing the dangers causing his injury); *Chicago & C. R. Co. v. Tackett*, 33 Ind. App. 379; s. c. 71 N. E. Rep. 524; *Consolidated Kansas City Smelting & C. Co. v. Sharber*, 71 Kan. 700; s. c. 81 Pac. Rep. 476; *Shanks v. Citizens' General Electric Co. (Ky.)*, 76 S. W. Rep. 379; s. c. 25 Ky. L. Rep. 811 (injury to employé of an electric company by contact with wires); *Murphy v. Marston Coal Co.*, 183 Mass. 385; s. c. 67 N. E. Rep. 342; *Bernard v. Pittsburg Coal Co.*, 137 Mich. 279; s. c. 100 N. W. Rep. 396; 11 Det. Leg. N. 246; *Corbett v. American Screen Door Co.*, 133 Mich. 669; s. c. 95 N. W. Rep. 737; 10 Det. Leg. N. 305; *Thomas v. Exeter & C. St. R.*, 73 N. H. 1; s. c. 58 Atl. Rep. 838 (laundry employé injured by sudden swaying of steam ironing machine); *Meehan v. Great Northern R. Co.*, — N. D. —; s. c. 101 N. W. Rep. 183; *Gulf & C. R. Co. v. Whisenhunt* (Tex. Civ. App.), 81 S. W. Rep. 332. It has been held that the operation of lowering by hand a circular piece of cast iron, from six to eight feet in diameter, five-eighths of an inch in thickness, and weighing upwards of a thousand pounds, from its position on edge to a flat position on the floor, was not so inherently dangerous as to charge a laborer engaged in the work with assumption of risk: Har-

§ 4643. Rule where Servant has Same Means of Knowledge that Master Has.⁶⁸

§ 4644. When Servant Presumed to have Knowledge of Defect or Danger.—Generally speaking, the servant will be charged with knowledge where his conduct shows an appreciation of the danger,⁶⁹ or he has continued in the service for a long time,⁷⁰ or the nature of the em-

ris v. H. D. Williams Cooperage Co., 107 Mo. App. 249; s. c. 80 S. W. Rep. 924.

⁶⁸ That the servant having equal knowledge with his master of the danger incident to the work assumes the risk if he continues therein, see: *Cartledge v. Pierpont Mfg. Co.*, 120 Ga. 221; s. c. 47 S. E. Rep. 586; *Vallie v. Hall*, 184 Mass. 358; s. c. 68 N. E. Rep. 829 (carpenter held to have same knowledge of qualities and nature of varnish as the master); *Kitzberger v. Chicago & C. R. Co.*, 4 Neb. (unoff.) 324; s. c. 93 N. W. Rep. 935 (defective hand car); *Hall v. United States Canning Co.*, 76 App. Div. (N. Y.) 475; s. c. 78 N. Y. Supp. 617 (injuries caused by ladder slipping); *Kane v. St. Louis & C. R. Co.*, 112 Mo. App. 650; s. c. 87 S. W. Rep. 571; *Scanlon v. Lake Shore & C. R. Co.*, 24 Ohio Cir. Ct. R. 256; *Meixner v. Philadelphia Brewing Co.*, 210 Pa. 597; s. c. 60 Atl. Rep. 259; *Tennessee & C. R. Co. v. Jarrett*, 111 Tenn. 565; s. c. 82 S. W. Rep. 224; *Roth v. Eccles*, 28 Utah 456; s. c. 79 Pac. Rep. 918; *Tham v. J. T. Steeb Shipping Co.*, 39 Wash. 271; s. c. 81 Pac. Rep. 711; *Giebell v. Collins*, 54 W. Va. 518; s. c. 46 S. E. Rep. 569. But see *contra*, *Pfisterer v. J. H. Peter & Co.*, 117 Ky. 501; s. c. 78 S. W. Rep. 450; 25 Ky. L. Rep. 1605. An unevenly worn factory floor is as apparent to a servant as it is to the master, and the risk of injury therefrom is one assumed by the servant: *McLaughlin v. Atlantic Mills*, 27 R. I. 158; s. c. 61 Atl. Rep. 42.

⁶⁹ *Clark v. Missouri & C. R. Co.*, 179 Mo. 66; s. c. 77 S. W. Rep. 882 (railroad employé directed to round up steer that escaped from train armed himself with a club of large size and testified that the steer "acted wild").

⁷⁰ *Harrington v. Wabash R. Co.*, 104 Mo. App. 663; s. c. 78 S. W. Rep. 662 (servant employed for thirty

years); *McDonald v. Standard Oil Co.*, 69 N. J. L. 445; s. c. 55 Atl. Rep. 289 (adult workmen of ordinary intelligence employed four or five weeks in cutting heads from rivets held to have assumed obvious risk of injury from the flying of metallic chips). Where the existence of a shaft furnishing motive power for stitching machines in a shoe factory was open and obvious to every one attempting to operate a machine, an employé engaged in stitching linings of shoes, who had been working many months the previous year at a machine for which power was furnished by a similar shaft, and who had done similar work for fifteen years, was not entitled to information or warning from the employer as to the existence of the shaft: *Chisholm v. Donovan*, 188 Mass. 378; s. c. 74 N. E. Rep. 652. In a case where a clerk had been employed in a department of a store for two years and it was one of her duties to take down medicine chests from shelves to show prospective customers, it was held that she was charged with the knowledge that these chests were slightly inclined on the shelves and assumed the risk of injury from the fall of one of them: *Hofnauer v. R. H. White Co.*, 186 Mass. 47; s. c. 70 N. E. Rep. 1038. Whether a brakeman assumed the risk from an engine having to run backwards in returning from a station at which there was no turntable, and having no headlight or cowcatcher on the front end of the train, was held a question for the jury, on evidence that he had worked for the railroad company as brakeman two years, and, at his request, on that branch of the road two months, and had frequently been brakeman on the train when it was run in that manner: *Chicago & C. R. Co. v. Camper*, 199 Ill. 569; s. c. 65 N. E. Rep. 448; rev'g s. c. 100 Ill. App. 21.

ployment is such that his ignorance is due solely to his own negligence.⁷¹ In a case for injuries to a railroad employé through falling into a pit in an unlighted stall in a roundhouse, it was held that the servant's knowledge that every stall he had previously entered had a pit in it was sufficient to put him on notice that all the others had pits.⁷² In another case it was held that a lineman whose duties required him to climb poles assumed the risk that some of the poles might fall on account of weakness, and that this was a risk incident to this particular employment.⁷³

§ 4646. **Facts Not Creating a Conclusive Presumption that the Injured Servant had Knowledge of the Defect or Danger.**—Under the following circumstances courts have refused, as a matter of law, to impute servants with knowledge of the defect or danger occasioning the injury:—Where a switchman was injured by having his foot caught in a frog which had been changed while he was absent from his duties through sickness, and in the few days of service after returning to work he had not acquired any knowledge of the change;⁷⁴ where a servant employed in an oil works was injured by inhalation of gas evolved in distilling the oil, and the gas causing the injury was not obvious and only occasionally present, and the employé had no previous experience with this form of gas;⁷⁵ where a brakeman was injured while handling a defective car and the car, though marked as defective, was marked at a place not easily observable in daylight and the injuries were received at night.⁷⁶ Similarly it has been held that the danger of injury in taking down a telephone pole without the use of "spikes" and "dead men" to lower it was not so obvious that a servant assumed the risk in attempting to do the work without the tools mentioned.⁷⁷

§ 4647. **Sufficient that Servant Knew, or with Ordinary Care Should Have Known.**—The servant is charged with the knowledge of

⁷¹ *Buey v. Chess & Wymond Co.*, 84 S. W. Rep. 563; s. c. 27 Ky. L. Rep. 198; *Weizinger v. Erie R. Co.*, 106 App. Div. (N. Y.) 411; s. c. 94 N. Y. Supp. 869. A fireman who had been drilling horses for several weeks before he was injured by being kicked by one of them, was denied a recovery against the city for his injuries, though if he had been furnished with an "electric whip" he would not have had to stand behind the horse, and this though the chief of the fire department had represented the horse as gentle: *Lynch v. North Yakima*, 37 Wash. 657; s. c. 80 Pac. Rep. 79.

⁷² *Galveston & C. R. Co. v. Walker*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 28.

⁷³ *Kellogg v. Denver City Tramway Co.*, 18 Colo. App. 475; s. c. 72 Pac. Rep. 609.

⁷⁴ *Texarkana & C. R. Co. v. Toliver*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 375.

⁷⁵ *Meany v. Standard Oil Co.*, — N. J. L. —; s. c. 55 Atl. Rep. 653.

⁷⁶ *Michigan Cent. R. Co. v. Butler*, 23 Ohio Cir. Ct. R. 459.

⁷⁷ *Orr v. Southern Bell Tel. & C. Co.*, 132 N. C. 691; s. c. 44 S. E. Rep. 401.

those dangers which he ought by the exercise of reasonable care to have known, and an employé is estopped to say that he did not appreciate obvious defects apparent to an ordinarily prudent person of his intelligence and experience.⁷⁸ So in a case where recovery was sought on the ground that the injury was caused by the failure of the master to employ sufficient help, the rule was announced that though a master is bound to exercise ordinary care to furnish suitable machinery, and to employ a sufficient number of competent and skillful servants, he is not responsible for injuries to a servant caused by his failure so to do, if the servant knows, or by the exercise of ordinary care for his own safety would have known, of such failure.⁷⁹

§ 4648. Which Generally Presents a Question for the Jury.⁸⁰

⁷⁸ *Johnson v. Southern Pac. Co.*, 117 Fed. Rep. 462; s. c. 54 C. C. A. 508; *St. Louis Cordage Co. v. Miller*, 126 Fed. Rep. 495; s. c. 63 L. R. A. 551; *Denver &c. Co. v. Scott*, — Colo. —; s. c. 81 Pac. Rep. 763 (fireman would have known by the most casual observation that his engine was without driver brakes); *Punkowski v. New Castle Leather Co.*, — Del. —; s. c. 57 Atl. Rep. 559; *Belt R. Co. v. Confrey*, 209 Ill. 344; s. c. 70 N. E. Rep. 773; *Chicago &c. R. Co. v. Heerey*, 203 Ill. 492; s. c. 68 N. E. Rep. 74; rev'g s. c. 105 Ill. App. 647; *Alton Roller Milling Co. v. Bender*, 112 Ill. App. 484; *Chicago City R. Co. v. Enroth*, 113 Ill. App. 285; *Illinois Cent. R. Co. v. Satowski*, 107 Ill. App. 524; *Chicago &c. Stone Co. v. Nelson*, 32 Ind. App. 355; s. c. 69 N. E. Rep. 705; *Atchison &c. R. Co. v. Bancord*, 66 Kan. 81; s. c. 71 Pac. Rep. 253; *Seeds v. American Bridge Co.*, 68 Kan. 522; s. c. 75 Pac. Rep. 480; *Louisville &c. R. Co. v. Hall*, 115 Ky. 567; s. c. 74 S. W. Rep. 280; 24 Ky. L. Rep. 2487; *Caven v. Bodwell Granite Co.*, 99 Me. 278; s. c. 59 Atl. Rep. 285; *Lee v. St. Louis &c. R. Co.*, 112 Mo. App. 372; s. c. 87 S. W. Rep. 12; *St. Louis &c. R. Co. v. Rea*, — Tex. —; s. c. 87 S. W. Rep. 324; rev'g s. c. 84 S. W. Rep. 324; *International &c. R. Co. v. Shaughnessy* (Tex. Civ. App.), 81 S. W. Rep. 1026; *Texas Portland Cement Co. v. Poe*, 32 Tex. Civ. App. 469; s. c. 74 S. W. Rep. 563. In order to fasten upon a servant the assumption of the risk of danger of contact with a shovel

in a gangway, it must be shown that he should have reasonably anticipated that the shovel lay in the very place where it was, and with the scoop up, so as to render his stepping upon it dangerous: *Galveston &c. R. Co. v. Manns*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 254.

⁷⁹ *Smith v. Armour & Co.*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 675.

⁸⁰ *Pennsylvania R. Co. v. Jones*, 123 Fed. Rep. 753; s. c. 59 C. C. A. 87 (whether brakeman knew that bumper had not been placed at end of switch track); *Allen B. Wrisley Co. v. Burke*, 203 Ill. 250; s. c. 67 N. E. Rep. 818; *Ottstot v. Indiana &c. Co.*, 103 Ill. App. 136; *Adams Exp. Co. v. Smith* (Ky.), 72 S. W. Rep. 752; s. c. 24 Ky. L. Rep. 1915 (whether porter of express company knew or by ordinary care could have known of defective plank in platform causing his injury); *Murphy v. Marston Coal Co.*, 183 Mass. 385; s. c. 67 N. E. Rep. 342 (whether defect in handle used to raise wagon bed to unload coal could have been known by employe in the exercise of reasonable care); *Coleman v. Perry*, 28 Mont. 1; s. c. 72 Pac. Rep. 42 (whether danger of operating laundry mangle was obvious to inexperienced employé); *Sirois v. J. E. Henry & Sons*, 73 N. H. 148; s. c. 59 Atl. Rep. 936 (machine prematurely started by helper); *Albanese v. Central R. Co.*, 70 N. J. L. 241; s. c. 57 Atl. Rep. 447 (whether workman assumed risk of failure of employer to warn him of impending danger); *Devereux v. Utica Steam Cotton Mills*, 84 App.

§ 4649. **Duty of Servant to Inspect, Examine and Find Out for Himself.**—It may be said generally, that the employé is only required to exercise ordinary care in the matter of inspection.⁸¹ He is not required to investigate for latent defects in the place of work or appliances furnished by the master, but in the absence of patent or obvious defects he may assume that they are fit and safe.⁸² And there is authority that the servant does not assume the risk of a defect of which he is ignorant by reason of his inexperience, though such defect is open and patent.⁸³ But the servant may be charged with the duty of inspection where its necessity is called to his attention, as, for example—where an employé engaged in work on a scaffold is given a printed notice by his master directing him to examine personally the scaffolding, tackle and other appliances before trusting himself upon the scaffold.⁸⁴

§ 4650. **Servant Not Under the Same Duty to Inspect as Master Is.**—Thus, where injuries to a railroad employé, caused by a defective hose, would not have occurred if the railroad had made a suitable inspection of such hose, it was held that the railroad was not relieved from liability for such injury by the fact, well known to the servant, that hose suitably inspected frequently burst, causing similar accidents.⁸⁵

§ 4652. **Assumption of Risk where Servant Knows of the Defect, but does not Know of nor Appreciate the Danger.**⁸⁶—In jurisdictions

Div. (N. Y.) 34; s. c. 32 N. Y. Supp. 145 (defective belt fastener).

⁸¹ George Weidemann Brewing Co. v. Wood, 87 S. W. Rep. 772; s. c. 27 Ky. L. Rep. 1012.

⁸² Allen B. Wrisley Co. v. Burke, 203 Ill. 250; s. c. 67 N. E. Rep. 818; Louisville &c. R. Co. v. Poulter, 84 S. W. Rep. 576; 27 Ky. L. Rep. 193; Garant v. Cashman, 183 Mass. 13; s. c. 66 N. E. Rep. 599; Rick v. Saginaw Bay Towing Co., 132 Mich. 237; s. c. 93 N. W. Rep. 632; 9 Det. Leg. N. 589; Moore v. Missouri &c. R. Co., 30 Tex. Civ. App. 266; s. c. 69 S. W. Rep. 997 (an instruction that the master is not liable if the defects were as open to the observation of the employé as of the master is not open to the objection that it tends to convey the idea that it was the employé's duty to investigate for defects).

⁸³ Gulf &c. R. Co. v. Davis, 35 Tex. Civ. App. 285; s. c. 80 S. W. Rep. 253.

⁸⁴ Higgins v. Southern Pac. Co., 26 Utah 164; s. c. 72 Pac. Rep. 690.

⁸⁵ Smith v. New York &c. R. Co., 86 App. Div. (N. Y.) 188; s. c. 83 N. Y. Supp. 259.

⁸⁶ That a servant injured by defective appliances is not necessarily prevented from recovery by reason of the fact that he knew of the defect if it is shown that he did not appreciate the danger, see generally: Siegel, Cooper & Co. v. Trecka, 115 Ill. App. 56; s. c. aff'd, 218 Ill. 559; s. c. 75 N. E. 1053 (a question for the jury whether danger was appreciated); Hartrich v. Hawes, 202 Ill. 334; s. c. 67 N. E. Rep. 13; aff'g s. c. 103 Ill. App. 433; Chicago &c. R. Co. v. Bell, 111 Ill. App. 280; Avery v. Nurdyke & Marmon Co., 34 Ind. App. 541; s. c. 70 N. E. Rep. 888; Moylon v. D. S. McDonald Co., 188 Mass. 499; s. c. 74 N. E. Rep. 929; Shepherd v. St. Louis Transit Co., 189 Mo. 362; s. c. 87 S. W. Rep. 1007; Depuy v. Chicago &c. R. Co.,

where this doctrine obtains the burden is on the master to show that the servant knew and understood the increased danger.⁸⁷

§ 4654. **When Servant may Assume that Master has Done his Duty.**⁸⁸—It is another expression of the doctrine of the main section to say that the risks assumed by an employé are such as exist after the employer has used due care to protect the employé against danger by furnishing reasonably safe appliances and materials and reasonably competent fellow servants.⁸⁹ The right of the employé to assume

110 Mo. App. 110; s. c. 84 S. W. Rep. 103; Peck v. Peck, — Tex. —; s. c. 87 S. W. Rep. 248; aff'g s. c. 83 S. W. Rep. 257; International & C. R. Co. v. Jourdan, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 266; El Paso & C. R. Co. v. Vizard, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 457. In a case where damages were sought for the death of a railway brakeman by being thrown from a car by looped tell-tales, it was held that an instruction that if deceased knew, or by the exercise of reasonable care might have known, that tell-tales are apt to become looped, he assumed the risk of injury therefrom, was properly refused for omission to require that deceased had knowledge of the danger reasonably to be anticipated from such looped tell-tales: McGarrity v. New York & C. R. Co., 25 R. I. 269; s. c. 55 Atl. Rep. 718.

⁸⁷ McDonald v. Champion Iron & C. Co., 140 Mich. 401; s. c. 103 N. W. Rep. 829; 12 Det. Leg. N. 208.

⁸⁸ In support of the general proposition that an employé has the right to assume that all proper attention will be given to his safety by his master, and that he will not be needlessly exposed to risks not necessarily resulting from his employment, see: Barnett & Record Co. v. Schlapka, 110 Ill. App. 672; s. c. aff'd, 208 Ill. 426; 70 N. E. Rep. 343; Pittsburg & C. R. Co. v. Hewitt, 102 Ill. App. 428; s. c. aff'd, 202 Ill. 28; 66 N. E. Rep. 829; Chicago & C. R. Co. v. Bell, 111 Ill. App. 280; Ehlen v. O'Donnell, 102 Ill. App. 141; Pressed Steel Car Co. v. Herath, 110 Ill. App. 596; Brazil Block Coal Co. v. Gibson, 160 Ind. 319; s. c. 66 N. E. Rep. 882; Lanza v. Le Grand Quarry Co., 124 Iowa 659; s. c. 100 N. W. Rep. 488; Buoy v.

Clyde Milling & C. Co., 68 Kan. 436; s. c. 75 Pac. Rep. 466; New Omaha & C. Elec. Light Co. v. Dent, — Neb. —; s. c. 94 N. W. Rep. 819; Geldard v. Marshall, 43 Ore. 438; s. c. 73 Pac. Rep. 330; Bartholomew v. Kemmerer, 211 Pa. 277; s. c. 60 Atl. Rep. 908. A repairer of heavy machinery may assume that his master has exercised due care to see that a cleat supporting the floor is properly fastened, and does not assume the risk of the master's failure to exercise care in that regard, although he knows the method of construction of the floor: Thompson v. American Writing Paper Co., 187 Mass. 93; s. c. 72 N. E. Rep. 343. An employé does not assume the risk in the use of tools and machinery, but has a right to suppose that they are provided with such guards and protection from injury as are usual, unless the absence is apparent, or his attention has been called thereto: Doyle v. Pittsburg Waste Co., 204 Pa. 618; s. c. 54 Atl. Rep. 363. In a case where a railroad company negligently allowed planing-mill refuse to be loaded loose on an open rack car and a track hand immediately following such car on his handcar was injured by the derailment of the handcar, caused by certain refuse falling on the track, it was held that the plaintiff, having a right to assume that his employer had furnished a proper car and loaded it in the proper manner, the danger was not so obvious that he assumed the risk: McLean v. Pere Marquette R. Co., 137 Mich. 482; s. c. 100 N. W. Rep. 748; 11 Det. Leg. N. 358.

⁸⁹ Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356; s. c. 75 Pac. Rep. 537; 64 L. R. A. 145.

that the master has done his duty is clear in cases where the employé is sent to work in a place where the discovery of defects is difficult.⁹⁰

§ 4657. **Effect of Continuing in the Service after Acquiring Knowledge of the Defect or Danger.**—It is a restatement of the doctrine of the main section to say that a servant by continuing in an employment without complaint assumes the risk which he knows and those which an ordinarily prudent person of his capacity in his situation would have known. The principle that before an employé can be held to have assumed the risk connected with his service, the employer must have performed the duties enjoined on him, does not obtain where the employé knows the danger and continues his service.⁹¹ The servant, by thus continuing in the employment without complaint, will be held to have assumed the risk of defects and dangers which arise during the service to the same extent that he assumes those which existed when he entered the service.⁹²

§ 4658. **Continuing in Service where Defect is Known, but Danger Not Glaring or Imminent.**—It is the doctrine of this section that

⁹⁰ Clark v. Wolverine Portland Cement Co., 138 Mich. 673; s. c. 101 N. W. Rep. 845; 11 Det. Leg. N. 723.

⁹¹ Chicago &c. R. Co. v. Voelker, 129 Fed. Rep. 522; s. c. 65 C. C. A. 226; rev'g s. c. 116 Fed. Rep. 867 (railroad employé held to have assumed risk of injury from kicked cars); Glenmont Lumber Co. v. Roy, 126 Fed. Rep. 524; St. Louis Cordage Co. v. Miller, 126 Fed. Rep. 495; s. c. 63 L. R. A. 551; Iowa Gold Min. Co. v. Diefenthaler, 32 Colo. 391; s. c. 76 Pac. Rep. 981 (operative of tram car in ore concentrating mill who could not have failed to observe that a certain switch was not supplied with a flange on the inner side which would have made the connection with main track more secure, held to have assumed risk of danger from this defect by voluntarily continuing to work without objection); Siegel, Cooper & Co. v. Treka, 115 Ill. App. 56; s. c. aff'd, 218 Ill. 559; 75 N. E. Rep. 1053; Chicago &c. R. Co. v. Wild, 109 Ill. App. 38; Harte v. Fraser, 104 Ill. App. 201; Illinois Cent. R. Co. v. Sadowski, 107 Ill. App. 524; Kinmundy v. Anderson, 103 Ill. App. 457; Hollingsworth v. Chicago &c. R. Co., 160 Ind. 259; s. c. 65 N. E. Rep. 750 (brakeman on freight train held to have assumed all dan-

ger from low overhead bridge); Bryant v. Great Northern Paper Co., 100 Me. 171; s. c. 60 Atl. Rep. 797; Archibald v. Cygolf Shoe Co., 186 Mass. 213; s. c. 71 N. E. Rep. 315; Herbert v. Mound City Boot &c. Co., 90 Mo. App. 305 (instruction held to submit fairly the question whether plaintiff assumed the risk in continuing to work with a machine known to be defective); Fields v. New York Cent. &c. R. Co., 83 N. Y. Supp. 535; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356; s. c. 75 Pac. Rep. 537; 64 L. R. A. 145. Where an employé, who was injured by the breaking of an iron wheel in a hoisting derrick, which was operated by pressing a revolving wooden wheel against it, knew for more than a month previous to the accident that the wooden wheel was defective, and the breaking of the iron wheel was caused by the excessive strain on it produced by the contact with the defective wooden wheel, the employé assumed the risk of any injury resulting from the breaking of the wheel, and was denied a recovery: Pautz v. Plankinton Packing Co., 118 Wis. 47; s. c. 94 N. W. Rep. 654.

⁹² St. Louis Cordage Co. v. Miller, 126 Fed. Rep. 495; s. c. 63 L. R. A. 551.

the servant can recover for an injury occasioned by defects due to the master's fault of which he had notice if, under all the circumstances, a servant of ordinary prudence, and exercising such prudence would, under similar conditions, have continued the same work under the same risk, but not otherwise. He is not obliged to quit the service if he reasonably believes that by the exercise of proper care he can safely use an appliance furnished him. In determining this question all the circumstances must be taken into account and not merely the isolated fact of risk;⁹³ and this question is peculiarly one for the determination of the jury.⁹⁴ In a case involving this phase of assumption of risk a court has sustained as proper an instruction that an employé is bound to use ordinary care for his own safety, and, if he voluntarily undertakes to do work which is attended with danger which is obvious, he assumes the risk involved, but that it does not follow that he is guilty of negligence in working, merely because he knows the work to be dangerous, without regard to the degree of danger and risk involved, unless it be of a degree which would deter an ordinarily prudent man from the work.⁹⁵

§ 4659. Continuing in Service after Knowledge of a Defect or Change Increasing the Risk.⁹⁶

⁹³ *Illinois Steel Co. v. Wierzbicky*, 206 Ill. 201; s. c. 68 N. E. Rep. 1101; aff'g s. c. 107 Ill. App. 69 (ropes); *Hartrich v. Hawes*, 103 Ill. App. 433; s. c. aff'd, 202 Ill. 334; 67 N. E. Rep. 13; *Buey v. Chess & Wymond Co.*, 84 S. W. Rep. 563; s. c. 27 Ky. L. Rep. 198; *Blundell v. William A. Miller Elevator Mfg. Co.*, 189 Mo. 552; s. c. 88 S. W. Rep. 103; *Adams v. McCormick Harvesting Mach. Co.*, 110 Mo. App. 367; s. c. 86 S. W. Rep. 484 (incompetency of fellow servant); *Nash v. Dowling*, 93 Mo. App. 156; *Robbins v. Big Circle Min. Co.*, 105 Mo. App. 78; s. c. 79 S. W. Rep. 480; *Weston v. Lackawanna Min. Co.*, 105 Mo. App. 702; s. c. 78 S. W. Rep. 1044; *Hester v. Jacob Dold Packing Co.*, 95 Mo. App. 16; s. c. 75 S. W. Rep. 695 (scaffold); *Studenroth v. Hammond Packing Co.*, 106 Mo. App. 480; s. c. 81 S. W. Rep. 487; *Whaley v. Coleman*, 113 Mo. App. 594; s. c. 88 S. W. Rep. 119; *Dowd v. Erie R. Co.*, 70 N. J. L. 451; s. c. 57 Atl. Rep. 248 (failure to protect gearing); *Welle v. Celluloid Co.*, 175 N. Y. 401; s. c. 67 N. E. Rep. 609; rev'g s. c. 65 N. Y. Supp. 370 (servant held not to have assumed

risk of dangers of machines installed in his absence where he has not been informed of danger likely to follow use of the machines and danger not glaring); *Hicks v. Naomi Falls Mfg. Co.*, 138 N. C. 319; s. c. 50 S. E. Rep. 703; *Missouri & C. R. Co. v. Crum*, 35 Tex. Civ. App. 609; s. c. 81 S. W. Rep. 72. An instruction that, if a servant might reasonably have supposed he could safely work at a place by the use of "care and caution," he did not assume the risk of the injury which occurred, is proper, the contention that the words "great or extraordinary care and caution" should have been used being without merit: *Henderson v. Kansas City*, 177 Mo. 477; s. c. 76 S. W. Rep. 1045.

⁹⁴ *Hartrich v. Hawes*, 202 Ill. 334; s. c. 67 N. E. Rep. 13; aff'g s. c. 103 Ill. App. 433.

⁹⁵ *Alabama Steel & C. Co. v. Wrenn*, 136 Ala. 475; s. c. 34 South. Rep. 970.

⁹⁶ *Ft. Worth & C. R. Co. v. Ramp*, 30 Tex. Civ. App. 483; s. c. 70 S. W. Rep. 568 (employé holding chisel during operation of cutting steel rails with knowledge that chisel was badly battered assumed risk of

§ 4660. **Effect of Failure of Servant to Give Notice to Master of the Defect or Danger.**⁹⁷—The principle is illustrated in a case where an engineer knew when he took charge of an engine the condition of chemical fuses packed loosely in a box and fastened to the ceiling of his cab, and knew that the motion of the engine while running would cause the fuses to slide from one end of the box to the other and loosen the caps, and with this knowledge continued in his employment for months without complaint or protest. It was held that he assumed the risk of an ignition of the fuses, which would fill the engine cab with dangerous gases, and could not recover from injuries resulting therefrom.⁹⁸

§ 4661. **Definiteness and Sufficiency of the Notice.**—There is a further illustration in a case of an employé injured by the falling of the roof of a pumping station at which he was employed while he was walking thereon in the attempt to extinguish a fire, and it appeared that he had notified his superintendent that the roof was defective, but it did not appear that the notice was to the effect that the roof was so defective as to be unsafe to go upon. It was held that it would be presumed that the notice referred only to the defects affecting its use as a roof, so that the promise to repair did not constitute an undertaking to make the roof safe to walk on.⁹⁹

§ 4663. **Effect of Coercion, Threats, or Fear of Losing Employment.**¹⁰⁰

§ 4664. **Effect of Assurance of the Master or his Representative that the Place, Machine, Appliance, or Method of Work is Safe.**—It is the consensus of all the recent decisions that if a servant with knowl-

injury from steel sliver flying therefrom); *Lehman v. Carbon Steel Co.*, 204 Pa. 612; s. c. 54 Atl. Rep. 475 (operator of steel shearing machine with knowledge that steel was unusually hard assumed risk of injury therefrom).

⁹⁷ That an employé will be held to have assumed the risk where he continues to work without giving notice to employer of danger discovered by him, see: *Sloss-Sheffield Steel & Co. v. Mobley*, 139 Ala. 425; s. c. 36 South. Rep. 181.

⁹⁸ *Crane v. Chicago & C. R. Co.*, 124 Iowa 81; s. c. 99 N. W. Rep. 169.

⁹⁹ *Shemwell v. Owensboro & C. R. Co.*, 117 Ky. 556; s. c. 78 S. W. Rep. 448; 25 Ky. L. Rep. 1671.

¹⁰⁰ *Adolf v. Columbia Pretzel & C. Co.*, 100 Mo. App. 199; s. c. 73 S. W.

Rep. 321 (question for the jury whether employé induced to obey order involving risk under fear of loss of position had assumed risk); *Leitner v. Grieb*, 104 Mo. App. 173; s. c. 77 S. W. Rep. 764 (youthful servant with experience and appreciating danger held to have assumed risk where he continued work after being told to quit job if he did not want to continue with what he claimed to be an inadequate force); *Chicago & C. R. Co. v. Bell*, 111 Ill. App. 280 (that employé was not bound to disobey command but might perform service and hold his master liable unless the danger was such that an ordinarily prudent person would not encounter it).

edge of a defect calls the attention of the master to it, and is assured by him that the work may proceed with safety, and that the condition is not dangerous, the servant is entitled to rely on the supposed better knowledge of the master and does not assume the risk of danger by continuing at work unless the danger is so obvious and manifest that a person of ordinary prudence and caution would not have incurred it.¹⁰¹ The fact that the servant relied on this assurance may be shown by the fact that he returned to work after it was given.¹⁰² The principle is, of course, inapplicable where the assurance is not made by the master or his *alter ego*, but by employés sustaining the relation of fellow servant to the injured employé.¹⁰³ An instruction has been held not erroneous which told the jury that it was for them to say whether the superintendent had agreed to take care of the plaintiff after the plaintiff had informed him of a certain danger in his work, and that if they were satisfied that there was such an assumption of duty on the part of the superintendent, acting within the scope of his duty, and he failed to do it, and by reason of such failure the plaintiff was injured, the plaintiff could recover.¹⁰⁴

§ 4666. Circumstances under which the Employé does Accept the Risk Notwithstanding the Promise of the Employer to Repair.—

Where the defect is obvious and well known to the servant, and the danger from its use is apparent and appreciated by him, he will be deemed to have assumed the risk incident to the defect, notwithstanding a promise by the master to remedy it.¹⁰⁵ So he will be held to have assumed the risk where a promise to repair is afterward revoked.

¹⁰¹ Highland Boy Gold Min. Co. v. Pouch, 124 Fed. Rep. 148; Anderson v. Seropian, 147 Cal. 201; s. c. 81 Pac. Rep. 521; Chicago &c. Coal Co. v. Moran, 110 Ill. App. 664; s. c. aff'd, 210 Ill. 9; 71 N. E. Rep. 38; Chicago Screw Co. v. Weiss, 107 Ill. App. 39; s. c. aff'd, 203 Ill. 536; 68 N. E. Rep. 54; Harte v. Fraser, 104 Ill. App. 201; Dryden v. H. E. Pogue Distillery Co., 82 S. W. Rep. 262; s. c. 26 Ky. L. Rep. 528; Cole v. St. Louis Transit Co., 183 Mo. 81; s. c. 81 S. W. Rep. 1138; Curtis v. McNair, 173 Mo. 270; s. c. 73 S. W. Rep. 167; Carter v. Baldwin, 107 Mo. App. 217; s. c. 81 S. W. Rep. 204; Levy v. Rosenblatt, 21 Pa. Super. Ct. 543; Haywood v. Galveston &c. R. Co., — Tex. Civ. App. —; s. c. 85 S. W. Rep. 433; Virginia

&c. Wheel Co. v. Harris, 103 Va. 708; s. c. 49 S. E. Rep. 991.

¹⁰² Curtis v. McNair, 173 Mo. 270; s. c. 73 S. W. Rep. 167.

¹⁰³ Van Derhoff v. New York &c. R. Co., 88 App. Div. (N. Y.) 418; s. c. 84 N. Y. Supp. 650; Neves v. Green, 111 Mo. App. 634; s. c. 86 S. W. Rep. 508 (foreman of carpenters not a fellow servant of carpenters, though he sometimes labored with them in the common employment).

¹⁰⁴ McKinnon v. Riter-Conley Mfg. Co., 186 Mass. 155; s. c. 71 N. E. Rep. 296.

¹⁰⁵ Musser-Sauntry Land &c. Co. v. Brown, 126 Fed. Rep. 141; s. c. 61 C. C. A. 207; Kansas &c. Coal Co. v. Chandler, 71 Ark 518; s. c. 77 S. W. Rep. 912.

In such a case the assumption will date from the time of the revocation of the promise to repair.¹⁰⁶

§ 4667. **Complaining of Defect and then Continuing in Service after Promise to Repair.**—There is ample support in the late cases for the doctrine that a servant is not chargeable with an assumption of risk, as a matter of law, by continuing his employment for a reasonable time, notwithstanding a defect, where he has complained of it and the master has promised to remedy the defect,¹⁰⁷ and he relies on such promise,¹⁰⁸ unless the danger of continuing in the service is so imminent that a man of ordinary prudence would refuse longer to continue therein,¹⁰⁹ and whether this is the case is usually a question of fact for the jury.¹¹⁰ The rule allowing a servant to continue his work on a promise to repair without assuming the risk is generally held not to apply to ordinary labor, which requires the use of only common implements with which the servant is entirely familiar.¹¹¹ The doctrine of this section does not change the rule of contributory negligence. The servant is not, by virtue of this promise to repair, relieved from the duty to exercise care for his own safety in the use of the defective

¹⁰⁶ *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okl. 356; s. c. 75 Pac. Rep. 537; 64 L. R. A. 145.

¹⁰⁷ *Alton Roller Milling Co. v. Bender*, 112 Ill. App. 484; *Shickle & c. Iron Co. v. Glon*, 106 Ill. App. 645; *Foster v. Chicago & c. R. Co.*, 127 Iowa 84; s. c. 102 N. W. Rep. 422; *Atchison & c. R. Co. v. Sledge*, 68 Kan. 321; s. c. 74 Pac. Rep. 1111; *Maryland Steel Co. v. Engleman*, 101 Md. 661; s. c. 61 Atl. Rep. 314; *Fouts v. Swift & Co.*, 113 Mo. App. 526; s. c. 88 S. W. Rep. 167; *Nash v. Dowling*, 93 Mo. App. 156; *Dowd v. Erie R. Co.*, 70 N. J. L. 451; s. c. 57 Atl. Rep. 248; *Calhoun v. Holland Laundry*, 208 Pa. 139; s. c. 57 Atl. Rep. 350; *Day v. Dominion Iron & c. Co.*, 36 N. S. 113.

¹⁰⁸ *Terre Haute Elec. Co. v. Kiely*, 35 Ind. App. 180; s. c. 72 N. E. Rep. 658; *Dowd v. Erie R. Co.*, 70 N. J. L. 451; s. c. 57 Atl. Rep. 248; *Dunkerley v. Webendorfer Mach. Co.*, 71 N. J. L. 60; s. c. 58 Atl. Rep. 94; *Daily v. Fiberloid Co.*, 186 Mass. 318; s. c. 71 N. E. Rep. 554.

¹⁰⁹ *Cudahy Packing Co. v. Skoumal*, 125 Fed. Rep. 470; s. c. 60 C. C. A. 306; *Roccia v. Black Diamond Coal Min. Co.*, 121 Fed. Rep. 451; s. c. 57 C. C. A. 567; *King-Ryder Lum-*

ber Co. v. Cochran, 71 Ark. 55; s. c. 70 S. W. Rep. 606; *Kinmundy v. Anderson*, 103 Ill. App. 457; *Crum v. North Vernon Pump & c. Co.*, 163 Ind. 596; s. c. 72 N. E. Rep. 587; s. c. 72 N. E. Rep. 193; *Louisville Hotel Co. v. Kaltenbrun*, 82 S. W. Rep. 378; s. c. 26 Ky. L. Rep. 669; *Shemwell v. Owensboro & c. R. Co.*, 117 Ky. 556; s. c. 78 S. W. Rep. 448; 25 Ky. L. Rep. 1671; *Anderson v. Fielding*, 92 Minn. 42; s. c. 99 N. W. Rep. 357; *Virginia & c. Wheel Co. v. Harris*, 103 Va. 708; s. c. 49 S. E. Rep. 991; *Crooker v. Pacific Lounge & c. Co.*, 34 Wash. 191; s. c. 75 Pac. Rep. 632.

¹¹⁰ *Going v. Alabama Steel & c. Co.*, 141 Ala. 537; s. c. 37 South. Rep. 784; *Virginia & c. Wheel Co. v. Harris*, 103 Va. 708; s. c. 49 S. E. Rep. 991.

¹¹¹ *Webster Mfg. Co. v. Nesbitt*, 205 Ill. 273; s. c. 68 N. E. Rep. 936; aff'g s. c. 105 Ill. App. 261 (blacksmith's hammer); *McCormick Harvesting Mach. Co. v. Woiciechowski*, 111 Ill. App. 641; *Baumwald v. Trenkman*, 88 N. Y. Supp. 182 (loose axle-pin in wagon). But see *Louisville Hotel Co. v. Kaltenbrun*, 80 S. W. Rep. 1163; s. c. 26 Ky. L. Rep. 208.

instrumentality.¹¹² On the question whether a promise to repair was made, it has been held that a statement of an engineer to his fireman that he would have a defective step fixed did not constitute a promise or assurance to repair, preventing the fireman from assuming the risk of the defective step.¹¹³ In another case where a servant complained of insufficient daylight in the room in which he was employed and his foreman replied, "Never mind, it will soon be light enough," it was held that this statement did not amount to a promise to change the supply, but merely an assurance that the natural supply would be better.¹¹⁴ A promise to have certain repairs to machinery made "as soon as he could" has been held not so indefinite that a servant was not justified in relying on it.¹¹⁵

§ 4668. **What is a Reasonable Time within which to Perform the Promise to Repair.**—A general promise by the master to repair without naming a time binds him to make the repairs within such time as would be reasonably necessary for the performance of the promise.¹¹⁶ And what is a reasonable time for the fulfillment of a promise of this character is a question of fact for the jury.¹¹⁷

¹¹² *Reiser v. Southern Planing Mill &c. Co.*, 114 Ky. 1; s. c. 69 S. W. Rep. 1085; 24 Ky. L. Rep. 796.

¹¹³ *Gulf &c. R. Co. v. Garren*, 96 Tex. 605; s. c. 74 S. W. Rep. 897; rev'g s. c. 72 S. W. Rep. 1028.

¹¹⁴ *Buehner v. Creamery Package Mfg. Co.*, 124 Iowa 445; s. c. 100 N. W. Rep. 345.

¹¹⁵ *Dowd v. Erie R. Co.*, 70 N. J. L. 451; s. c. 57 Atl. Rep. 248. A promise to make the repairs as soon as the servant got far enough ahead with the material on which he was at work, was held not too indefinite and contingent to relieve the plaintiff from the assumption of risk: *Anderson v. Seropian*, 147 Cal. 201; s. c. 81 Pac. Rep. 521.

¹¹⁶ *Louisville Hotel Co. v. Kaltenbrun*, 80 S. W. Rep. 1163; s. c. 26 Ky. L. Rep. 208; *Missouri &c. R. Co. v. Baker*, 35 Tex. Civ. App. 542; s. c. 81 S. W. Rep. 67; *Rice v. Eureka Paper Co.*, 174 N. Y. 385; s. c. 66 N. E. Rep. 979; rev'g s. c. 75 N. Y. Supp. 49.

¹¹⁷ *Anderson v. Fielding*, 92 Minn. 42; s. c. 99 N. W. Rep. 357; *Studenroth v. Hammond Packing Co.*, 106 Mo. App. 480; s. c. 81 S. W. Rep. 487; *Dowd v. Erie R. Co.*, 70 N. J. L. 451; s. c. 57 Atl. Rep. 248. In these cases it was held that an un-

reasonable time had elapsed between the promise which was unfulfilled and the injury: *Gunning System v. Lapointe*, 212 Ill. 274; 72 N. E. Rep. 393; rev'g s. c. 113 Ill. App. 405 (two or three days where repairs on scaffold could have been made in two or three hours); *Crum v. North Vernon Pump &c. Co.*, 163 Ind. 596; s. c. 72 N. E. Rep. 587 (two or three days where chute that would have avoided danger could have been constructed in a few hours). In these cases it was the holding that the time between the promise and the injury caused by the defect complained of was not unreasonable and the servant did not assume the risk: *Buehner v. Creamery Package Mfg. Co.*, 124 Iowa 445; s. c. 100 N. W. Rep. 345 (two days for construction of guards around cog wheels); *Shemwell v. Owensboro & N. R. Co.*, 117 Ky. 556; s. c. 78 S. W. Rep. 448; 25 Ky. L. Rep. 1671 (one week for the repair of a roof over a railroad pumping station); *Republic Iron &c. Works v. Gregg*, 71 S. W. Rep. 900; s. c. 24 Ky. L. Rep. 1627 (between complaint of defect in shears used for cutting sheet iron the evening of one day and an injury at ten o'clock the next morn-

§ 4669. When Servant may Presume that Master has Complied with his Promise to Repair.—Where a reasonable time for making the repairs has not elapsed the servant will not be charged with having assumed the risk, though he has taken no steps to find out whether the repairs promised have been made.¹¹⁸

§ 4671. Effect of Continuing in Service with Knowledge of Defect or Danger without Complaint, or Without Promise of Master to Repair.¹¹⁹

§ 4672. Effect of Servant Objecting or Protesting.—A servant assumes the risk where he complains of the conditions under which he is employed and is told that no change will be made in such conditions. The fact that he made complaint in no wise relieves him from the operation of the doctrine of assumed risk.¹²⁰

§ 4675. Assumption of Risk where Servant is Ordered to a Duty which he did not Contract to Perform.¹²¹—Where the servant saw or should have seen the dangerous defects in the appliance or the place for work and appreciated such dangers, it is not material that the employment was outside the direct line of work he was engaged to do. He will be held to have assumed the risk.¹²² It is clear that the servant will be charged with the assumption of risk where he obeys an order to perform services outside his line of duty by another employé and not the master or one representing him.¹²³ Where the servant is a railroad employé working on a train on the track of another railroad, he will be held to have assumed the risks of his employment in regard

ing); *Leaux v. New York*, 87 App. Div. (N. Y.) 405; s. c. 84 N. Y. Supp. 511 (eight days); *Collins v. Harrison*, 25 R. I. 489; s. c. 56 Atl. Rep. 678; 64 L. R. A. 156 (seven days for repair of a leaky roof over servant's bedroom).

¹¹⁸ *Studenroth v. Hammond Pack ing Co.*, 106 Mo. App. 480; s. c. 81 S. W. Rep. 487. But see *Hempstock v. Lackawana &c. Co.*, 98 App. Div. (N. Y.) 332; s. c. 90 N. Y. Supp. 663.

¹¹⁹ That an employé will be charged with having assumed the risk where he continues to work with defective tools or amid dangerous surroundings without making complaint, see: *St. Louis Cordage Co. v. Miller*, 126 Fed. Rep. 495; s. c. 61 C. C. A. 477; 63 L. R. A. 551; *Cichowicz v. International Packing Co.*, 206 Ill. 346; s. c. 68 N. E. Rep. 1083; aff'g s. c. 107 Ill. App. 234; *Buehner v. Creamery Package Mfg. Co.*, 124 Iowa 445;

s. c. 100 N. W. Rep. 345; *Crane v. Chicago &c. R. Co.*, 124 Iowa 81; s. c. 99 N. W. Rep. 169; *Wexler v. Salisbury*, 91 Minn. 308; s. c. 98 N. W. Rep. 95; *Parlett v. Dunn*, 102 Va. 459; s. c. 46 S. E. Rep. 467.

¹²⁰ *Alton Roller Milling Co. v. Bender*, 112 Ill. App. 484.

¹²¹ "The doctrine of the assumption of risk does not apply where the employé is ordered to do work out of the line and away from the place of the work he is hired to do and is so engaged when injured." *American Car &c. Co. v. Clark*, 32 Ind. App. 644; s. c. 70 N. E. Rep. 828.

¹²² *Hathaway v. Washington Milling Co.*, 139 Mich. 708; s. c. 103 N. W. Rep. 164; 12 Det. Leg. N. 47; *Avery v. Nordyke & Marmon Co.*, 34 Ind. App. 541; s. c. 70 N. E. Rep. 888.

¹²³ *Natchez Cotton Mill Co. v. McLain (Miss.)*, 33 South. Rep. 723.

to his own road, but not risks incident to the operation of the other road, unless engaged at the time in work for such road, or for both roads jointly.¹²⁴

§ 4676. Servant Ordered, Uninstructed, into an Unfamiliar and Dangerous Service, Outside of his Employment, does Not Accept the Risk.¹²⁵

§ 4677. Volunteer Assumes the Risk of the New Situation.—Speaking generally, an employé who voluntarily puts himself in a place of danger where he is not required to go, assumes the risk of the dangers in this situation, and the employer is in no way responsible for the resulting injury.¹²⁶ The principle finds illustration in a case where an engine hostler exchanged duties with a watchman whom he found in possession of an engine he had been ordered to shift, and permitted the watchman to run the engine while he ran ahead to flag and switch it, and in so doing was injured by falling into an insufficiently covered steam box, the existence of which, though well known to workmen in the yards, was unknown to the hostler. Here the injured employé was held to have assumed the risk.¹²⁷ The same conclusion was

¹²⁴ *Keck v. Philadelphia &c. R. Co.*, 206 Pa. 501; s. c. 56 Atl. Rep. 47.

¹²⁵ *Spring Valley Coal Co. v. Buzis*, 115 Ill. App. 196; s. c. aff'd, 213 Ill. 341; 72 N. E. Rep. 1060; *Flickner v. Lambert*, 36 Ind. App. 524; s. c. 74 N. E. Rep. 263 (young and inexperienced servant employed to operate hand straw cutter did not assume risk of injury from steam cutter); *Branz v. Omaha &c. R. Co.*, 120 Iowa 406; s. c. 94 N. W. Rep. 906 (ordinary railroad laborer ordered to couple cars did not assume risk of defect in car or drawhead of which he was ignorant); *International &c. R. Co. v. Gaitanes* (Tex. Civ. App.), 70 S. W. Rep. 101 (section hand ordered to help train hands throw rails off cars—held not to have assumed risks incident to this employment which were not obvious, and of which he had not been informed). An employé in other line of work ordered to work on wall of brick kiln which fell, was held not to have assumed the risk, though the dangerous condition of the wall was more or less apparent to other experienced employés engaged thereon. *Browning v. Kasten*, 107 Mo. App. 59; s. c. 80 S. W. Rep. 354.

¹²⁶ *Punkowski v. New Castle*

Leather Co., — Del. —; s. c. 57 Atl. Rep. 559; *George Fowler &c. Co. v. Brooks*, 65 Kan. 861; s. c. 70 Pac. Rep. 600; *Hollingsworth v. Pineville Coal Co.*, 74 S. W. Rep. 205; s. c. 24 Ky. L. Rep. 2437; *Kentucky Freestone Co. v. McGee*, 118 Ky. 306; s. c. 80 S. W. Rep. 1113; 25 Ky. L. Rep. 2211; *Young v. Eugene Dietzgen Co.*, 72 App. Div. (N. Y.) 618; s. c. 76 N. Y. Supp. 123; s. c. aff'd, 176 N. Y. 590; 68 N. E. Rep. 1126 (errand boy intruded himself on unoccupied elevator and was injured while attempting to run it for a purpose of his own); *Jones v. Scranton Coal Co.*, 211 Pa. 577; s. c. 61 Atl. Rep. 117; *Michael v. Henry*, 209 Pa. 213; s. c. 58 Atl. Rep. 125. The plaintiff, employed by a city, could not recover of the city for his having contracted small-pox from a patient brought by a policeman into the room where the plaintiff's duties required him to remain, the plaintiff having remained and assisted in fumigating the patient, which was no part of his duties: *Lynch v. North Yakima*, 37 Wash. 657; s. c. 80 Pac. Rep. 79.

¹²⁷ *Baltimore &c. R. Co. v. Doty*, 133 Fed. Rep. 866; s. c. 67 C. C. A. 38.

reached in a case where a carpet scourer in a mill, undertook, after working hours, to help run a line of hot water pipe over a vat of boiling caustic soda, and while standing on a plank placed over the vat, the pipe slipped out of his hands and he was knocked into the vat and scalded to death.¹²⁸

§ 4679. **Employés Acting to Accomplish their Own Purposes.**—The employé will be charged with having assumed the risk where the danger to which he became exposed was created by himself in selecting the place he did for the performance of his work and the master had provided other safe places practicable for the purpose,¹²⁹ though possibly not so convenient.¹³⁰ In a case where a brakeman on a freight train went into the cab of the locomotive of another train to secure a drink of water and while there for that purpose the two trains collided and he was killed, it was held that there could be no recovery for his death, though the collision was due to the negligence of the servants of the railroad company, since the deceased was not in the discharge of any duty to the master at the time of the accident.¹³¹

§ 4685. **Servant Assumes Only Such Risks as would be Discernible by a Person of his Age and Capacity.**—The age, intelligence and experience of the employé are to be considered in determining whether he assumed the risk of a given danger.¹³² In the case of infants the law will merely presume that he took such notice of patent and obvious dangers as would be reasonably expected by a person of his years and experience.¹³³

§ 4686. **When Minors Assume the Risks of the Employment.**—The doctrine of assumption of known risks is as applicable to a minor as to an adult where there is positive evidence that the minor was instructed and cautioned as to the danger,¹³⁴ and the risk in question was understood,¹³⁵ or so obvious that knowledge would be imputed to

¹²⁸ *Durst v. Bromley Bros. Carpet Co.*, 208 Pa. 573; s. c. 57 Atl. Rep. 986.

¹²⁹ *Lobstein v. Sajatovich*, 111 Ill. App. 654.

¹³⁰ *Hettich v. Hillje*, 33 Tex. Civ. App. 571; s. c. 77 S. W. Rep. 641.

¹³¹ *Shadoan v. Cincinnati & C. R. Co.*, 82 S. W. Rep. 567; s. c. 26 Ky. L. Rep. 828.

¹³² *Dickenson v. Vernon*, 77 Conn. 537; s. c. 60 Atl. Rep. 270; *Reynolds v. Grace*, 115 Ill. App. 473; *Shebek v. National Cracker Co.*, 120 Iowa 414; s. c. 94 N. W. Rep. 930; *Babb v. Oxford Paper Co.*, 99 Me. 298; s. c. 59 Atl. Rep. 290; *McDonald v. Cham-*

pion Iron & C. Co., 140 Mich. 401; s. c. 103 N. W. Rep. 829; 12 Det. Leg. N. 208; *Henderson v. Kansas City*, 177 Mo. 477; s. c. 76 S. W. Rep. 1045.

¹³³ *Merrifeld v. Maryland Gold Quartz Min. Co.*, 143 Cal. 54; s. c. 76 Pac. Rep. 710; *Ittner Brick Co. v. Killian*, 67 Neb. 589; s. c. 93 N. W. Rep. 951; *Bender v. New York Glucose Co.*, — N. J. L. —; s. c. 61 Atl. Rep. 388.

¹³⁴ *Evans Laundry Co. v. Crawford*, 67 Neb. 153; s. c. 93 N. W. Rep. 177; 94 N. W. Rep. 814; *Williams v. Belmont Coal & C. Co.*, 55 W. Va. 84; s. c. 46 S. E. Rep. 802.

¹³⁵ *Evans Laundry Co. v. Crawford*,

one of his capacity and understanding.¹³⁶ Where, however, a statute is in force, prohibiting the employment of children under a certain age, this statute is regarded as a determination in effect that a child under that age does not possess the judgment and discretion necessary for the pursuit of a dangerous work and hence such a child is not, as a matter of law, chargeable with the assumption of any risks of the employment.¹³⁷

§ 4687. When Assumption of Risk by a Minor Presents a Question of Fact for a Jury.¹³⁸

§ 4694. Risks Assumed by Inexperienced Servants who are Not Minors.—An inexperienced employé directed to work with a dangerous instrumentality,—the work requiring experience—does not assume the risk where the master has given him no instruction, notice, or warning of the dangers or defects therein,¹³⁹ unless the risks or dangers are

67 Neb. 153; s. c. 93 N. W. Rep. 177; 94 N. W. Rep. 814; *Sitts v. Waiontha Knitting Co.*, 94 App. Div. (N. Y.) 38; s. c. 87 N. Y. Supp. 911 (bright and intelligent girl of fifteen years employed on mangle); *Langlois v. Dunn Worsted Mills*, 25 R. I. 645; s. c. 57 Atl. Rep. 910; *Williams v. Belmont Coal & Co.*, 55 W. Va. 84; s. c. 46 S. E. Rep. 802. In one case a child fourteen years of age, was employed to operate a stamping press, and was injured by having his fingers caught in the same. He gave a full description of the machine, and testified that he fully understood the operation thereof, and that the superintendent had warned him to look out for his fingers. The machine was neither defective nor out of repair, but plaintiff testified that the continued operation thereof caused the muscles of his right leg to become numbed and his eyes to become strained, of which, however, no complaint was made or notice given to defendant. Here it was held that the risk of such injury was obvious, and one which plaintiff assumed: *Cohen v. Hamblin-Russell Mfg. Co.*, 186 Mass. 544; s. c. 71 N. E. Rep. 948.

¹³⁶ *Ritchie v. Krueger*, 102 Ill. App. 654; *Kupkofski v. John S. Spiegel Co.*, 135 Mich. 7; s. c. 97 N. W. Rep. 48; 10 Det. Leg. N. 640 (bright girl of seventeen employed on simply constructed ironing machine for one year—assumed risk); *Carter v. Baldwin*, 107 Mo. App. 217; s. c.

81 S. W. Rep. 204; *Hightower v. Gray*, 36 Tex. Civ. App. 674; s. c. 83 S. W. Rep. 254; *Upthegrove v. Jones & Co. Coal Co.*, 118 Wis. 673; s. c. 96 N. W. Rep. 385.

¹³⁷ *Mace v. H. A. Boedker & Co.*, 127 Iowa 721; s. c. 104 N. W. Rep. 475 (inexperienced boy employed as switch tender injured by train while his foot was caught in unblocked frog—risk not assumed as matter of law); *Lee v. Sterling Silk Mfg. Co.*, 47 Misc. Rep. (N. Y.) 182; s. c. 93 N. Y. Supp. 560; *Marino v. Lehmaier*, 173 N. Y. 530; s. c. 66 N. E. Rep. 572; aff'g s. c. 72 N. Y. Supp. 1118.

¹³⁸ The question of assumption of risk by a minor is a question for the jury where the machine which the minor operated and which caused his injuries was of complex mechanism and the evidence as to whether he had been warned is conflicting: *Slack v. Carter & Co.*, 72 N. H. 267; s. c. 56 Atl. Rep. 316.

¹³⁹ *Merrifield v. Maryland Gold Quartz Min. Co.*, 143 Cal. 54; s. c. 76 Pac. Rep. 710 (shoveler on dump of quartz mill put to work in a dangerous place in the mill); *Coleman v. Perry*, 28 Mont. 1; s. c. 72 Pac. Rep. 42; *Kasjeta v. Nashua Mfg. Co.*, 73 N. H. 22; s. c. 58 Atl. Rep. 874 (servant of less than average intelligence employed to operate cotton picker without being informed that it contained revolving knives): *Klein v. Garvey*, 94 App. Div. (N. Y.) 183; s. c. 87 N. Y.

obvious.¹⁴⁰ Thus, for example, it has been held very properly that a servant must be held to have known that, if he got underneath an overhanging rock, and struck it with a sledge hammer, portions of it would necessarily fall, and, if he was in the way, he would be struck, although he had previously had no experience in digging under rock.¹⁴¹ So where a section hand was put to work wielding a hammer and striking a chisel held on a rail for the purpose of cutting it, it was held that he must have known, being a man of ordinary intelligence, that chips would fly from the rail, and hence assumed the risk, though prior to the accident he had not done any of this kind of work.¹⁴²

§ 4697. Duty of Master to Keep his Premises Clear of Dangerous Holes, Pitfalls, etc.—The law imposes upon the master the duty to exercise reasonable care to furnish his servant a reasonably safe place in which to work, having regard for the nature and dangers of the employment, and to the extent that these dangers cannot be reasonably expected to be guarded against, the risk is assumed by the servant.¹⁴³ One court has declined to hold, as a matter of law, that a factory employé assumed the risk of unlighted stairs in going out of the building in which he worked at night where it was shown that the stairs theretofore had been lighted, and these stairs were the only exit from the building.¹⁴⁴

§ 4698. When Servant Does Assume Risks of Known Defects in Premises, Place of Working, etc.—The servant assumes the risk of dangers and conditions which he knows,¹⁴⁵ and of conditions so ob-

Supp. 998 (inexperienced servant put to work on a planing machine); *Bonn v. Galveston & C. R. Co.*, — Tex. Civ. App. —; s. c. 82 S. W. Rep. 808 (inexperienced trackman injured while carrying rail because of inadequate force provided by master and he acted on command of his foreman).

¹⁴⁰ *San Antonio & C. Co. v. Drake*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 447 (use of defective rail hook by section hand with two years' experience). Where plaintiff, a person of ordinary intelligence, was employed as a general helper in excavating cellars, etc., and his duty was to do whatever work he was directed by his employers to do, he assumed the risk of injury by the swinging of a derrick boom, which he was working while a high wind was blowing; the natural effect of the wind being open and obvious: *Frangiose v. Horton & C.*, 26 R. I. 291; s. c. 58 Atl. Rep. 949.

¹⁴¹ *Hightower v. Gray*, 36 Tex. Civ. App. 674; s. c. 83 S. W. Rep. 254.

¹⁴² *Illinois Cent. R. Co. v. Brown*, 107 Ill. App. 512.

¹⁴³ *Kentucky Freestone Co. v. McGee*, 118 Ky. 306; s. c. 80 S. W. Rep. 1113; 25 Ky. L. Rep. 2211. But the servant does not assume the risk of the negligent omission of the master to provide him with a reasonably safe place to perform his work: *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185.

¹⁴⁴ *English v. Amidon*, 72 N. H. 301; s. c. 56 Atl. Rep. 548. See also *Galveston & C. R. Co. v. Manns*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 254.

¹⁴⁵ *Kline v. Abraham*, 178 N. Y. 377; s. c. 70 N. E. Rep. 923; rev'g s. c. 80 App. Div. (N. Y.) 641; 81 N. Y. Supp. 1132 (slippery condition of stairway); *Grant v. National R. Spring Co.*, 86 App. Div. (N. Y.) 593; s. c. 83 N. Y. Supp. 1021 (soft and uneven condition of

vious as to impute him with this knowledge.¹⁴⁶ He will be charged with an assumption of risk under these circumstances:—Where he expressly assents to occupy a dangerous place for the performance of work to which he is assigned, and he is of sufficient intelligence to understand the dangers;¹⁴⁷ where the place is being continually changed by the work of the employé;¹⁴⁸ where, without the master's authority, he creates a dangerous condition in the place of work,—in such a case the master is under no obligation to safeguard the dangerous situation;¹⁴⁹ where the servant, for purposes of his own, takes the dangerous instead of the safe way provided by the master and is injured.¹⁵⁰

§ 4699. When Servant Does Not Assume Risk of Dangerous Holes, Pitfalls, etc., in Master's Premises.¹⁵¹

§ 4700. When Employé Does Assume Risk of Holes, Pits, etc.¹⁵²

ground used for piling steel rails by reason of which pile toppled over and injured workman acquainted with this condition); *Purkey v. Southern Coal & Co.*, 57 W. Va. 595; s. c. 50 S. E. Rep. 755; *Faber v. C. Reiss Coal Co.*, 124 Wis. 554; s. c. 102 N. W. Rep. 1049.

¹⁴⁶ *Turner v. Southern Pac. Co.*, 142 Cal. 580; s. c. 76 Pac. Rep. 384; *Steele v. Georgia Iron & Co.*, 121 Ga. 459; s. c. 49 S. E. Rep. 291; *Beckman v. Anheuser-Busch Brewing Ass'n* 98 Mo. App. 555; s. c. 72 S. W. Rep. 710.

¹⁴⁷ *Christienson v. Rio Grande Western R. Co.*, 27 Utah 132; s. c. 74 Pac. Rep. 876; *O'Donnell v. Armour Curled Hair Works*, 111 Ill. App. 516 (employment in work in which inflammable material is used).

¹⁴⁸ *Grayson-McLeod Lumber Co. v. Carter*, — Ark. —; s. c. 88 S. W. Rep. 597; *Gibson v. Freygang*, 112 Mo. App. 594; s. c. 87 S. W. Rep. 3.

¹⁴⁹ *Sharp v. Durand*, 71 N. J. L. 354; s. c. 59 Atl. Rep. 7.

¹⁵⁰ *Gillette v. General Electric Co.*, 187 Mass. 1; s. c. 72 N. E. Rep. 255; *McKean v. Colorado Fuel & Co.*, 18 Colo. App. 285; s. c. 71 Pac. Rep. 425.

¹⁵¹ In one case an employé in a foundry, while carrying a ladle of molten metal stepped into a hole which his employer had excavated a few minutes before in an unusual place in a pathway used by em-

ployés, and left it unguarded, and the injured employé, without knowledge of the existence of the hole, stepped in it and was burned by the metal. It was held that the hole, being in an unusual place in the pathway where the injured employé had never known one to be placed before, and his attention not having been called to it, he did not assume the risk of injury therefrom: *San Antonio Foundry Co. v. Drish*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 440. It is the holding in another case that in order to charge a servant with assumption of the risk of being injured by an obstacle on the premises, such obstacle must have been habitually left at the place where the servant encountered it, and it is not sufficient that it was sometimes left there and sometimes at other places: *Galveston & Co. R. Co. v. Manns*, — Tex. Civ. App. —; 84 S. W. Rep. 254. An employé entering for the first time a passageway insufficiently lighted should proceed with caution, but does not assume the risk of injury from a hatchway negligently left open in the floor of the passageway: *Schwarzchild & Co. v. Drysdale*, 69 Kan. 119; s. c. 76 Pac. Rep. 441.

¹⁵² So an experienced employé working over and around vats will assume the risk of falling into such vats, where he continues to work without complaint as to the accessories furnished him: *Scheir v. Quirin*, 77 App. Div. (N. Y.) 624;

§ 4704. Assumes Risks of Exposed Machinery.¹⁵³

§ 4705. Risks Assumed in the Work of Making a Dangerous Place Safe.¹⁵⁴

§ 4707. Assumes Risks of Known Defects in Tools, Appliances, etc.—Generally speaking, the servant assumes the risk of known defects in tools and machinery,¹⁵⁵ and such obvious defects as would impute him with knowledge of their existence.¹⁵⁶ “When the defects are of such a nature as to be obvious to any one giving attention to the duties of the occasion, the employé is required to observe and avoid them. He may not rely upon a presumption as against his own senses.”¹⁵⁷ But there is authority that the servant does not assume the risk, though he knows of the defect, if the danger in its use is not such as to threaten immediate injury.¹⁵⁸

§ 4708. Assumes Risks of Injuries from Defects in Appliances in Known and Common Use.¹⁵⁹

§ 4710. Risk of Injuries from Dangerous Machinery.—Generally speaking, the servant does not assume the risk of injury from the use of machinery containing latent defects of which he is ignorant,¹⁶⁰ but

s. c. 78 N. Y. Supp. 956; s. c. aff'd, 177 N. Y. 568; 69 N. E. Rep. 1130; Wilson v. Chess & Co., 117 Ky. 567; s. c. 78 S. W. Rep. 453; 25 Ky. L. Rep. 1655.

¹⁵³ A sawmill man, working overtime with knowledge that a saw was not guarded as required by law, and that it was a dangerous implement, assumed the risk, and cannot recover for an injury, although it would not have occurred if the statute had been complied with: *Notage v. Sawmill Phoenix*, 133 Fed. Rep. 979.

¹⁵⁴ *Florence & Co. R. Co. v. Whipps*, 138 Fed. Rep. 13 (clearing railroad wreck); *Nugent v. Cudahy Packing Co.*, 126 Iowa 517; s. c. 102 N. W. Rep. 442 (carpenter at work under building being raised on jackscrews to be placed on piers held not to have assumed the risk of collapse of piers because cement therein had not set sufficiently); *Henson v. Armour Packing Co.*, 113 Mo. App. 618; s. c. 38 S. W. Rep. 166 (experienced man sent to re-enforce shoring of a bank of earth that was unsafe); *International & Co. R. Co. v. Royal*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 713 (an employé engaged in replacing a derailed car on a track as-

sumed the risk of danger from going under a car raised by jacks placed on insufficient supports though he obeyed command of the foreman, the danger being apparent).

¹⁵⁵ *Webster Mfg. Co. v. Goodrich*, 104 Ill. App. 76.

¹⁵⁶ *Glenmont Lumber Co. v. Roy*, 126 Fed. Rep. 524; s. c. 61 C. C. A. 506; *McCormick Harvesting Mach. Co. v. Wojciechowski*, 111 Ill. App. 641; *Caven v. Bodwell Granite Co.*, 99 Me. 278; s. c. 59 Atl. Rep. 285; *Zevin v. Goldman*, 94 N. Y. Supp. 35; *Hicks v. Naomi Falls Mfg. Co.*, 138 N. C. 319; s. c. 50 S. E. Rep. 703.

¹⁵⁷ *Roby, J., in Chicago & Co. R. Co. v. Tackett*, 33 Ind. App. 379; s. c. 71 N. E. Rep. 524.

¹⁵⁸ *Edwards v. Barber Asphalt Pav. Co.*, 92 Mo. App. 221; *Franklin v. Missouri & Co. R. Co.*, 97 Mo. App. 473; s. c. 71 S. W. Rep. 540; *Herbert v. Mound City Boot & Co.*, 90 Mo. App. 305; *Parsons v. Hammond Packing Co.*, 96 Mo. App. 372; s. c. 70 S. W. Rep. 519.

¹⁵⁹ *San Antonio Sewer Pipe Co. v. Noll*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 900 (common chisel).

¹⁶⁰ *Pierce v. Contrexville Mfg. Co.*,

otherwise where the danger is open, obvious, and known to him, and with such knowledge he continues to use such machinery.¹⁶¹ Where sufficient appliances are furnished by the master for the servant and the servant exercises the right to select the tool, he will ordinarily be held to have assumed the risk incident to this choice.¹⁶²

§ 4712. Risk of Injury from the Incompetency or Negligence of Fellow Servants.¹⁶³—Under the rule governing in this connection the master is not liable for the negligence of a foreman who works with the men and is not the head of a department and exercises no function belonging to the master.¹⁶⁴ But the servant does not assume the risk of injury from the negligence of a servant sustaining the relation of vice-principal to the master.¹⁶⁵

25 R. I. 512; s. c. 56 Atl. Rep. 778; *Carson v. Southern R. Co.*, 68 S. C. 55; s. c. 46 S. E. Rep. 525. It is the holding of one court in a case of injury to a laundress that though she may have been an experienced laundress she did not assume the risk incident to the operation of a defective machine with which she was without experience: *Bradford v. Taylor*, 85 Miss. 409; s. c. 37 South. Rep. 812.

¹⁶¹ *Jones v. American Warehouse Co.*, 137 N. C. 337; s. c. 49 S. E. Rep. 355; 138 N. C. 546; 51 S. E. Rep. 106. A servant assumes the risk of using a planing machine after the removal of a hood and blow-pipe with which it had previously been covered: *Erickson v. Cummer Mfg. Co.*, 140 Mich. 434; s. c. 103 N. W. Rep. 828; 12 Det. Leg. N. 194. So where an employé was injured while working in a woodworking establishment, and knew that a suitable device had been furnished by the master to protect the machinery, but also understood the risks incident to its use in an unguarded condition, he was held to have assumed all risks of injury which would follow his failure to attach the device so furnished: *McGinty v. Waterman*, 93 Minn. 242; s. c. 101 N. W. Rep. 300. In a case where an intelligent woman, twenty-five years of age and having three months' experience, was injured while working on a mangle by having her hand caught therein, it was held that she assumed the obvious risk to which she was exposed in working with the mangle

without a guard: *Bier v. Hosford*, 35 Wash. 544; s. c. 77 Pac. Rep. 867.

¹⁶² *Randa v. Detroit Screw Works*, 134 Mich. 343; s. c. 96 N. W. 454; 10 Det. Leg. N. 504.

¹⁶³ On the general proposition that the servant assumes the risk of the negligence of fellow servants, see: *Deye v. Lodge & Shipley Mach. Tool Co.*, 137 Fed. Rep. 480; *Evans v. Josephine Mills*, 119 Ga. 448; s. c. 45 S. E. Rep. 674; *Wells v. O'Hare*, 209 Ill. 627; s. c. 70 N. E. Rep. 1056; rev'g s. c. 110 Ill. App. 7; *Collingwood v. Illinois &c. Fuel Co.*, 125 Iowa 537; s. c. 101 N. W. Rep. 283; *Atchison &c. Bridge Co. v. Miller*, 71 Kan. 13; s. c. 80 Pac. Rep. 18; *Donnelly v. Cudahy Packing Co.*, 68 Kan. 653; s. c. 75 Pac. Rep. 1017; *Nordquist v. Fuller*, 182 Mass. 411; s. c. 65 N. E. Rep. 834; *Palmer v. Coyle*, 187 Mass. 136; s. c. 72 N. E. Rep. 844; *Boyer v. Eastern R. Co.*, 87 Minn. 367; s. c. 92 N. W. Rep. 326; *Campbell v. T. A. Gillespie Co.*, 69 N. J. L. 279; s. c. 55 Atl. Rep. 276; *Ehrenfried v. Lackawana Iron &c. Co.*, 89 App. Div. (N. Y.) 130; s. c. 85 N. Y. Supp. 57; s. c. aff'd, 180 N. Y. 515; 72 N. Y. Supp. 1141; *Louisville &c. R. Co. v. Dillard*, 114 Tenn. 240; s. c. 86 S. W. Rep. 313; *Metzler v. McKenzie*, 34 Wash. 470; s. c. 76 Pac. Rep. 114.

¹⁶⁴ *Dill v. Marmon*, 164 Ind. 507; s. c. 73 N. E. Rep. 67; *Southern &c. R. Co. v. Harrell*, 161 Ind. 689; s. c. 68 N. E. Rep. 262; 63 L. R. A. 460; rev'g s. c. 66 N. E. Rep. 1016.

¹⁶⁵ *Pittsburgh &c. R. Co. v. Nicholas*, — Ind. App. —; s. c. 73 N. E. Rep. 195; 74 N. E. Rep. 626 (con-

§ 4713. **When Risks of Incompetent or Unfit Fellow Servants Not Assumed; Knowledge of Master, Ignorance of Servant.**—Generally speaking, a servant will not be held to have assumed the risk resulting from the employment of an incompetent fellow servant unless he has notice of such incompetency.¹⁶⁶ Thus, where a railroad engineer used, without protest, a locomotive having a defective headlight, it was held that he did not thereby assume the risk of injuries from the company's negligence in placing an incompetent flagman near a washout, who gave him the signal to proceed with his train, though he might have avoided the accident if he had had a perfect headlight.¹⁶⁷ Neither is the risk of the negligence of a fellow servant assumed by an infant of tender years.¹⁶⁸

§ 4714. **Assumes such Risks by Remaining in the Service without Complaint after Acquiring Knowledge of the Dangerous Habits of the Co-Servant.**—Here it is the rule that the servant will assume the risk of injury from the negligence or incompetency of his fellow servant where he knows of such negligence or incompetency, and continues in the employment of the master without making any objection.¹⁶⁹ Actual knowledge of the unfitness of the fellow servant is not required; a servant is charged with such knowledge of the fitness of his fellow servant as he could have acquired by the exercise of ordinary care.¹⁷⁰

§ 4715. **Effect of Giving Notice of the Incompetency of a Fellow Servant and then Remaining in the Service.**¹⁷¹

ductor held to sustain this relation toward brakeman); *Meagher v. Crawford Laundry Mach. Co.*, 187 Mass. 586; s. c. 73 N. E. Rep. 853; *Deckerd v. Wabash R. Co.*, 111 Mo. App. 117; s. c. 85 S. W. Rep. 982.

¹⁶⁶ *Metropolitan West Side Elevated R. Co. v. Fortin*, 203 Ill. 454; s. c. 67 N. E. Rep. 977; *Metropolitan West Side Elevated R. Co. v. Fortin*, 107 Ill. App. 157; *Scott v. Iowa Tel. Co.*, 126 Iowa 524; s. c. 102 N. W. Rep. 432; *Anderson v. Southern R.*, 70 S. C. 490; s. c. 50 S. E. Rep. 202.

¹⁶⁷ *Galveston & C. R. Co. v. Fitzpatrick*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 406.

¹⁶⁸ *Evans v. Josephine Mills*, 119 Ga. 448; s. c. 46 S. E. Rep. 674.

¹⁶⁹ *Hull v. Northern Pac. R. Co.*, 136 Fed. Rep. 153; s. c. 69 C. C. A. 151; *Southern Pac. Co. v. Hetzer*, 135 Fed. Rep. 272; s. c. 68 C. C. A. 26; *Illinois Cent. R. Co. v. Smiesni*, 104 Ill. App. 194 (intemperance);

Enright v. Oliver & Burr, 69 N. J. L. 357; s. c. 55 Atl. Rep. 277; *White v. Lewiston & C. R. Co.*, 94 App. Div. (N. Y.) 4; s. c. 87 N. Y. Supp. 901 (intemperance); *Dooling v. Deutscher Verein*, 97 App. Div. (N. Y.) 39; s. c. 89 N. Y. Supp. 580; *Austin v. Fisher Tanning Co.*, 96 App. Div. (N. Y.) 550; s. c. 89 N. Y. Supp. 137 (servant held to have assumed the risk of injury by reason of fellow servant's unfamiliarity with the English language).

¹⁷⁰ *Indianapolis & C. T. Co. v. Foreman*, 162 Ind. 85; s. c. 69 N. E. Rep. 669.

¹⁷¹ Evidence held sufficient to have authorized the jury to infer an admission of the master to an injured servant that a fellow servant was unfit for work, and an assurance that such unfit servant would not be put to work near servant injured by his alleged negligence, and hence the jury could find that the risk of injury from the unfit serv-

§ 4718. General Statement of Doctrine as to Acceptance of Risks in Coupling and Uncoupling Cars.—A railroad brakeman will not be held to have assumed the risk of injury from a defective coupling unless he knows or should know the danger arising from its use.¹⁷² But where he knows of the defect before the accident and incurs the risk of injury with a full knowledge, without complaint, and not in obedience to any command from a superior, he will be held to have assumed the risk.¹⁷³

§ 4719. Risks of Injuries from Coupling or Uncoupling Cars of Different Construction, or Different Height, or having Different Coupling-Appliances.¹⁷⁴

§ 4721. Risk of Injury in Coupling or Uncoupling Cars from the Manner in which the Cars are Loaded.—A brakeman familiar with the method usually adopted in loading steel rails on cars and knowing that the rails project beyond the end of the car and that the brake is not set, and having such knowledge undertakes to make a coupling, will be held to have assumed the hazards of any injury he may receive from this cause.¹⁷⁵

§ 4722. Where the Brakemen or other Trainmen Proceed to Couple or Uncouple Cars in a Manner Prohibited by Known Rules of the Company.—Generally an experienced brakeman will be charged with assuming the risk where he unnecessarily goes between moving cars to make a coupling, in violation of a rule of the company and of specific instructions.¹⁷⁶

§ 4723. Failing to Use a Safety Coupler. Coupling-Stick, etc.—Recent decisions are not in harmony on the question whether the brakeman assumes the risk of injury in coupling cars not equipped with automatic couplers as required by a statute in force in the jurisdiction.

ant was not assumed: *Allcot v. Kirkham*, 101 App. Div. (N. Y.) 77; s. c. 91 N. Y. Supp. 775.

¹⁷² *Brinkmeier v. Missouri Pac. R. Co.*, 69 Kan. 738; s. c. 77 Pac. Rep. 586.

¹⁷³ *Hayzel v. Columbia R. Co.*, 19 App. (D. C.) 359.

¹⁷⁴ A brakeman of ordinary intelligence and experience assumes the dangers of coupling cars provided with different kinds of couplers, bumpers and deadwoods: *Johnson v. Southern Pac. Co.*, 117 Fed. Rep. 462; s. c. 54 C. C. A. 508.

¹⁷⁵ *Cleveland & C. R. Co. v. Somers*, 24 Ohio Cir. Ct. R. 67.

¹⁷⁶ *Whalin v. Illinois Cent. R. Co.*, 112 Ill. App. 428; *Moore v. St. Louis & C. R. Co.*, 115 La. 86; s. c. 38 South. Rep. 913. Where a switchman, knowing that the automatic coupler did not work, went between slowly moving cars to uncouple them, in violation of a rule of the company forbidding switchmen going between cars when moving, and was injured by having his foot caught in the guard rail, he assumed the risk: *Hynson v. St. Louis & C. R. Co.*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 928.

In North Carolina it is held that the fact that an employé remains in the service of the railroad company, knowing that its freight cars are not equipped with automatic couplers, does not excuse the railroad company from liability to such employé if injured while coupling cars by hand.¹⁷⁷ On the other hand, an Ohio decision holds that a brakeman entering the service of a railroad company, with full knowledge and notice that its cars are not provided with automatic couplers as required by statute, cannot recover for an injury received by reason of the use of hand couplers instead of automatic couplers.¹⁷⁸

§ 4724. Effect of the Brakeman Being Ordered by the Conductor to Make the Coupling or Uncoupling.—It is the rule in Illinois that a brakeman ordered by the conductor of his train, whom it is his duty to obey, to make a coupling, has the right to assume that the coupling may be safely made, unless the danger in making it is so apparent and imminent that a reasonably prudent man would have refused to make it.¹⁷⁹

§ 4727. Risk of Injury from the Sudden Starting, Stopping or Jolting of Cars.¹⁸⁰

§ 4730. Other Circumstances under which Trainmen have been Held to have Accepted the Risk of Injury in Coupling or Uncoupling Cars.—A freight conductor, without being required to do so, volunteered to assist in reassembling his train, broken into various sections while in transit, and was injured while endeavoring to detach a chain which was used in moving one of the cars, by reason of the negligence of a brakeman in giving a signal to the engineer to start. It was held, in the absence of evidence that the plaintiff did not know or appreciate the danger of his act, that he assumed the risk thereof.¹⁸¹

§ 4731. Other Circumstances under which Brakemen Not Deemed to Assume the Risk.¹⁸²

¹⁷⁷ *Elmore v. Seaboard Air Line R. Co.*, 132 N. C. 865; s. c. 44 S. E. Rep. 620.

¹⁷⁸ *Cleveland & c. R. Co. v. Somers*, 24 Ohio Cir. Ct. R. 67.

¹⁷⁹ *Pittsburgh & c. R. Co. v. Hewitt*, 102 Ill. App. 428; s. c. aff'd, 202 Ill. 28; 66 N. E. Rep. 829.

¹⁸⁰ Where an employé of a railroad company voluntarily exposes himself to danger by going between the cars of a train of his employer he does not assume responsibility for the danger caused by the bumping of such cars by the train of

another company, where he did not know of such danger, and by the exercise of ordinary prudence could not have discovered it: *Holmes v. Chicago & c. R. Co.*, — Neb. —; s. c. 103 N. W. Rep. 77.

¹⁸¹ *Murphy v. Grand Trunk R. Co.*, 73 N. H. 18; s. c. 58 Atl. Rep. 835.

¹⁸² *Hewitt v. East Jordan Lumber Co.*, 136 Mich. 110; s. c. 98 N. W. Rep. 992; 10 Det. Leg. N. 1008 (bed of car slipping off bolsters on which it was placed—brakeman held not to have assumed this risk as a matter of law).

§ 4734. Circumstances under which Railway Employé Assumes the Risk of Getting his Foot Caught in Unblocked Frogs, Switches, Guard-Rails, etc.¹⁸³

§ 4736. Risk of Injury from Ashes, Cinders, and Other Things Thrown Upon the Track.—In a case where a railroad brakeman, finding that the automatic coupler in the train did not work, went between the cars for the purpose of uncoupling them, while they were moving slowly, and was injured by stumbling over a clinker on the track, it was held that he, having exercised ordinary care, did not assume the risk of this form of injury.¹⁸⁴

§ 4737. Risk of Injury from Defective Tracks in Railway-Yards.—Generally speaking, the risks in working in a railroad yard with many tracks lying close together are open and apparent to employés. These risks are incident to the business of the handling and switching of cars, and the employé who voluntarily engages in the service must be held to have assumed them when he enters upon his service.¹⁸⁵

§ 4739. Other Risks Assumed by Railway Yardmen, Switchmen, etc.—The holdings are numerous that railroad brakemen,¹⁸⁶ switchmen,¹⁸⁷ or trainmen¹⁸⁸ do not assume a risk of injury arising from the

¹⁸³ In a case where it appeared that a railroad company maintained between twenty-five and thirty spring rail frogs with necessary excavations under the spring rails in its yards, and the plaintiff had worked as a switchman for some six months prior to his injury occasioned by having his foot caught in one of such excavations, it was held that it was his duty to take note of such conditions and that he therefore assumed the risk of danger therefrom: *Riley v. Louisville & C. R. Co.*, 133 Fed. Rep. 904. In another case a night yardmaster went in front of a moving train to couple the same to a caboose before the train had passed the frog in the track at the switch. He walked sideways, and, while loosening a wedge in a patent coupler, his foot was caught in the frog and he was run over. That he recognized the danger of this method was shown by the fact that he had previously warned his subordinates not to go in front of moving trains, and in this instance there was no necessity for him to have done so. The conclusion was readily reached

that he voluntarily assumed the risk of his injury: *Shannon v. Louisville & C. R. Co.*, 70 S. W. Rep. 626; s. c. 24 Ky. L. Rep. 1083. A switchman who had worked in a yard for over seven months assumed the risk arising from the fact that a majority of the switches in the yard were not blocked: *Hynson v. St. Louis & C. R. Co.*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 928.

¹⁸⁴ *Missouri & C. R. Co. v. Keefe*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 679.

¹⁸⁵ *Mobile & C. R. Co. v. Healy*, 109 Ill. App. 531. See also *Pittsburg & C. R. Co. v. Gipe*, 160 Ind. 360; s. c. 65 N. E. Rep. 1034.

¹⁸⁶ *Missouri & C. R. Co. v. Keefe*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 679.

¹⁸⁷ *International & C. R. Co. v. Reeves*, 35 Tex. Civ. App. 162; s. c. 79 S. W. Rep. 1099; *Montgomery v. Chicago Great Western R. Co.*, 109 Mo. App. 88; s. c. 83 S. W. Rep. 66.

¹⁸⁸ *Northern Alabama R. Co. v. Shea*, 142 Ala. 119; s. c. 37 South. Rep. 796.

master's failure to use ordinary care to provide a reasonably safe track, unless they know of such failure in the discharge of their duties. It follows that a railroad brakeman will not be held to have assumed the risk of a defect in the blocking at a switch in the absence of knowledge of this defect.¹⁸⁹ A railroad switchman was killed while attempting to throw the handle of a jackknife switch, by reason of the wheels of an engine or car striking the switch point or movable rail in such a manner as to cause the handle to fly back and strike him. It was claimed not only that the switch was out of order, but as originally constructed was faulty in design, and that the accident was in some degree due to such improper mode of construction. It further appeared that the switchman was experienced in this line of work, and had been employed by the railroad company for a number of years and had worked for some months in the yard where the accident occurred, and the mode of construction of the switch was perfectly obvious. It was held that the switchman assumed the risk of such defective construction, if any, and a recovery for the injuries was refused.¹⁹⁰

§ 4740. Risk of Injury from Unsafe Cattle-Guards, Trestles, Culverts, etc.¹⁹¹

§ 4742. Trainmen in General Not Required to Inspect the Track.—An engineer has a right to assume that the railroad has exercised ordinary care to maintain the track in a reasonably safe condition, and unless he knows that this has not been done he will not be charged with the assumption of the risk arising from such failure.¹⁹²

§ 4744. Risks of Injuries from Other Defects in Railway-Tracks.—A brakeman who stepped into an open drain under a switch covered with snow and was run over by his train was held to have assumed the risk of injury from this cause where it was shown that the drain had existed for many years, and the brakeman had been in the employ of the railroad at this place for more than a year as a member of a switching crew which daily stopped at the siding for dinner and took in and put out cars there four or five times each day, and no complaint about the drain had been made by the deceased or any other employé, and

¹⁸⁹ *Pierson v. Chicago & C. R. Co.*, 127 Iowa 13; s. c. 102 N. W. Rep. 149.

¹⁹⁰ *Loushay v. Erie R. Co.*, 95 App. Div. (N. Y.) 102; s. c. 88 N. Y. Supp. 446.

¹⁹¹ *Southern Pac. Co. v. Gloyd*, 138 Fed. Rep. 388 (brakeman assumed risk of injury from falling through open culvert in the night while cut-

ting trains); *Kath v. Wisconsin Cent. R. Co.*, 121 Wis. 503; s. c. 99 N. W. Rep. 217 (engineer sent to burning bridge with knowledge of that fact assumed the risk of injury from running engine onto bridge).

¹⁹² *Gulf & C. R. Co. v. Boyce*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 395.

it was not claimed that the drain was the cause of any other accident.¹⁹³

§ 4752. Risks of Injury from Overhead Bridges, when Not Assumed.¹⁹⁴

§ 4754. Effect of Failure of the Company to Maintain "Whiplashes" or "Tell-tales."—The courts of Louisiana—where a statute compels railroad companies to install tell-tales at a distance of one hundred fifty feet from the approach of an overhead bridge—hold that a brakeman does not assume the risks arising from the failure of the railroad company to comply with the statute.¹⁹⁵ The fact that a brakeman on top of freight cars knows of the tendency of tell-tales to become looped or get out of order, does not conclusively charge him with the assumption of the risk of injury from being caught therein. The duties of the brakeman may have so absorbed his attention as to divert his mind from the danger, and this fact should be considered on the question whether he has actually assumed the risk.¹⁹⁶

§ 4755. Risk of Lateral Objects Too Near the Track, when Assumed.—Generally speaking, a railroad trainman assumes the risk of contact with fixed lateral objects close to the track if he knows or ought to know of their dangerous location.¹⁹⁷ Where he knows of the existence of such an object at the side of the track, but does not know whether it is dangerously near the track, the question of assumption of risk is one for the determination of the jury;¹⁹⁸ and this is the case where the evidence as to knowledge of the existence of the object is conflicting,¹⁹⁹ or there is evidence that the injured servant was engrossed in his duties at the time of receiving the injury.²⁰⁰

¹⁹³ *Miller v. Detroit & C. R. Co.*, 133 Mich. 564; s. c. 95 N. W. Rep. 718; 10 Det. Leg. N. 342.

¹⁹⁴ A former passenger brakeman, which employment did not require him to know the position of low bridges, was sent out as rear brakeman on a freight train. The rules required him to be on top of his train when approaching or passing through station yards. In endeavoring to reach the top of his train in compliance with this rule, after dark, as the train was approaching a station yard, he raised his head above the train at a point between the tell-tale and a low bridge of which he had not been informed, and he was struck and fatally injured. It was held that he had not assumed the risk of such injury

as he was without knowledge of the danger: *Miller v. Boston & C. R. Co.*, 73 N. H. 330; s. c. 61 Atl. Rep. 360.

¹⁹⁵ *Hailey v. Texas & C. R. Co.*, 113 La. 533; s. c. 37 South. Rep. 131.

¹⁹⁶ *McGarrity v. New York & C. R. Co.*, 25 R. I. 269; s. c. 55 Atl. Rep. 718.

¹⁹⁷ *Mobile & C. R. Co. v. Vallowe*, 214 Ill. 124; s. c. 73 N. E. Rep. 416.

¹⁹⁸ *Chicago & C. R. Co. v. Howell*, 208 Ill. 155; s. c. 70 N. E. Rep. 15; aff'd s. c. 109 Ill. App. 546.

¹⁹⁹ *Texas & C. R. Co. v. Swearingen*, 122 Fed. Rep. 193; s. c. 59 C. C. A. 31; *Mobile & C. R. Co. v. Vallowe*, 214 Ill. 124; s. c. 73 N. E. Rep. 416.

²⁰⁰ *McDannald v. Washington & C. R. Co.*, 31 Wash. 585; s. c. 72 Pac. Rep. 481.

§ 4756. **Risk of Lateral Objects Too Near the Track, when Not Assumed.**—As a general proposition, it is the duty of a railroad company to place its structures at such a distance from the track as not to endanger its employes in the performance of their ordinary duties, and the employé on his part has a right to presume that such duty has been performed, and is not charged with the duty of inspection to ascertain the exact distance of such structures from the track.¹ There is authority that a trainman engaged in switching does not assume the risk of injury on account of the nearness to the track of an object, though he knows how near it is, unless he knows and appreciates the danger created thereby.² Certainly a trainman will not be conclusively charged with knowledge of the dangerous proximity of one of these objects where he has passed it only one time, and then in the night.³ Nor can he be charged with the assumption of the risk on the ground that he knew of the dangerous proximity of the object and yet did not complain, if the accident followed so soon after acquiring this knowledge that he did not have an opportunity to complain.⁴

§ 4757. **Risk of Injury from Cars Negligently Left Standing on Side-Tracks.**⁵

§ 4759. **Risk of Injury from being Brought into Contact with Mail-Cranes.**⁶

§ 4761. **Risk of Injury from Other Overhead Objects.**—It is held that the risk of danger from a cattle chute erected over railroad tracks

¹ Texas &c. R. Co. v. Swearingen, 122 Fed. Rep. 193; s. c. 59 C. C. A. 31; Chicago &c. R. Co. v. Howell, 109 Ill. App. 546; s. c. aff'd, 208 Ill. 155; 70 N. E. Rep. 15; Philadelphia &c. R. Co. v. Devers, 101 Md. 341; s. c. 61 Atl. Rep. 418; Bradburn v. Wabash R. Co., 134 Mich. 575; s. c. 96 N. W. Rep. 929; 10 Det. Leg. N. 592 (piles of lumber); Galveston &c. R. Co. v. Brown, 33 Tex. Civ. App. 589; s. c. 77 S. W. Rep. 832; Leach v. Oregon Short Line R. Co., 29 Utah 285; s. c. 81 Pac. Rep. 90 (uprights of bridge).

⁴ Wright v. Chicago &c. R. Co., 160 Ind. 583; s. c. 66 N. E. Rep. 454.

⁵ Gorham v. Sioux City Stock Yards Co., 118 Iowa 749; s. c. 92 N. W. Rep. 698.

⁶ Wright v. Chicago &c. R. Co., 160 Ind. 583; s. c. 66 N. E. Rep. 454.

⁷ A brakeman does not assume the risk of a violation by other employes of a rule requiring cars standing on a grade siding to be

coupled together: St. Louis &c. R. Co. v. Pope, — Tex. —; s. c. 86 S. W. Rep. 5; rev'g s. c. 82 S. W. Rep. 360.

⁸ In one case a locomotive fireman was held to have assumed the risk from proximity to the track of a mail crane where it appeared that he had been a fireman on the road for a year, during which time there was no increase in the size of the engines, and he had passed this place eighty-three times, and been over the other division 123 times, and the crane had been in position all that time, and at substantially the same distance from the track as the other cranes on both divisions. And this was the conclusion though the injuries from contact therewith were received on a dark night when it was blowing hard, and snowing, since these circumstances demanded extra caution on his part: Kenney v. Meddaugh, 118 Fed. Rep. 209; s. c. 55 C. C. A. 115.

at an insufficient height is not so inherent in the occupation of a railroad brakeman as to be assumed by the mere acceptance of such employment, in the face of the presumption that an employé will be furnished with a safe place to work.⁷

§ 4762. Risk of Injury from Objects Too Near Street-Railway Tracks.⁸

§ 4765. Assumption of Risk of Defects in Locomotive-Engines.—It seems a proper holding that an engineer has a right to assume that the step on his engine is safe when the engine is turned over to him for his trip, and that it will remain so, except for defects discoverable by ordinary observation, until the railroad company might deem it its duty to make an inspection.⁹

§ 4769. Risk of Injury from Switches being Negligently Left Open.¹⁰

§ 4770. Risk of Danger from Absent or Defective Handholds upon Cars.—It may be said generally, that a trainman will assume the risks of such defects in handholds on freight cars as would not have been discoverable by the master by an ordinarily careful inspection, even though this kind of an inspection was not made.¹¹ The railroad company is under no obligation to point out to trainmen the difference in construction between its own and foreign cars as to the location

⁷ *Coles v. Union Terminal R. Co.*, 124 Iowa 48; s. c. 99 N. W. Rep. 108.

⁸ That a conductor killed by contact with objects while collecting fares not charged with assumption unless he had actual knowledge, or the location was so obvious as to exclude ignorance, see: *Hoffmeier v. Kansas City L. R. Co.*, 68 Kan. 831; s. c. 75 Pac. Rep. 1117; *True v. Niagara Gorge R. Co.*, 70 App. Div. (N. Y.) 383; s. c. 75 N. Y. Supp. 216; s. c. aff'd, 175 N. Y. 487; 67 N. E. Rep. 1090 (tracks too close together). A street railroad conductor who had been over a road about one hundred times as conductor and about fifty trips as motorman and was familiar with the location of a tree in dangerous proximity to the side of the car was held to have assumed the risk of injury by contact with this tree by continuing in the employment with this knowledge: *Drake v. Auburn City R. Co.*, 173 N. Y. 466; s.

c. 66 N. E. Rep. 121; rev'g s. c. 75 N. Y. Supp. 1124.

⁹ *Texas & C. R. Co. v. Hartnett*, 33 Tex. Civ. App. 103; s. c. 75 S. W. Rep. 809. In a case where it appeared that an engineer on turning in his locomotive had reported a defect to the foreman of the repair shop, who promised to remedy it, and he was injured by reason of this defect on the next trip, it was held a question for the jury whether he had failed to exercise such care that he could be considered as having assumed the risk: *Olney v. Boston & C. R.*, 71 N. H. 427; s. c. 52 Atl. Rep. 1097.

¹⁰ *Jones v. Kansas City & C. R. Co.*, 178 Mo. 528; s. c. 77 S. W. Rep. 890 (that engineer does not assume risk of injury from cars which have escaped from a siding onto main track).

¹¹ *Galveston & C. R. Co. v. Perry*, 36 Tex. Civ. App. 414; s. c. 82 S. W. Rep. 343.

of the handholds, as this fact is perfectly obvious to the employé.¹² A brakeman will not be held to have assumed the risk of a defective ladder where the defective condition is unknown to him, and is difficult of ascertainment because of darkness.¹³ It is the holding of one case that a laborer, riding on a dirt train, may lean on the stakes used to hold in the sides of the car to steady himself while the train is moving without being charged with assuming the risk of injury from defects in the stakes.¹⁴

§ 4771. **Risk of Injury while Riding on Hand-Cars: Defective Hand-Cars.**—Section-men with knowledge of defects in hand-cars, such as loose wheels,¹⁵ and defective brakes,¹⁶ assume the risk of injury from these defects. But they will not assume the risk of defects which are neither open nor obvious to common observation, and are only discoverable by upsetting the car and the application of unusual tests.¹⁷ The employé riding on a hand-car does not assume the risk of injury from the negligent operation of trains without signal or lookout,¹⁸ nor from obstructions erected across the track by the railroad company.¹⁹ Neither will an inexperienced employé be charged with knowledge that a car carrying ten persons had a capacity limited to six so as to impute him with an assumption of the risk of danger from overcrowding.²⁰ Again it has been held that a section-hand does not assume the risk of a collision of his hand-car with a train where he is acting in obedience to his foreman's order in operating the car along the track on the time of an approaching train instead of waiting for it to pass.²¹ The danger to an employé in attaching a hand-car to a moving train is regarded as so obvious to an experienced employé as to charge him with assumption of the risk.²²

¹² Woods v. Northern Pac. R. Co., 36 Wash. 658; s. c. 79 Pac. Rep. 309.

¹³ El Paso Northeastern R. Co. v. Ryan, 36 Tex. Civ. App. 190; s. c. 81 S. W. Rep. 563.

¹⁴ Briner v. Chicago & C. R. Co., 109 Mo. App. 493; s. c. 85 S. W. Rep. 653.

¹⁵ Foster v. Chicago & C. R. Co., 127 Iowa 84; s. c. 102 N. W. Rep. 422.

¹⁶ Texas Cent. R. Co. v. Bender, 32 Tex. Civ. App. 568; s. c. 55 S. W. Rep. 561; Texas & C. R. Co. v. Kelly (Tex. Civ. App.), 80 S. W. Rep. 79.

¹⁷ Missouri & C. R. Co. v. Blackman, 32 Tex. Civ. App. 200; s. c. 74 S. W. Rep. 74.

¹⁸ San Antonio & C. R. Co. v. Brock, 35 Tex. Civ. App. 155; s. c. 80 S. W.

Rep. 422. See also International & C. R. Co. v. McVey (Tex. Civ. App.), 81 S. W. Rep. 991; s. c. 83 S. W. Rep. 34 (employé injured while attempting to remove the car to prevent accident to train).

¹⁹ Texas & C. R. Co. v. Kelly (Tex. Civ. App.), 80 S. W. Rep. 1073.

²⁰ Anderson v. Great Northern Ry. Co., 95 Minn. 212; s. c. 103 N. W. Rep. 1021.

²¹ Illinois Cent. R. Co. v. McIntosh, 118 Ky. 145; s. c. 80 S. W. Rep. 496; 81 S. W. Rep. 270; 26 Ky. L. Rep. 14, 347; San Antonio & C. R. Co. v. Stevens, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 235.

²² Lee v. Northern Pac. R. Co., 39 Wash. 388; s. c. 81 Pac. Rep. 834.

§ 4773. **Risks Assumed in Street-Railway Operation.**—Street car operatives will be held to the assumption of the usual and ordinary risks incident to the employment so far as such risks are known, or could be known to them by the exercise of ordinary and reasonable care.²³ Among these are included the risk of a rear-end collision with a car when the lights are out because the trolley has slipped from the wire;²⁴ the risk of a collision with work cars, the likelihood of meeting which he knows by reason of his long term of service on the particular line;²⁵ the risk of electric shock from the contact of a high tension wire with a trolley pole he is engaged in repairing.²⁶ So, a motorman with knowledge that cars were operated backward on some occasions without red lanterns being carried on the rear thereof, and that the company had not established telephone connections to warn following cars of a car being operated backward, was held to have assumed the risk of the operation of the cars without these precautions.²⁷ It has been held in a case where the street car company had recognized the necessity of sanding its track at a certain place by sanding it continually, that a motorman operating a car in the night had a right to rely on the continuance of this custom and did not assume the risk of a failure to sand the track at that time.²⁸ An employé of a street railroad company, travelling on the company's cars on transportation furnished him by the company to go and come from his work, does not assume the risk of defective appliances in connection with the track over which he rides, as he is under no duty calling his attention to such a matter.²⁹

§ 4774. **Risks of Injury from Absent or Defective Air-Brakes.**—A trainman who knows that the engine operating the train is not supplied with air brakes assumes the risk of injury from the absence of such brakes,³⁰ if he knows that the absence of such brakes increases the danger of the operation of the train.³¹

§ 4775. **Other Dangerous Defects on Locomotives or Cars.**—There is a holding that an engineer accepting and using, without protest, a

²³ *Union Traction Co. v. Buckland*, 34 Ind. App. 420; s. c. 72 N. E. Rep. 158.

²⁴ *Simmons v. Southern Traction Co.*, 207 Pa. 589; s. c. 57 Atl. Rep. 45.

²⁵ *Nelson v. Oil City St. R. Co.*, 207 Pa. 363; s. c. 56 Atl. Rep. 933.

²⁶ *Harrison v. Detroit & C. R.*, 137 Mich. 78; s. c. 100 N. W. Rep. 451; 11 Det. Leg. N. 228.

²⁷ *Secombe v. Detroit Elec. R. Co.*, 133 Mich. 170; s. c. 94 N. W. Rep. 747; 10 Det. Leg. N. 129.

²⁸ *Union Traction Co. v. Buckland*, 34 Ind. App. 420; s. c. 72 N. E. Rep. 158.

²⁹ *Noe v. Rapid R. Co.*, 133 Mich. 152; s. c. 94 N. W. Rep. 743; 10 Det. Leg. N. 155.

³⁰ *Texas & C. R. Co. v. Peden*, 32 Tex. Civ. App. 315; s. c. 74 S. W. Rep. 932.

³¹ *Texas & C. R. Co. v. Peden*, 32 Tex. Civ. App. 315; s. c. 74 S. W. Rep. 932.

defective headlight, does not thereby assume the risk of injuries from a misplaced switch, though the accident might have been avoided if the headlight had not been defective.³² An experienced brakeman will be held to have assumed the risk of injury from snow and ice on the top of freight cars.³³

§ 4778. Risk of Collision with Other Engines, Cars, or Trains.³⁴

§ 4779. Risks Assumed by Engine and Car Inspectors, Repairers and Cleaners.—A car inspector assumes the risk incident to an inspection of cars while a train is being made up in the ordinary and usual manner.³⁵ Similarly he will assume the risk of a method of notifying him of the approach of engines or cars likely to disturb the car on which he is at work.³⁶ So it has been held that a servant employed for years in cleaning out the ash pans of locomotives, which necessitated his going beneath them, assumed the risk,—in the absence of rules or regulations,—that some employé might carelessly set an engine in motion while he was under it.³⁷ So a car repairer will assume the risk of proceeding with his work without placing signals to protect the car, as required by the rules.³⁸

§ 4780. Risks Not Assumed by Engine and Car Inspectors, Repairers and Cleaners.³⁹

³² *International &c. R. Co. v. Moynahan*, 33 Tex. Civ. App. 302; s. c. 76 S. W. Rep. 803.

³³ *Kilkin v. New York Cent. &c. R. Co.*, 76 App. Div. (N. Y.) 529; s. c. 78 N. Y. Supp. 568; s. c. aff'd, 177 N. Y. 566; 69 N. E. Rep. 1125.

³⁴ A brakeman at work on cars on a side-track, who fell between cars suddenly bumped against because they were not coupled, was held to have assumed the risk of the cars being uncoupled, though there was a rule requiring cars on side-tracks to be coupled, but he knew of its habitual violation: *Texas &c. R. Co. v. Peden*, 32 Tex. Civ. App. 315; s. c. 74 S. W. Rep. 932.

³⁵ *Rea v. St. Louis &c. R. Co.* (Tex. Civ. App.), 73 S. W. Rep. 555. A car inspector who knew, or, in the exercise of ordinary care would necessarily have known, that the brake shoes on the cars of the train which he was inspecting were not set, assumed the risk arising from that fact: *St. Louis &c. R. Co. v. Rea*, — Tex. —; s. c. 87 S. W. Rep. 324; rev'g s. c. 84 S. W. Rep. 428.

³⁶ *State v. South Baltimore Carworks*, 99 Md. 461; s. c. 58 Atl. Rep. 447.

³⁷ *Lane v. New York &c. R. Co.*, 107 App. Div. (N. Y.) 166; s. c. 94 N. Y. Supp. 988.

³⁸ *Canadian Pac. R. Co. v. Elliott*, 137 Fed. Rep. 904; rev'g s. c. 129 Fed. Rep. 163.

³⁹ A car repairer at work on a car on the main line of a railroad does not assume the risk of injury from a car escaping from a switch track and running onto the main line: *Smith v. Fordyce*, 190 Mo. 1; s. c. 88 S. W. Rep. 679. Where a railroad employé knew the relative positions of the engine he was cleaning and a string of cars ahead of it, and knew that a switch engine was liable at any time to make a coupling from the other end of the string of cars, but did not know that it would be negligently made without warning, he did not assume the risk resulting from a negligent coupling: *Ft. Worth &c. R. Co. v. Smith*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 371.

§ 4781. **Railway Track-Repairers Assume Risk of being Struck by Approaching Trains.**—Workmen engaged in repairing a railroad track are bound to take notice of the dangers peculiar to the place where they are at work. Thus, repairers at work near the mouth of a tunnel from which trains are likely to emerge at any time will be held to assume the risk of these dangers.⁴⁰ But it has been held that the failure of a foreman to give warning of the approach of a train was not an obvious danger of which a track repairer assumed the risk.⁴¹

§ 4783. **Further Risks Assumed by Railway Track-Repairers, Section-Men, etc.**—Assumption of the risk will be ascribed to a section-hand put to work in a gravel pit to undermine a bank therein so that the gravel would fall into the pit—a work he must have known to be fraught with danger, and this particularly where he was perfectly familiar with the bank, its conditions and surroundings and the character of the materials of which it was composed.⁴² So generally a section-man of mature years will be charged with the assumption of the risk of the head coming off a spike he is attempting to draw from a tie with a clawbar.⁴³

§ 4784. **Risks Not Assumed by Railway Track-Repairers.**⁴⁴

§ 4787. **Risks Assumed or Not Assumed by Locomotive Firemen.**—It is held in one case that the mere fact that a locomotive fireman, killed in a collision caused by a train of cars left on a downgrade moving and running into his engine, detached for the purpose of taking water, knew that it was customary to stop trains and detach the engine for such purpose, did not charge him with an assumption of the risk, as he had a right to assume that the train would be sufficiently secured.⁴⁵ In another case, where there was no direct evidence that a fireman on a freight train, who was killed in a collision with a stray car on the track, which had evidently come from a branch, knew that there was no derailing switch on the branch, or that such a switch was necessary on account of the grade of the branch, it was held a question

⁴⁰ *Sanker v. Pennsylvania R. Co.*, 205 Pa. 609; s. c. 55 Atl. Rep. 833.

⁴¹ *D'Agostino v. Pennsylvania R. Co.*, — N. J. L. —; s. c. 60 Atl. Rep. 1113.

⁴² *Christenson v. Rio Grande Western R. Co.*, 27 Utah 132; s. c. 74 Pac. Rep. 876.

⁴³ *Parish v. Missouri & C. R. Co.* (Tex. Civ. App.), 76 S. W. Rep. 234.

⁴⁴ It is held that an employé in construction work on a railroad

does not assume the risk of injury in running the construction train on which he is riding home at night with the headlight behind a box-car, whereby a collision with a hand-car is caused: *Barley v. Southern Ind. R. Co.*, 30 Ind. App. 406; s. c. 66 N. E. Rep. 72.

⁴⁵ *Cincinnati & C. R. Co. v. Maley*, 76 S. W. Rep. 334; s. c. 25 Ky. L. Rep. 690.

for the jury whether he had assumed the risk of accidents on account of the absence of such a switch.⁴⁶

§ 4789. Risk of Injury in Handling Defective or "Crippled" Cars.—A brakeman, part of whose duty it is to board defective cars as they are sent from the main track onto a repair track and bring them to a stop, assumes the risk of injury from the defects in the cars, and has no right to rely on markings on the car to indicate the nature of the particular defect therein.⁴⁷

§ 4795. Risks Assumed by Railway and Street-Railway Conductors.—A street car conductor, who continues in service knowing of the company's failure to provide a sufficient number of cars to accommodate the business on the line, will be held to an assumption of the risks incident to the operation of the line with insufficient cars.⁴⁸ It is the holding of one case that a freight conductor, asleep in his caboose in the freight yard while awaiting orders, does not assume the risk of the caboose being negligently run into by switch engines.⁴⁹

§ 4796. Various Other Risks Assumed by Railway Employés.—Among recent decisions on this question the following holdings are encountered:—That a servant of a railroad company injured while alighting from a moving flat car on an order of his foreman did not assume the risk where there was no evidence that he was informed when employed, or knew, that the work he was to do would require him to alight from moving trains;⁵⁰ that an employé familiar with the danger of working on a derrick car as a cranesman without anchoring the car assumed the risk of his injury resulting from his failure to anchor;⁵¹ that an experienced section-man, at work unloading ties from a moving car, assumed the risk of injury incident to this work;⁵² that a section-hand assumes the risk of injury from such sparks and cinders as may be thrown off by the engine in the ordinary operation of the road while he is necessarily standing beside the track;⁵³ that a station agent who, for his own convenience, uses a side-track rather than the space between the main track and side-tracks provided by

⁴⁶ *Cooper v. New York & C. R. Co.*, 84 App. Div. (N. Y.) 42; s. c. 82 N. Y. Supp. 98.

⁴⁷ *Gerstner v. New York & C. R. Co.*, 81 App. Div. (N. Y.) 562; s. c. 80 N. Y. Supp. 1063; s. c. *aff'd*, 178 N. Y. 627; 71 N. E. Rep. 1131.

⁴⁸ *Shaw v. Manchester St. R. Co.*, 73 N. H. 65; s. c. 58 Atl. Rep. 1073.

⁴⁹ *St. Louis Southwestern R. Co. v. Texas v. McDowell* (Tex. Civ. App.), 73 S. W. Rep. 974.

⁵⁰ *Mitchell v. Chicago & C. R. Co.*, 108 Mo. App. 142; s. c. 83 S. W. Rep. 289.

⁵¹ *Wagner v. New York & C. R. Co.*, 93 App. Div. (N. Y.) 14; s. c. 86 N. Y. Supp. 921.

⁵² *St. Louis & C. R. Co. v. Austin* (Tex. Civ. App.), 72 S. W. Rep. 212.

⁵³ *Duree v. Chicago & C. R. Co.*, 118 Iowa 640; s. c. 92 N. W. Rep. 890.

the company, while walking to the station, assumes the risk of danger therefrom;⁵⁴ that an employé who has assisted in making "flying switches" for some time without objection, assumes the risk of danger from this method of switching;⁵⁵ that employés, with knowledge that trains are run through a city in excess of the lawful speed, assumes the risk of such increased speed;⁵⁶ that employés do not, as a matter of law, assume the risk of injury from sudden bumps or jerks in the management of trains;⁵⁷ that an employé of a quarry company, put to work scabbing stone on cars standing on a side-track on a steep grade, did not assume the risk of his employer leaving such cars unblocked;⁵⁸ that a servant employed by a railroad company to help load cars with a steam shovel did not assume the risk of his foreman's negligence in starting the shovel without warning.⁵⁹

§ 4802. **Risk of Injuries from Elevators in Buildings, When Assumed.**—An elevator operator, with knowledge that his car may be moved by persons outside the cage, assumes the risk of a movement of the car by some one on the outside while he is on the inside.⁶⁰ An instruction in an action for injuries to the operator through defects in the elevator, that if the decedent knew of the defect, and the danger, if any, was "obvious and open to the inspection" of the decedent, then he would have assumed the risk, precluding a recovery, was held not erroneous, as requiring the decedent to inspect to discover the defect in the elevator. The charge was construed to mean that the decedent assumed the risk if the danger was obvious, and therefore open to his inspection.⁶¹

⁵⁴ *Morehead v. Yazoo & Co. R. Co.*, 84 Miss. 112; s. c. 36 South. Rep. 151.

⁵⁵ *Carr v. St. Clair Tunnel Co.*, 131 Mich. 592; s. c. 92 N. W. Rep. 110; 9 Det. Leg. N. 455.

⁵⁶ *Martin v. Chicago & Co. R. Co.*, 118 Iowa 148; s. c. 91 N. W. Rep. 1034; 59 L. R. A. 698. But see *Missouri & Co. R. Co. v. Goss*, 31 Tex. Civ. App. 300; s. c. 72 S. W. Rep. 94, where it is held that while a flagman stationed at a highway grade crossing in a city assumed the risks of injury incident to his employment, he did not assume the risk of being run down and killed by an engine backed over the crossing at a speed exceeding the limit prescribed by the city ordinances, and not provided with a switchman on the tender who could have stopped the

same by the use of the air brakes provided for that purpose, as required by the rules of the company.

⁵⁷ *Texas & Co. R. Co. v. Behymer*, 189 U. S. 468; s. c. 23 Sup. Ct. Rep. 622; 47 L. Ed. 905; *Carroll v. New York & Co. R.*, 182 Mass. 237; s. c. 65 N. E. Rep. 69; *Branco v. Illinois Cent. R. Co.*, 119 Iowa 211; s. c. 93 N. W. Rep. 97.

⁵⁸ *Chicago & Co. R. Co. v. Martin*, 31 Ind. App. 308; s. c. 65 N. E. Rep. 591.

⁵⁹ *Texas Cent. R. Co. v. Pelfrey*, 35 Tex. Civ. App. 501; s. c. 80 S. W. Rep. 1036.

⁶⁰ *Middendorf v. Schulze*, 105 Ill. App. 221.

⁶¹ *Horton v. Ft. Worth & Co. R. Co.*, 33 Tex. Civ. App. 150; s. c. 76 S. W. Rep. 211.

§ 4803. **Accepting Risk of Falling into Elevator-Shafts.**—An elevator operator was held not to have assumed the risk of injury from falling down the shaft on the removal of the elevator car by a guest having permission from the landlord to use the elevator for his own convenience.⁶²

§ 4804. **Risk of Injuries from Elevators in Buildings, When Not Assumed.**—Holdings such as these are encountered in the recent decisions:—That a servant employed to operate a freight elevator does not assume the risk of injury from its fall in the absence of knowledge of any defect therein, and of any duty to inspect it;⁶³ that the fact that the operator knows that the car stops with a jerk does not charge him with knowledge of the risk which may result from such defect;⁶⁴ that the operator does not assume the risk of injury from the negligence of the engineer in charge while he is at work on the machinery to remedy a defect in the working parts;⁶⁵ that a common laborer sent to start a freight elevator which had stuck, and who had on previous occasions started it by shaking it, did not assume the risk of the fall of the elevator as the result of this method, where it did not appear that he knew the cause of the stoppage, or the danger that the elevator would fall if released, or that such cause or danger was obvious to one of his intelligence and experience.⁶⁶

§ 4805. **Assumption of Risk of Injury from Elevators in Buildings in Process of Construction by Independent Contractors.**—It is the holding of one case that the erection, fastening and operation of a material hoist constitutes a mere detail of the general work, and the apparatus is not an appliance and hence a servant assumes the risk incident to its operation.⁶⁷

§ 4807. **Miners and Mine-Workers Assume what Risks.**—It may be said generally that the miner will assume the ordinary risks and dangers of his occupation and those defects and dangers which he knows,⁶⁸

⁶² Lyons v. Dee, 88 Minn. 490; s. c. 93 N. W. Rep. 899.

⁶³ Womble v. Merchants' Grocery Co., 135 N. C. 474; s. c. 47 S. E. Rep. 493.

⁶⁴ Slack v. Harris, 200 Ill. 96; s. c. 65 N. E. Rep. 669; aff'g s. c. 101 Ill. App. 527.

⁶⁵ Slack v. Harris, 200 Ill. 96; s. c. 65 N. E. Rep. 669; aff'g s. c. 101 Ill. App. 527.

⁶⁶ American Distributing Co. v. Thorne, 122 Fed. Rep. 431; s. c. 58 C. C. A. 413.

⁶⁷ Gittens v. William Porten Co.,

90 Minn. 512; s. c. 97 N. W. Rep. 378.

⁶⁸ Bunker Hill & Co. v. Kettleston, 121 Fed. Rep. 529; s. c. 58 C. C. A. 525 (rope furnished miner to prevent falling was removed by fellow workman to the knowledge of the injured miner); Harvey v. Mountain Pride Gold Min. Co., 18 Colo. 234; s. c. 70 Pac. Rep. 1001 (risk of danger from fire where mature miner knew of the absence of fire protection); Jennings v. Ingle, 35 Ind. App. 153; s. c. 73 N. E. Rep. 945; L. T. Dickason Coal Co. v.

or which are so obvious as to impute him with knowledge.⁶⁹ Thus, an experienced miner who continued to work under an overhanging rock, with knowledge of the weak condition of the roof of the mine and that the rock was being further undermined, instead of suspending work and calling upon the mining boss to place supports under it, as required by the rules of the master, was held to have assumed the risk of danger from the fall of the rock.⁷⁰

§ 4808. Miners and Mine-Workers do Not Assume what Risks.—

An inexperienced employé going to work in a mine is charged with the assumption only of the ordinary risks incident to the employment, and he has the right to assume that the mine is properly timbered by his employer, unless he knows to the contrary or the danger is obvious.⁷¹ These holdings are encountered in recent decisions on the subject in hand:—That a mine boss is the representative of the master and an employé does not assume the risk of his negligence;⁷² that a miner did not assume the risk of being thrown from a cage in which he was being lifted to the surface due to the negligence of a superintendent,—not a competent engineer—who was attempting to operate the cage in the absence of the regular engineer;⁷³ that a miner, employed in blasting with powder of certain explosive quality, did not assume the risk incident to the substitution without notice to him of a powder of a higher explosive power and more dangerous character;⁷⁴ that a person employed in driving a tunnel in a mine did not assume the risk of injury from unexploded blasts left by others without his knowledge and of which he had not been warned;⁷⁵ that a miner did not assume the risk that the master would not properly and safely operate the elevator by which he was let down to his work;⁷⁶ that a miner, with

Unverferth, 30 Ind. App. 546; s. c. 66 N. E. Rep. 759 (danger of fall of ledge of slate to miner experienced and selected for this particular work at demand of committee of miners); Jacobson v. Smith, 123 Iowa 263; s. c. 98 N. W. Rep. 773 (miner charged with knowledge where he may inspect before going to work).

⁶⁹ Czarecki v. Seattle & C. R. & Nav. Co., 30 Wash. 288; s. c. 70 Pac. Rep. 750. A master is not liable for injuries to a servant owing to the caving in of a bank beside which the servant was working, where the caving was due to the nature of the soil, which was as apparent to the servant as to any one: McQueeney v. Chicago & C. R. Co., 120 Iowa 522; s. c. 94 N. W. Rep. 1124.

⁷⁰ Heald v. Wallace, 109 Tenn. 346; s. c. 71 S. W. Rep. 80.

⁷¹ Mountain Copper Co. v. Van Buren, 133 Fed. Rep. 1; s. c. 66 C. C. A. 151; Green v. Western American Co., 30 Wash. 87; s. c. 70 Pac. Rep. 310.

⁷² Island Coal Co. v. Swaggerty, 159 Ind. 664; s. c. 65 N. E. Rep. 1026.

⁷³ Beresford v. American Coal Co., 124 Iowa 34; s. c. 98 N. W. Rep. 902.

⁷⁴ Chambers v. Chester, 172 Mo. 461; s. c. 72 S. W. Rep. 904.

⁷⁵ McMillan v. North Star Min. Co., 32 Wash. 579; s. c. 73 Pac. Rep. 635.

⁷⁶ Illinois Third Vein Coal Co. v. Cioni, 115 Ill. App. 455; s. c. aff'd, 215 Ill. 583; 74 N. E. Rep. 751.

knowledge of the violation of a statute prescribing shaft lights, did not assume the risk of injuries due to this violation of the statute.⁷⁷

§ 4809. **Duty of Miner to Make Inspections and his Right to Assume that the Employer has Done So.**—Generally speaking, a miner may rely upon the performance of the mine owner's duty to make the room⁷⁸ and the entries thereto reasonably safe for his work,⁷⁹ unless he actually knows that this duty has not been performed.⁸⁰

§ 4815. **Risks Assumed by Electrical Linemen.**—So linemen generally will be held to assume the risk of injury from unsound poles,⁸¹ particularly where the lineman himself has examined and tested them.⁸² So a lineman, substantially familiar with the manner of raising cables and attaching them to the arms of poles, will be held to have assumed the risk of injury from the use of these methods.⁸³

§ 4816. **Risks Not Assumed by Electrical Linemen.**⁸⁴

§ 4817. **Risk of Injury from Defects in Scaffoldings and Stagings.**—A servant will not be charged with an assumption of the risk of injury in using a dangerous scaffold unless a man of ordinary prudence, under the circumstances, would have refused to go upon it at the master's bidding.⁸⁵ It is the holding of one case that the fall of staging furnished as a completed structure for a certain work, and allowed to remain in place for the other work on the premises, is not a passing risk of employment which was assumed by a servant injured thereby.⁸⁶

⁷⁷ Spring Valley Coal Co. v. Patting, 210 Ill. 342; s. c. 71 N. E. Rep. 371; aff'g s. c. 112 Ill. App. 4.

⁷⁸ St. Bernard Coal Co. v. Southard, 76 S. W. Rep. 167; s. c. 25 Ky. L. Rep. 638.

⁷⁹ Davis v. Turner, 69 Ohio St. 101; s. c. 68 N. E. Rep. 819.

⁸⁰ Indiana &c. Coal Co. v. Batey, 34 Ind. App. 16; s. c. 71 N. E. Rep. 191.

⁸¹ Ewald v. Michigan Cent. R. Co., 107 Ill. App. 294. But see Dawson v. Lawrence Gaslight Co., 188 Mass. 481; s. c. 74 N. E. Rep. 912 (electric light trimmer without experience injured by fall of decayed pole—risk not assumed).

⁸² Britton v. Central Union Tel. Co., 131 Fed. Rep. 844; s. c. 65 C. C. A. 598.

⁸³ Meehan v. Holyoke St. R. Co., 186 Mass. 511; s. c. 72 N. E. Rep. 61.

⁸⁴ An electrical lineman, with knowledge that there were live wires where he had to work, did

not assume the risk where his employer informed him that they were safely insulated, and he had no knowledge that the wire causing his injury was not so insulated: Haworth v. Mineral Belt Tel. Co., 105 Mo. App. 161; s. c. 79 S. W. Rep. 727. In another case where a telephone lineman not required to inspect the wires for defects nor furnished with tools for testing live wires was injured by touching a telephone wire which had become charged by contact with a defectively insulated electric light wire, it was held that he was not chargeable with knowledge of the condition of the wire, and hence did not assume the risk: Barto v. Iowa Tel. Co., 126 Iowa 241; s. c. 101 N. W. Rep. 876.

⁸⁵ Neves v. Green, 111 Mo. App. 634; s. c. 86 S. W. Rep. 508.

⁸⁶ Bourbonnais v. West Boylston Mfg. Co., 184 Mass. 250; s. c. 68 N. E. Rep. 232.

Under the New York statute making it the duty of the master to provide safe scaffolds the master is liable, though the servant participated in the construction, unless the servant knew of the defect, or by the exercise of reasonable care might have known of it.⁸⁷

§ 4819. Risk of Injury from Defects in Ladders.⁸⁸

§ 4820. Risk of Injury from Defects in Derricks.—A servant assumes the risks incident to the use by his fellow servants of a derrick of the kind generally used for building purposes, and not defective either in material or in the manner of its erection and support.⁸⁹

§ 4825. Risks Assumed by Sailors.⁹⁰

§ 4826. Risks Assumed by Stevedores, Steamboat and Dock Laborers, etc.—So a servant engaged in unloading a cargo of timber and cotton from a ship was held to have assumed the risk of the timber falling on him when the cotton, which had acted as a support for the timber was removed.⁹¹ In another case it was held that a person working in the hold of a barge did not, as a matter of law, assume the risk of working there without lights, which should have been furnished, when it became so dark that the person who should have guided the bucket being raised from the hold failed to see it was rising, and so did not guide it, whereby the person in the hold was struck and killed.⁹²

§ 4828. Risks Assumed in Blasting.⁹³—A servant who explodes a blast without covering it, whether there is a custom requiring the blast to be covered or not, assumes the risk of injury incident to a method so obviously dangerous.⁹⁴ A driller of holes for blasts injured by an explosion while attempting to scrape out a hole containing an unexploded blast, will be charged with the assumption of risk in that

⁸⁷ Wingert v. Krakauer, 76 App. Div. (N. Y.) 34; s. c. 78 N. Y. Supp. 664. See also Madden v. Hughes, 104 App. Div. (N. Y.) 101; s. c. 93 N. Y. Supp. 324.

⁸⁸ In an action for injuries to a servant by falling from a ladder, where the only negligence alleged was that the ladder was too short, and no reason was given why the plaintiff could not have seen that this was the fact, it was held that he assumed the risk: Duncan v. Gernert Bros. Lumber Co., 87 S. W. Rep. 762; s. c. 27 Ky. L. Rep. 1039.

⁸⁹ Rosa v. Volkening, 64 App. Div. (N. Y.) 426; s. c. 72 N. Y. Supp. 236; s. c. aff'd, 173 N. Y. 590; 65 N. E. Rep. 1122.

⁹⁰ The Esperanza, 133 Fed. Rep. 1015 (kitchen boy injured by falling through open hatch while hunting for wood, assumes the risk).

⁹¹ Toohey v. Ocean S. S. Co., 78 App. Div. (N. Y.) 178; s. c. 79 N. Y. Supp. 567.

⁹² Madigan v. Oceanic Steam Nav. Co., 82 App. Div. (N. Y.) 206; s. c. 81 N. Y. Supp. 705.

⁹³ That an experienced employé assumes risk of injury from missed shots, see: Poorman Silver Mines v. Devling, — Colo. —; s. c. 81 Pac. Rep. 252.

⁹⁴ Hjelm v. Western Granite Contracting Co., 94 Minn. 169; s. c. 102 N. W. Rep. 334.

undertaking, particularly where his duties do not require him to scrape out these holes and he has been specially instructed not to do so.⁹⁵

§ 4829. **Risk of Working with Insufficient Help.**—Generally speaking, a servant will be charged with the assumption of risk of performing work with inadequate help where the conditions are such that he must necessarily know that the work requires additional help and without it he will expose himself to danger.⁹⁶

§ 4832. **Risks Assumed by Servants in Charge of Steam-Boilers.**—It is the holding of one case that an engineer and fireman of a stationary engine did not assume the risk from the corrosion of the boiler, due to the action of chlorides in the water furnished for the boiler, where they were ignorant of the presence of these chemicals in the water.⁹⁷

§ 4834. **Risk of Injury from Straining in Lifting and From Overwork.**⁹⁸

§ 4836. **Risk of Injury from Poisons, Microbes, etc.**—In another case an employé was instructed to clean out a certain drain which was filled with decaying animal matter and emitted offensive odors and was injured by inhalation of poisonous gases arising from the drain. It was held that he did not assume the risk of injury from this source,

⁹⁵ *Hamrick v. Balfour Quarry Co.*, 132 N. C. 282; s. c. 43 S. E. Rep. 820. The question whether plaintiff, a workman in a quarry, assumed the risk of an unexploded charge, in removing tamping from drill holes which had been fired without lifting the rock, was held one for the jury, without regard to whether, as a prudent man, he had reason to believe powder was there, though the foreman assured him the charges had exploded, where the evidence showed that he was an experienced quarryman, and that, when the tamping is not blown out, it is impossible for any one to say with certainty that the charge has exploded, and that the methods used in drawing tamping are adopted in recognition of this uncertainty: *McKane v. Marr & Gordon*, 77 Vt. 7; s. c. 58 Atl. Rep. 721.

⁹⁶ *Blundell v. William A. Miller Elevator Mfg. Co.*, 189 Mo. 552; s. c. 88 S. W. Rep. 103; *Hettich v. Hillje*, 33 Tex. Civ. App. 571; s. c. 77 S. W.

Rep. 641; *San Antonio Traction Co. v. De Rodriguez* (Tex. Civ. App.), 77 S. W. Rep. 420 (lifting heavy timbers); *Seery v. Gulf & C. R. Co.*, 34 Tex. Civ. App. 89; s. c. 77 S. W. Rep. 950 (lifting hand-car); *Texas & C. R. Co. v. Miller*, 36 Tex. Civ. App. 240; s. c. 81 S. W. Rep. 535 (experienced laborer injured while attempting to carry a heavy tie without sufficient help).

⁹⁷ *Nelson v. New York*, 101 App. Div. (N. Y.) 18; s. c. 91 N. Y. Supp. 763.

⁹⁸ In a case where a railroad employé strained his back while loading steel rails onto a flat car, and it nowhere appeared from his testimony that the force employed was inadequate, or that he was expected or required to lift more than any ordinary man could lift or shove, or more than he had previously lifted or shoved with safety, or that anything unusual occurred to cause the injury, a recovery was denied: *Haviland v. Kansas City & C. R. Co.*,

though he knew of the condition of the drain, it being shown that he had no knowledge of the presence of the poisonous gases.⁹⁹

§ 4837. **A Catalogue of Risks which the Servant Assumes.**—These holdings are encountered in the recent decisions:—That servants injured by cave-ins of sewers and earth banks assumed the risk of this danger, the probability of the accident being as obvious to the servant as to the master;¹⁰⁰ that an employé accustomed to throw off belts from machinery, though he had never before removed the one at which he was killed, assumed the risk where he attempted to throw a belt while standing on two transverse timbers affording only a slight surface and at an elevation of nineteen feet above the ground;¹⁰¹ that a brewery employé, with knowledge of the slanting, slippery condition of the floor and of the throbbing of an engine in the establishment, assumed the risk of the fall of a pile of kegs he was engaged in washing.¹⁰²

§ 4841. **Various Other Risks Not Assumed.**¹⁰³

172 Mo. 106; s. c. 72 S. W. Rep. 515.
⁹⁹ Cox v. American Agricultural Chemical Co., 24 R. I. 503; s. c. 53 Atl. Rep. 871.

¹⁰⁰ Ft. Worth Stockyards Co. v. Whittenburg, 34 Tex. Civ. App. 163; s. c. 78 S. W. Rep. 363 (sand bank); Lenderink v. Rockford, 135 Mich. 531; s. c. 98 N. W. Rep. 4; 10 Det. Leg. N. 832 (sewer).

¹⁰¹ Koepcke v. Wisconsin Bridge & Co., 116 Wis. 92; s. c. 92 N. W. Rep. 558.

¹⁰² Houston Ice & Co. v. Pisch, 33 Tex. Civ. App. 684; s. c. 77 S. W. Rep. 1047.

¹⁰³ Dorney v. O'Neill, 60 App. Div. (N. Y.) 119; s. c. 69 N. Y. Supp. 729; s. c. aff'd, 172 N. Y. 595; 64 N. E. Rep. 1120 (injury to employé's eye from contact with a twig projecting from debris loaded on a truck in a dark hall through which he had to pass in going from his work).

PART THREE.

THE FELLOW-SERVANT DOCTRINE.

[§§ 4846-5316.]

§ 4846. **General Rule as to Negligence of Fellow Servants in the Same Common Employment.**¹⁰⁴—The fellow-servant doctrine is without application where the servant injured by another servant was not engaged in the performance of services for his master, but was engaged in an individual matter.¹⁰⁵ Under the rule that when a trial court in a charge undertakes concisely to sum up and formulate the law which is to govern the jury in its deliberations, it is its duty to

¹⁰⁴ On the general proposition that where the liability of the master for an injury to an employé by the negligence of a servant is governed by the common law not affected by statute an employer is not liable to one servant in his employ for the negligence of another employé where both are engaged in the common service, and the negligence complained of consists only in the non-performance of some act incidental to the general employment, and to the safe prosecution of the business in which both are engaged, see: Carr v. Shields, 125 Fed. Rep. 827; Hale v. Kansas City Southern R. Co., 120 Fed. Rep. 735; s. c. 57 C. C. A. 149; Kane v. Erie R. Co., 133 Fed. Rep. 681; s. c. 67 C. C. A. 653; rev'g s. c. 128 Fed. Rep. 474; Peterson v. New York & C. R. Co., 77 Conn. 351; s. c. 59 Atl. Rep. 502; Taylor v. George W. Bush & Sons Co., — Del. —; s. c. 61 Atl. Rep. 236; Cedartown Cotton Co. v. Hanson, 118 Ga. 176; s. c. 44 S. E. Rep. 992 (non-suit should be granted where evidence sustains defense); Chicago & C. R. Co. v. Bell, 209 Ill. 25; s. c. 70 N. E. Rep. 754 (laborer in cinder pit injured by engine driven over pit without giving signals and negligence in this respect was that of a fellow servant); Mott v. Chicago & C. R. Co., 102 Ill. App. 412 (maxim *respondeat superior* has no application); Dill v. Marmon, 164 Ind. 507; s. c. 73 N. E. Rep. 67;

Ahern v. Hildreth, 183 Mass. 296; s. c. 67 N. E. Rep. 328; McRea v. Hood Rubber Co., 187 Mass. 326; s. c. 72 N. E. Rep. 1015 (floor of elevator in slippery condition because rubber cement spilled thereon by fellow workman); Karch v. Kipp, 90 N. Y. Supp. 404 (premature starting of elevator); Peet v. H. Remington & C. Pulp & C. Co., 86 App. Div. (N. Y.) 101; s. c. 83 N. Y. Supp. 524; Zilver v. Robert Graves Co., 106 App. Div. (N. Y.) 582; s. c. 94 N. Y. Supp. 714; Kelly Island Lime & C. Co. v. Pachuta, 69 Ohio St. 462; s. c. 69 N. E. Rep. 988; Hyland v. Southern Bell Tel. & C. Co., 70 S. C. 315; s. c. 49 S. E. Rep. 879; Rosemand v. Southern R., 66 S. C. 91; s. c. 44 S. E. Rep. 574; Bering Mfg. Co. v. Femelat, 35 Tex. Civ. App. 36; s. c. 79 S. W. Rep. 869; Ralph v. American Bridge Co., 30 Wash. 500; s. c. 70 Pac. Rep. 1098; Norfolk & C. R. Co. v. Cromer, 101 Va. 667; s. c. 44 S. E. Rep. 898. Where the plaintiff just prior to his injury was in a precarious condition and the proper giving of signals might have avoided such injury, the master is not liable if the fellow servants of the plaintiff, in an endeavor to save him, gave hasty and confusing signals: Illinois Steel Co. v. Rolewicz, 113 Ill. App. 312.

¹⁰⁵ Louisville & C. R. Co. v. Wade, 46 Fla. 197; s. c. 35 South. Rep. 863.

cover every legal question involved, a charge in an action for the negligence of a master undertaking to do this is erroneous which fails to state that if the accident was due to the negligence of a fellow servant there can be no recovery against the master.¹⁰⁶

§ 4847. This Doctrine a Part of the Doctrine of Accepting the Risk.¹⁰⁷

§ 4852. Suitable Materials and Appliances Furnished by Master, but Negligently Selected or Used by Servants.¹⁰⁸—The principle is illustrated by a case where the duty of keeping a planing machine in order was delegated to one of six or seven employés, who was required to use the machine in common with his fellow employés, and one of these employés was injured by the knives becoming dull and the belt driving the same becoming loose. The negligence was clearly that of a fellow servant and the master was not liable.¹⁰⁹ The mere fact that an employé was not present at the time a change was made in an appliance by his fellow servants without the master's knowledge, and by

¹⁰⁶ Northern Alabama R. Co. v. Mansell, 138 Ala. 548; s. c. 36 South. Rep. 459; Kurstelska v. Jackson, 89 Minn. 95; s. c. 93 N. W. Rep. 1054.

¹⁰⁷ That the servant assumes the risk incident to his employment, including such as arises from the negligence of a fellow servant engaged in the common employment, see *ante*, § 4712 *et seq.*, and McDonald v. Standard Oil Co., 69 N. J. L. 445; s. c. 55 Atl. Rep. 289; Dixon v. Union Iron Works, 90 Minn. 492; s. c. 97 N. W. Rep. 375.

¹⁰⁸ On the general proposition that the master is not liable where he furnishes suitable materials and appliances and the injury is the result of the negligence of a fellow servant in the selection or use of the appliance, see: Phoenix Bridge Co. v. Castleberry, 131 Fed. Rep. 175 (a holding that in the absence of evidence the materials furnished by the master for construction of bridge were not in all respects suitable and sufficient to make a safe structure, he was not liable for the negligence of the foreman either in the construction of the frame causing the injury, or in failing to inspect it on the day of the accident); Maxfield v. Graveson, 131 Fed. Rep. 841; s. c. 65 C. C. A. 595 (insufficient rigging of derrick); Larsen v. Le Doux, — Idaho —; s. c. 81 Pac. Rep.

600 (scaffold); Amburg v. International Paper Co., 97 Me. 327; s. c. 54 Atl. Rep. 765; Gauges v. Fitchburg R. Co., 185 Mass. 76; s. c. 69 N. E. Rep. 1063 (railroad spikes); Morrison v. Whittier Mach. Co., 184 Mass. 39; s. c. 67 N. E. Rep. 646 (ropes for operation of crane); Lenderink v. Rockford, 135 Mich. 531; s. c. 98 N. W. Rep. 4; 10 Det. Leg. N. 832 (curbing for trench); Depuy v. Chicago & C. R. Co., 110 Mo. App. 110; s. c. 84 S. W. Rep. 103; Herbert v. Wiggins Ferry Co., 107 Mo. App. 287; s. c. 80 S. W. Rep. 978 (ropes); Jackson v. Lincoln Min. Co., 106 Mo. App. 441; s. c. 80 S. W. Rep. 727; Enright v. Oliver & Burr, 69 N. J. L. 357; s. c. 55 Atl. Rep. 277; Ivers v. Minnesota Dock Co., 84 App. Div. (N. Y.) 27; s. c. 82 N. Y. Supp. 193 (ropes for operation of derrick); Zilzer v. Robert Graves Co., 106 App. Div. (N. Y.) 582; s. c. 94 N. Y. Supp. 714 (sufficient lights were furnished but fellow servant failed to light them); Driver v. Southern R. Co., 103 Va. 650; s. c. 49 S. E. Rep. 1000 (train improperly made up by employés contrary to company's rules); Metzler v. McKenzie, 34 Wash. 470; s. c. 76 Pac. Rep. 114 (scaffold).

¹⁰⁹ Helling v. Schindler, 145 Cal. 303; s. c. 78 Pac. Rep. 710.

reason of this change the employé was subsequently injured, does not render the master liable in damages for the injury.¹¹⁰ In a case where the jury was told that the only negligence for which the defendant was liable was that of the superintendent, it was held that the question of transitory conditions caused by the selection of fellow servants or improper materials was eliminated, and that a charge on this phase of the case was properly refused.¹¹¹

§ 4853. **Application of the Rule as to Proximate and Remote Cause to Injuries by Fellow Servants.**¹¹²—In a case of injury to a conductor by the derailment of his car on a curve, it appeared that the company maintained lights at the curve, not for the benefit of the employés, but for the convenience of passengers, and required these lights to be extinguished at two o'clock in the morning. A motorman on a car approaching the curve after that hour while it was still dark, saw a light further ahead in the same line of vision that the curve lights would be in, and mistook this light for the curve lights, believing them to be still burning, and failed to slacken speed for the curve until he struck it, and the plaintiff suffered the injuries sued upon. It was held that since under the custom to extinguish the lights at two o'clock in the morning the motorman had no right to expect them to be burning, the conductor's injury was the proximate result of the negligence of a fellow servant for which the defendant was not liable.¹¹³

§ 4856. **If Negligence of Master Mingles with that of Fellow Servant, Master Liable.**¹¹⁴

¹¹⁰ *Maxfield v. Graveson*, 131 Fed. Rep. 841; s. c. 65 C. C. A. 595.

¹¹¹ *Pierce v. Arnold Print Works*, 182 Mass. 260; s. c. 65 N. E. Rep. 368.

¹¹² *Gila Valley &c. R. Co. v. Lyon* (Ariz.), 71 Pac. Rep. 957 (an instruction held erroneous as warranting the jury in the belief that though the negligence of a fellow servant was the proximate cause they might find for the plaintiff if defendant was negligent in some respect, whether this negligence contributed to the injury or not).

¹¹³ *Godfrey v. St. Louis Transit Co.*, 107 Mo. App. 193; s. c. 81 S. W. Rep. 1230.

¹¹⁴ *Pennsylvania R. Co. v. Jones*, 123 Fed. Rep. 753; s. c. 59 C. C. A. 87; *The Anchoria*, 120 Fed. Rep. 1017; s. c. 56 C. C. A. 452; aff'g s. c. 113 Fed. Rep. 982; *Gila Valley &c. R. Co. v. Lyon*, — Ariz. —; s. c. 80 Pac. Rep. 337; *Neal v. St.*

Louis &c. R. Co., 71 Ark. 445; s. c. 78 S. W. Rep. 220; *Tanner v. Harper*, 32 Colo. 156; s. c. 75 Pac. Rep. 404; *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399; s. c. 73 N. E. Rep. 787; aff'g s. c. 115 Ill. App. 209; *Loveless v. Standard Gold Min. Co.*, 116 Ga. 427; s. c. 42 S. E. Rep. 741; 59 L. R. A. 596; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145; s. c. 69 N. E. Rep. 12; aff'g s. c. 106 Ill. App. 649; *Chicago &c. R. Co. v. Harrington*, 192 Ill. 9; s. c. 61 N. E. Rep. 622; aff'g s. c. 90 Ill. App. 638; *Chicago &c. R. Co. v. Bell*, 111 Ill. App. 280; *Klauffe v. Bettendorf Axle Co.*, 125 Iowa 223; s. c. 100 N. W. Rep. 1116; *Schwarzschild & Sulzberger v. Drysdale*, 69 Kan. 119; s. c. 76 Pac. Rep. 441; *Fuller v. Tremont Lumber Co.*, 114 La. 266; s. c. 38 South. Rep. 164; *Thomas v. Smith*, 90 Minn. 379; s. c. 97 N. W. Rep. 141; *Cole v. St. Louis Transit Co.*, 183 Mo. 81; s. c.

§ 4858. Negligence of Master in Furnishing Dangerous Premises, Machinery, Tools, or Appliances, Commingling with that of Fellow Servant—Master Liable.¹¹⁵—Under the rule that exempts the master from liability for unsafe conditions existing while machinery is in process of erection it has been held that an employer was not liable for injuries caused by the explosion of an improperly adjusted emery

81 S. W. Rep. 1138; *Sirois v. J. E. Henry & Sons*, 73 N. H. 148; s. c. 59 Atl. Rep. 936; *Campbell v. T. A. Gillespie Co.*, 69 N. J. L. 279; s. c. 55 Atl. Rep. 276; *Kremer v. New York Edison Co.*, 102 App. Div. (N. Y.) 433; s. c. 92 N. Y. Supp. 883; *Strauss v. New York & C. R. Co.*, 91 App. Div. (N. Y.) 583; s. c. 87 N. Y. Supp. 67; *Bodie v. Charleston & C. R. Co.*, 66 S. C. 302; s. c. 44 S. E. Rep. 943; *Bonn v. Galveston & C. R. Co.* (Tex. Civ. App.), 82 S. W. Rep. 808; *Ray v. Pecos & C. R. Co.*, 35 Tex. Civ. App. 123; s. c. 80 S. W. Rep. 112; *Ray v. Pecos & C. R. Co.*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 466; *Texas & C. R. Co. v. Kelly*, 34 Tex. Civ. App. 21; s. c. 80 S. W. Rep. 1073; *Hicks v. Southern Pac. Co.*, 27 Utah 526; s. c. 76 Pac. Rep. 625; *Merrill v. Oregon Short Line R. Co.*, 29 Utah 264; s. c. 81 Pac. Rep. 85; *Conine v. Olympia Logging Co.*, 36 Wash. 345; s. c. 78 Pac. Rep. 932; *Howe v. Northern Pac. R. Co.*, 30 Wash. 569; s. c. 70 Pac. Rep. 1100.

¹¹⁵ That the master is liable where his negligence in furnishing dangerous premises, machinery, tools or appliances commingles with that of a fellow servant to cause the injury, see: *Cudahy Packing Co. v. Anthes*, 117 Fed. Rep. 118; s. c. 54 C. C. A. 504 (defective elevator appliances and negligence of operator, a fellow servant); *Shugart v. Atlanta & C. R.*, 133 Fed. Rep. 505; s. c. 66 C. C. A. 379 (fireman injured by derailment of engine caused by defective track and negligent speed of engineer); *Colley v. Southern Cotton Oil Co.*, 120 Ga. 258; s. c. 47 S. E. Rep. 932 (failure to furnish safe place to work combined with negligence of fellow servant); *Southern Bauxite Min. & C. Co. v. Fuller*, 116 Ga. 695; s. c. 43 S. E. Rep. 64 (unsafe place to work and negligence of fellow servant); *Chicago & C. Coal Co. v. Moran*, 210 Ill.

9; s. c. 71 N. E. Rep. 38; aff'g s. c. 110 Ill. App. 664 (defective roof in entryway of mine combined with negligence of fellow servant in causing miner's presence in room); *American Tin Plate Co. v. Williams*, 30 Ind. App. 46; s. c. 65 N. E. Rep. 304 (defective mechanism for unloading steel from dump car and negligence of fellow servant, the insufficient appliance being the proximate cause); *Buehner v. Creamery Package Mfg. Co.*, 124 Iowa 445; s. c. 100 N. W. Rep. 345 (planing mill employé injured through negligence of fellow servant and failure of master to cover exposed cog-wheel); *Tradewater Coal Co. v. Johnson* (Ky.), 72 S. W. Rep. 274; s. c. 24 Ky. L. Rep. 1777 (inexperienced miner put to work in mine without instruction and injured by fellow servant); *McGinn v. McCormick*, 109 La. 396; s. c. 33 South. Rep. 382 (defective brake on hand-car combined with negligence of fellow servant thereon in running car in too close proximity to car ahead); *O'Keefe v. Great Northern Elevator Co.*, 105 App. Div. (N. Y.) 8; s. c. 93 N. Y. Supp. 407; *Pluckham v. American Bridge Co.*, 104 App. Div. (N. Y.) 404; s. c. 93 N. Y. Supp. 748; *Ruemmel-Braun Co. v. Cahill*, 14 Okla. 422; s. c. 79 Pac. Rep. 260; *Missouri & C. R. Co. v. Hutchens*, 35 Tex. Civ. App. 343; s. c. 80 S. W. Rep. 415 (freight handler injured by fall of defective freight door concurring with negligence of sealer); *Consumers' Cotton Oil Co. v. Jonte*, 36 Tex. Civ. App. 18; s. c. 80 S. W. Rep. 847 (servant struck by falling bale of cotton); *Czarecki v. Seattle & C. R. & Nav. Co.*, 30 Wash. 288; s. c. 70 Pac. Rep. 750 (insufficient ventilation of mine concurring with negligence of fellow servant); *Grant v. Keystone Lumber Co.*, 119 Wis. 229; s. c. 96 N. W. Rep. 535.

wheel before the machinery was ready for operation—the improper adjustment being due to the fault of a fellow servant.¹¹⁶ It is the holding of another case that a master, bound to use reasonable care in furnishing his servants a reasonably safe place in which to work, cannot excuse a default in that respect by showing that a person charged with the duty of seeing that the place was reasonably safe for the use of his servants was for some purposes a fellow servant of the injured servant.¹¹⁷

§ 4861. **Negligence of Vice-Principal Commingling with that of Fellow Servant—Master Liable.**¹¹⁸—Thus, where the negligence of the conductor of a freight train, who stood in the relation of a vice-principal to the fireman, in connection with the negligence of the brakeman, who was the fireman's fellow servant, caused the latter's injury, the railroad was held liable therefor as though it alone was blamable.¹¹⁹ So where a roustabout on a boat was injured by falling through an open hatchway the master's liability for failing to maintain a safe place to work was not lessened because he had intrusted the opening and closing of the hatch to a fellow servant with the roustabout.¹²⁰ Where work is performed by shifts of men who succeed each other at regular intervals, these shifts have been held to sustain the relation of deputies or vice-principals to the common master so as to render him liable for injuries the result of a failure of one of such shifts to make neces-

¹¹⁶ *W. R. Trigg Co. v. Lindsay*, 101 Va. 193; s. c. 43 S. E. Rep. 349.

¹¹⁷ *John S. Metcalf Co. v. Nystedt*, 203 Ill. 333; s. c. 67 N. E. Rep. 764; aff'g s. c. 102 Ill. App. 71.

¹¹⁸ In support of principle indicated, see, generally: *St. Louis & C. R. Co. v. Haist*, 71 Ark. 258; s. c. 72 S. W. Rep. 893; *Moseley v. J. S. Schofield Sons Co.*, 123 Ga. 197; s. c. 51 S. E. Rep. 209; *Texas Cent. R. Co. v. Pelfrey*, 35 Tex. Civ. App. 501; s. c. 80 S. W. Rep. 1036; *Gulf & C. R. Co. v. Whisenhunt* (Tex. Civ. App.), 81 S. W. Rep. 332. In a case where an employer kept in his factory timbering for the construction of staging used in installing elevators, and an employé who had charge of installing an elevator selected from such supply a palpably defective plank, which caused the death of a laborer working under his direction, it was held that any intervening negligence of the employé in charge of the installation did not relieve the master from lia-

bility: *Farrell v. Eastern Machinery Co.*, 77 Conn. 484; s. c. 59 Atl. Rep. 611; 68 L. R. A. 239. So where a collision with a vehicle at a crossing, which resulted in an injury to a foreman of a switch crew, was occasioned by the negligence of the gateman in failing to lower the gates upon the approach of an engine, combined with the negligence of engineer and fireman, the fellow servants of the foreman, such foreman may recover, since the negligence of the gateman was the negligence of the master, and whenever the negligence of the master, united to the negligence of a fellow servant, contributes to the injury, the servant injured thereby may recover: *Chicago & C. R. Co. v. Wise*, 106 Ill. App. 174; s. c. aff'd, 206 Ill. 453; 69 N. E. Rep. 500.

¹¹⁹ *Virginia & C. R. Co. v. Bailey*, 103 Va. 205; s. c. 49 S. E. Rep. 33.

¹²⁰ *Vandyke v. Memphis & C. Packet Co.*, 71 S. W. Rep. 441; s. c. 24 Ky. L. Rep. 1283.

sary repairs, and as a consequence a member of a succeeding shift is injured by this failure of duty.¹²¹

§ 4862. **Negligence of Foreman Concurring with that of Fellow Servant.**¹²²—Where between the day when the dangerous character of the work arose which resulted in the death of an employé, and the day when such employé was put to work in such dangerous place there was sufficient time to enable the employer to discover the danger, he was charged with knowledge thereof, independent of the knowledge of the foreman.¹²³

§ 4863. **Always Assuming that the Negligence of the Master is a Proximate Cause of the Injury.**¹²⁴

§ 4865. **Failure to Employ Enough Competent Servants.**—It is another statement of the doctrine of the main section to say that the master's duties to a servant embrace the exercise of care to supply a sufficient number of workmen and to retain in his service none but suitable servants.¹²⁵ It is the doctrine of one case that where a master employs competent servants, and a fellow servant of the plaintiff, without the master's authority, selects from the competent servants, one unsuited to the task created by an emergency, and transfers him from work he can do to work he cannot do, the act of thus assigning him will be regarded as the act of a fellow servant and not that of the master.¹²⁶

§ 4867. **What if the Child is Too Young and Inexperienced to Understand the Risks of the Service.**¹²⁷

¹²¹ Zellars v. Missouri Water &c. Co., 92 Mo. App. 107.

¹²² That a servant may recover where the negligence of a foreman, sustaining the relation of vice-principal to the master, concurs with the negligence of a fellow servant to cause the injury, see generally: Illinois Southern R. Co. v. Marshall, 210 Ill. 562; s. c. 71 N. E. Rep. 597; Texas &c. R. Co. v. Lee, 32 Tex. Civ. App. 23; s. c. 74 S. W. Rep. 345 (injury to injured section-hand while lifting a hand-car caused by the act of a fellow servant physically incompetent for his work in throwing the weight of the car on plaintiff and this incompetency was known to the foreman); St. Louis &c. R. Co. v. Smith, 30 Tex. Civ. App. 336; s. c. 70 S. W. Rep. 789.

¹²³ Simone v. Kirk, 173 N. Y. 7; s. c. 65 N. E. Rep. 739; rev'g s. c. 67 N. Y. Supp. 1019.

¹²⁴ See generally in support of principle that it is always essential to the operation of these rules that the negligence of the master was the proximate cause of the injury: Jackson v. Merchants' &c. Transp. Co., 118 Ga. 651; s. c. 45 S. E. Rep. 254; Armour v. Golkowska, 202 Ill. 144; s. c. 66 N. E. Rep. 1037; aff'g s. c. 95 Ill. App. 492; Chicago City R. Co. v. Enroth, 113 Ill. App. 285.

¹²⁵ Hilton v. Fitchburg R. Co., 73 N. H. 116; s. c. 59 Atl. Rep. 625; Chesapeake &c. R. Co. v. Board, 77 S. W. Rep. 189; s. c. 25 Ky. L. Rep. 1118 (laborer in trench injured by timber falling therein because timber was handled by insufficient force).

¹²⁶ Hilton &c. Lumber Co. v. Ingram, 119 Ga. 652; s. c. 46 S. E. Rep. 895.

¹²⁷ That fellow-servant doctrine does not apply where servant is too

§ 4877. **Questions of Pleading in Fellow-Servant Cases.**—Among recent cases involving questions of pleading the following holdings—mostly decided in view of some employer's liability statute—are encountered:—That a complaint averring that the plaintiff was bound to conform to the directions of a foreman, and, knowing the facts surrounding the existence of a defective brake, the foreman negligently and carelessly ordered the plaintiff to apply the brake, resulting in his injury, sufficiently conforms with a statute allowing a recovery for injuries the result of the negligence of a person in the service of a corporation having charge of a certain department;¹²⁸ that a complaint alleging injury through the negligence of the plaintiff's foreman while the plaintiff was performing the directions of such foreman was insufficient because of a failure to aver that the foreman had authority to give the order, or that the plaintiff at the time was bound to conform thereto;¹²⁹ that an allegation that the engineer in charge of a locomotive negligently ran into and caused it to collide with one of the defendant's freight trains, sufficiently alleged negligence under a statute making railroads liable for injuries to employés caused by the negligence of other employés in charge of locomotives or trains to withstand a demurrer for want of facts;¹³⁰ that a complaint is not rendered insufficient by failure to confine the negligence alleged to a single employé in charge of the locomotive causing the injury;¹³¹ that a complaint was insufficient which left it to inference that the person named as having charge of a locomotive was an employé of the defendant;¹³² that a complaint which charged that it was the defendant's duty through its engineer to stop an engine before reaching the burned portion of a bridge; and that the plaintiff relied on the discharge of this duty and that the engineer negligently failed to discharge that duty, and because of such failure the engine fell through such bridge, sufficiently charged negligence by an employé under the Wisconsin statute;¹³³ that the defendant, under a general denial to a complaint alleging that the plaintiff's injuries were due to the carelessness of a vice-principal, can show that such person was the fellow servant of

young and inexperienced to understand the risks of the service, see: *Evans v. Josephine Mills*, 119 Ga. 448; s. c. 46 S. E. Rep. 674.

¹²⁸ *Chicago &c. R. Co. v. Tackett*, 33 Ind. App. 379; s. c. 71 N. E. Rep. 524.

¹²⁹ *Ft. Wayne Gas Co. v. Nieman*, 33 Ind. App. 178; s. c. 71 N. E. Rep. 59.

¹³⁰ *Pittsburgh &c. R. Co. v. Collins*,

163 Ind. 569; s. c. 71 N. E. Rep. 661.

¹³¹ *Chicago &c. R. Co. v. Lain*, — Ind. App. —; s. c. 72 N. E. Rep. 539.

¹³² *Alabama Great Southern R. Co. v. Williams*, 140 Ala. 230; s. c. 37 South. Rep. 255.

¹³³ *Kath v. Wisconsin Cent. R. Co.*, 121 Wis. 503; s. c. 99 N. W. Rep. 217.

the plaintiff.¹³⁴ There is authority that the legal effect of allegations in a complaint, which show that the injury was due to the negligence of a fellow servant, is not changed by an allegation that the work in which the plaintiff was engaged was not connected with the employment of the servant responsible for the injuries.¹³⁵ It is the doctrine of one case that to render the master liable for the negligence of a fellow servant for an injury sustained by a servant in the prosecution of a plan devised by the servants, on the theory that the fellow servant was known by the master not to be skilled in the execution of the plan adopted, it must be alleged and proved that the plan adopted by the servant was proper and usual under the same or similar conditions.¹³⁶

§ 4878. **Question of Fellow Servant or Vice-Principal, Whether a Question for Court or for Jury.**—Generally speaking, the question as to who are fellow servants is ordinarily one of fact for the determination of the jury, particularly where the evidence on the question is conflicting¹³⁷ and does not become one of law for the court unless the facts admitted or proved beyond dispute are so conclusive that all reasonably intelligent minds must reach a like conclusion on the question.¹³⁸ Under the principle indicated the definition of fellow servant

¹³⁴ *Johnson v. Heath*, — Neb. —; s. c. 98 N. W. Rep. 832; *Pennsylvania Co. v. Fishack*, 123 Fed. Rep. 465; s. c. 59 C. C. A. 269.

¹³⁵ *Indianapolis &c. Rapid Transit Co. v. Andis*, 33 Ind. App. 625; s. c. 72 N. E. Rep. 145.

¹³⁶ *Riverside Mills v. Jones*, 121 Ga. 33; s. c. 48 S. E. Rep. 700.

¹³⁷ *Chicago &c. R. Co. v. Driscoll*, 107 Ill. App. 615; s. c. aff'd 207 Ill. 9; 69 N. E. Rep. 620; *Chicago &c. R. Co. v. Harrington*, 192 Ill. 9; s. c. 61 N. E. Rep. 622; aff'g s. c. 90 Ill. App. 638; *Consolidated Coal Co. v. Fleischbein*, 207 Ill. 593; s. c. 69 N. E. Rep. 963; aff'g s. c. 109 Ill. App. 509; *John S. Metcalf Co. v. Nystedt*, 102 Ill. App. 71; s. c. aff'd, 203 Ill. 333; 67 N. E. Rep. 764; *Metropolitan West Side Elevated R. Co. v. Fortin*, 203 Ill. 454; s. c. 67 N. E. Rep. 977; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145; s. c. 69 N. E. Rep. 12; aff'g s. c. 106 Ill. App. 649; *Slack v. Harris*, 200 Ill. 96; s. c. 65 N. E. Rep. 669; aff'g s. c. 101 Ill. App. 527; *Spring Valley Coal Co. v. Patting*, 210 Ill. 342; s. c. 71 N. E. Rep. 371; aff'g s. c. 112 Ill. App. 4; *Spring Valley Coal Co. v. Robizas*, 207 Ill. 226; s. c. 69 N. E. Rep. 925;

Cleveland &c. R. Co. v. Surrells, 115 Ill. App. 615; *Gruenendahl v. Consolidated Coal Co.*, 108 Ill. App. 644; *Himrod Coal Co. v. Clingan*, 114 Ill. App. 568; *Junction Min. Co. v. Goodwin*, 109 Ill. App. 144; *Shickie-Harrison &c. Iron Co. v. Beck*, 112 Ill. App. 444; *Cunningham v. Atlas Tack Co.*, 187 Mass. 51; s. c. 72 N. E. Rep. 325; *Comers v. Washburn-Crosby Co.*, 91 Minn. 105; s. c. 97 N. W. Rep. 733; *Renlund v. Commodore Min. Co.*, 89 Minn. 41; s. c. 93 N. W. Rep. 1057; *Gayle v. Missouri Car &c. Co.*, 177 Mo. 427; s. c. 76 S. W. Rep. 987.

¹³⁸ *Chicago City R. Co. v. Leach*, 208 Ill. 198; s. c. 70 N. E. Rep. 222; rev'g s. c. 104 Ill. App. 30; *Illinois Southern R. Co. v. Marshall*, 112 Ill. App. 514; s. c. aff'd, 210 Ill. 562; 71 N. E. Rep. 597; *Illinois Steel Co. v. Coffey*, 205 Ill. 206; s. c. 68 N. E. Rep. 751; rev'g s. c. 107 Ill. App. 582; *Chicago &c. R. Co. v. Mikesell*, 113 Ill. App. 146; *Tubelowish v. Lathrop*, 104 Ill. App. 82; *Shaw v. Bambrick-Bates Const. Co.*, 102 Mo. App. 666; s. c. 77 S. W. Rep. 96; *Koszlowski v. American Locomotive Co.*, 96 App. Div. (N. Y.) 40; s. c. 89 N. Y. Supp. 55.

is a question of law, in regard to which the jury must be instructed with substantial accuracy; but it is always a question of fact to be determined by the jury from the evidence, whether or not the particular case falls within the definition.¹³⁹

§ 4882. **Liability of Master for Injury to Servant in Consequence of Employing or Retaining Incompetent, Unskillful, Habitually Negligent, Drunken, or Otherwise Unfit Fellow Servants.**—It is another statement of the doctrine of the main section to say that the duty of the master to furnish proper tools and appliances, so far as appliances are concerned, embraces human instrumentalities as well as mechanical devices.¹⁴⁰ To render the master liable for the negligence of a fellow servant, it must appear from the evidence that the master or the person authorized by him to employ servants was negligent in failing to learn of the unfitness of the servant for the duties to which he was assigned.¹⁴¹

§ 4883. **This Duty a Primary, Absolute and Unassignable Duty.**¹⁴²

§ 4884. **This Duty Discharged by the Exercise of Ordinary or Reasonable Care.**—It may be said generally, that to hold the master liable for the incompetency of a servant employed by him there must be evidence of a want of reasonable care in his selection, or actual notice of his unfitness, or proof of such acts of negligence as would have affected the master with knowledge, had he exercised due diligence.¹⁴³

¹³⁹ Chicago City R. Co. v. Leach, 104 Ill. App. 30; Otstot v. Indiana &c. R. Co., 103 Ill. App. 136.

¹⁴⁰ Hyland v. Southern Bell Tel. &c. Co., 70 S. C. 315; s. c. 49 S. E. Rep. 879. See also Evans v. Louisiana Lumber Co., 111 La. 534; s. c. 35 South. Rep. 736; McDonald v. Standard Oil Co., 69 N. J. L. 445; s. c. 55 Atl. Rep. 289.

¹⁴¹ Hilton &c. Lumber Co. v. Ingram, 119 Ga. 652; s. c. 46 S. E. Rep. 895.

¹⁴² That the diligence or lack of diligence of an agent in selecting employes is that of the master, see: Hilton &c. Lumber Co. v. Ingram, 119 Ga. 652; s. c. 46 S. E. Rep. 895.

¹⁴³ Pennsylvania Co. v. Fishack, 123 Fed. Rep. 465; s. c. 59 C. C. A. 269; Southern Pac. Co. v. Hetzer, 135 Fed. Rep. 272; s. c. 68 C. C. A. 26; Big Stone Gap Iron Co. v. Ketrion, 102 Va. 23; s. c. 45 S. E. Rep. 740. In an action for injuries due to a locomotive having passed a semaphore that indicated that the track was occupied, it appeared that

the engineer had not been over that part of the road more than three or four times in as many years prior to the accident; but it was not shown that he was not trusty, and it appeared that he knew where the semaphore was, and knew its purpose. It was held that defendant was not negligent in selecting the engineer: Streets v. Grand Trunk R. Co., 76 App. Div. (N. Y.) 480; s. c. 78 N. Y. Supp. 729; s. c. aff'd, 178 N. Y. 553; 70 N. E. Rep. 1109. Thus where a telephone company handled electricity, and exposed its employes thereto, it was liable for the exercise of great care, and was not relieved from responsibility for the death of a servant, caused by the negligence of an inexperienced servant, to whom it had intrusted the work of repairing a defective live wire, by the mere fact that defendant did not know of such servant's incompetency: Scott v. Iowa Telephone Co., 126 Iowa 524; s. c. 102 N. W. Rep. 432.

The mere fact that a servant is incompetent does not make the master liable for his negligence, if he has exercised proper care in selecting him and ascertaining his fitness.¹⁴⁴ It is plain that the master is not to be imputed with negligence in the employment of an operative where it appears that such employé had been employed at similar work for years and had performed his duties carefully and without previous accident.¹⁴⁵ There is authority that the master will be held in the selection of the servant to the exercise of care reasonable and commensurate with the perils and hazards likely to be encountered in the performance of the duty for which he is employed.¹⁴⁶

§ 4886. How Far Master may Rely upon Presumption of Servant's Competency and Fitness.—The diligence required of a master to learn the habits of servants in his employment is not the same as that demanded in their employment, or in the inspection of machinery, but he may rely on the presumption that servants once competent remain so.¹⁴⁷

§ 4892. Notice to Master of Incompetency or Unfitness of Servant.¹⁴⁸—After the master has acquired knowledge of the incompetency of a servant he is liable for injuries the proximate result of his incompetency, regardless of whether an ordinarily prudent man under like circumstances would have retained such a servant in his employ after such knowledge.¹⁴⁹ If he retains such an employé it is his duty, as an obvious dictate of prudence, to exercise closer supervision for the protection of other employés.¹⁵⁰

¹⁴⁴ *Consumers' Cotton Oil Co. v. Jonte*, 36 Tex. Civ. App. 18; s. c. 80 S. W. Rep. 847; *El Paso & C. R. Co. v. Kelley*, — Tex. —; s. c. 87 S. W. Rep. 660; rev'g s. c. 83 S. W. Rep. 855.

¹⁴⁵ *Grams v. C. Reiss Coal Co.*, 125 Wis. 1; s. c. 102 N. W. Rep. 586.

¹⁴⁶ *Illinois Cent. R. Co. v. Smiesni*, 104 Ill. App. 194.

¹⁴⁷ *Southern Pac. Co. v. Hetzer*, 135 Fed. Rep. 272; s. c. 68 C. C. A. 26. In a case where a blacksmith employed in a railroad repair shop was usually assisted by a helper who delivered left-handed blows on the head of a "set" held by the blacksmith, and he, on applying to the foreman for a helper, was furnished with a right-handed striker, who, owing to his unskillfulness in delivering left-handed blows, injured the blacksmith, it was held that the master was not liable, as the foreman was not bound to have

anticipated that the helper would attempt to do that in which he was not skilled: *Hilton v. Fitchburg R. Co.*, 73 N. H. 116; s. c. 59 Atl. Rep. 625.

¹⁴⁸ On the general proposition that the master will not be liable for the negligence of an incompetent fellow servant in the absence of evidence that he was aware of such incompetency, or chargeable with knowledge thereof, see: *Gillen v. McAllister*, 97 App. Div. (N. Y.) 310; s. c. 89 N. Y. Supp. 953; *Venbuhr v. Lafayette Worsted Mills*, 27 R. I. 89; s. c. 60 Atl. Rep. 770.

¹⁴⁹ *Kamp v. Cox Bros. & Co.*, 122 Wis. 206; s. c. 99 N. W. Rep. 366.

¹⁵⁰ *Merritt v. Victoria Lumber Co.*, 111 La. 159; s. c. 35 South. Rep. 497. Since the proper performance of the duties of engineers in charge of railway trains depends on their being prudent, alert, and mindful of orders, railway companies must

§ 4893. **Constructive Notice of the Master of Unfitness of Servant.**—To fix a corporation with constructive notice of the incompetency of a servant it is not required that the official to whom the notice was given should be in the service of the company when an injury due to incompetency is suffered.¹⁵¹ The fact that a servant guilty of repeated acts of negligence is not negligent in some specific instances called to the attention of the master, does not relieve the master from liability for an injury to a fellow servant resulting from the servant's negligence.¹⁵²

§ 4898. **Unfitness in Consequence of Disease, such as Epilepsy.**¹⁵³

§ 4899. **Liability Under Statutes for Employing Incompetent or Unfit Fellow Servant.**—Under the Iowa statute prohibiting mine operators from placing inexperienced engineers in charge of engines used in the operation of mines, it has been held that the act of a mine superintendent, who was not a competent engineer, in attempting to operate an engine in lifting a cage filled with mine employes from the pit of the mine to the surface, resulting in the death of one of them, was negligence, for which the owner of the mine, who employed the superintendent, was liable.¹⁵⁴

§ 4906. **Presumptions and Burden of Proof with Respect to the Employment of Unfit Fellow Servants.**—Generally speaking, there is no presumption, as against the diligence of a master, where the record is silent as to whether an agent, in selecting a servant from one department for work in another, was negligent; nor does any arise from the mere happening of a subsequent injury.¹⁵⁵

§ 4911. **Various Evidentiary Facts Tending to Prove Incompetency or Unfitness.**—In one case evidence tending to show that the person acting for a railroad company in employing a brakeman shortly be-

keep a close watch on the habits and mental peculiarities of the persons whom they employ as engineers; this exaction being nothing more than that they exercise ordinary care in the selection of their engineers, in the light of their duties: *Southern Pac. Co. v. Huntsman*, 118 Fed. Rep. 412; s. c. 55 C. C. A. 366.

¹⁵¹ *Baird v. New York &c. R. Co.*, 64 App. Div. (N. Y.) 14; s. c. 71 N. Y. Supp. 734; s. c. aff'd, 172 N. Y. 637; 65 N. E. Rep. 1113.

¹⁵² *Baird v. New York &c. R. Co.*, 64 App. Div. (N. Y.) 14; s. c. 71 N. Y. Supp. 734; s. c. aff'd, 172 N. Y. 637; 65 N. E. Rep. 1113.

¹⁵³ Where a brakeman was subject to epileptic fits and was likely at any moment to be unable to perform his duties, the fact that he had never been guilty of carelessness does not affect the question of the impropriety of keeping such a servant in a position of responsibility such as that of a brakeman: *Baird v. New York Cent. &c. R. Co.*, 64 App. Div. (N. Y.) 14; s. c. 71 N. Y. Supp. 734; s. c. aff'd, 172 N. Y. 637; 65 N. E. Rep. 1113.

¹⁵⁴ *Beresford v. American Coal Co.*, 124 Iowa 34; s. c. 98 N. W. Rep. 902.

¹⁵⁵ *Hilton &c. Lumber Co. v. Ingram*, 119 Ga. 652; s. c. 46 S. E. Rep. 895.

fore an accident was the brakeman's cousin, and that he had doubt as to the brakeman's proper command of himself when braking cars, he having not been so previously employed, was held sufficient to justify a finding that the defendant was negligent in employing such brakeman.¹⁵⁶

§ 4912. Evidence from which Incompetency or Unfitness of Fellow Servant Cannot be Inferred.—A charge of incompetency is not sustained by mere evidence of an isolated case of negligent performance of duty.¹⁵⁷ In another case involving the competency of a street railway conductor, evidence that he was slow in ringing bells and liable to get excited and give wrong signals, and that he was short and had to stand on tiptoe to reach the bell cord, which made him slow in emergencies, was held insufficient to raise a presumption that the company knew or ought to have known of his incompetency, and this particularly where there was no evidence that the conductor's incompetency had ever been reported to the company.¹⁵⁸

§ 4917. The General Rule as to Who Are and Who Are Not Fellow Servants Stated.¹⁵⁹

§ 4918. Theory of "Dual Relationship."—Under the "dual capacity" doctrine the mere fact that a master has a foreman over the injured servant does not make the master responsible for the foreman's negligence, nor does the mere fact that the foreman is sometimes, or generally, also a co-laborer, excuse the master from his negligence; but every case must depend on its own circumstances, and if the negligence complained of consists of some act done or omitted by one having such authority, which relates to his duties as a co-laborer with

¹⁵⁶ *Elliott v. Canadian Pac. R. Co.*, 129 Fed. Rep. 163.

¹⁵⁷ *Wicklund v. Saylor Coal Co.*, 119 Iowa 335; s. c. 93 N. W. Rep. 305 (act of mine engineer in one instance allowing cage to descend with great force).

¹⁵⁸ *Secombe v. Detroit Electric R.*, 133 Mich. 170; s. c. 94 N. W. Rep. 747; 10 Det. Leg. N. 129.

¹⁵⁹ *Colley v. Southern Cotton Oil Co.*, 120 Ga. 258; s. c. 47 S. E. Rep. 932 (employés subject to the same general control of a common master, and whose labor conduces to the same general purpose); *Atchison & Co. Bridge Co. v. Miller*, 71 Kan. 13; s. c. 80 Pac. Rep. 18 (all employés of the same master, engaged in the same general business, and whose efforts tend to promote the

same general purposes); *Donnelly v. Cudahy Packing Co.*, 68 Kan. 653; s. c. 75 Pac. Rep. 1017 (co-employés under the control of one master and engaged in the discharge of duties directed to one common end, so that each employé must know who is exposed to the risk of another); *Merritt v. Victoria Lumber Co.*, 111 La. 159; s. c. 35 South. Rep. 497 (servant in the same common employment and engaged in the same common work); *W. R. Trigg Co. v. Lindsay*, 101 Va. 193; s. c. 43 S. E. Rep. 349 (all servants of a common master working under the same control receiving authority or compensation from the same source and engaged in the same general business, though in different grades or departments).

those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable; but when the negligent act complained of arises out of, and is the direct result of, the authority conferred on him by the master over his co-laborers, the master will be liable.¹⁶⁰ The question whether a particular act under this doctrine is the act of a fellow servant or a vice-principal is a question of fact for the jury.¹⁶¹ It is the holding of one case that the men who prepared a platform on which a servant was to work were his fellow servants in the use which such servant made of it after it was prepared, but that they did not sustain that relation to him in furnishing, by order of the master, the material out of which it was made.¹⁶²

§ 4919. Servants Engaged in Different Grades of Employment under a Common Master.¹⁶³—In a case where a servant was injured through negligence in loading lumber on cars, in which work he had no part, but which was done under the direction of the foreman under whom he worked when injured, it was held that the negligence was not that of a fellow servant, but of a vice-principal, for which the common master was liable.¹⁶⁴ Another case holds that a member of a crew of riveters ordered by the master to use a scaffold erected by members of another crew engaged in the same work, is not a fellow servant with the latter crew in the construction of the scaffold.¹⁶⁵

§ 4923. Grade of Rank of Servant Not the Controlling Test, but the Test is the Character of the Act.—It is another statement of the doctrine of this section to say that the question whether employes of a common master are fellow servants, so as to relieve the master from liability for injuries to one by the negligence of another, is to be determined by the nature of the act which caused the injury, and not by a difference in the rank or grade of service between the particular servants.¹⁶⁶ Under this doctrine a superior is regarded as a fellow

¹⁶⁰ *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 490; s. c. 79 S. W. Rep. 664.

¹⁶¹ *Chicago & C. R. Co. v. Driscoll*, 107 Ill. App. 615; s. c. aff'd, 207 Ill. 9; 69 N. E. Rep. 620; *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 490; s. c. 79 S. W. Rep. 664.

¹⁶² *Beal v. Bryant*, 99 Me. 112; s. c. 58 Atl. Rep. 428.

¹⁶³ *Enright v. Oliver & Burr*, 69 N. J. L. 357; s. c. 55 Atl. Rep. 277 (fellow servants notwithstanding employment in different departments

of common business). But see *Merritt v. Victoria Lumber Co.*, 111 La. 159; s. c. 35 South. Rep. 497 (servants engaged in different duties in the same establishment not fellow servants).

¹⁶⁴ *Gaudie v. Northern Lumber Co.*, 34 Wash. 34; s. c. 74 Pac. Rep. 1009.

¹⁶⁵ *Shore v. American Bridge Co.*, 111 Mo. App. 278; s. c. 86 S. W. Rep. 905.

¹⁶⁶ *The Westport*, 136 Fed. Rep. 391; s. c. 69 C. C. A. 235; s. c. rev'd,

servant where his act is one of mere detail and in the line of a servant's duty.¹⁶⁷

§ 4924. Servant Charged with the Primary or Absolute Duties of the Master is a Vice-Principal and Not a Fellow Servant.¹⁶⁸

§ 4925. Provided the Injury Results from the Negligent Discharge of those Duties and Not from a Mere Act of Fellow Service.—Then again the master may escape liability for injury to a servant in cases where an unauthorized servant usurps the function of the master as to providing a safe place to work and renders it more dangerous, and as a result a fellow servant sustains injuries.¹⁶⁹

§ 4926. Of this Nature is the Duty of Inspection and Repair.—The principle of this section finds recent expression and application in cases where servants have been injured by reason of defects and dangerous conditions in boilers,¹⁷⁰ railway roadbeds,¹⁷¹ platforms,¹⁷² and mines,¹⁷³ and these injuries are directly traceable to the negligence of a servant charged with the duty of inspection and repair.

131 Fed. Rep. 815; *Skelton v. Pacific Lumber Co.*, 140 Cal. 507; s. c. 74 Pac. Rep. 444; *Larsen v. Le Doux*, — Idaho —; s. c. 81 Pac. Rep. 600; *Coffeyville Vitrified Brick & Co. v. Shanks*, 69 Kan. 306; s. c. 76 Pac. Rep. 856; *Galvin v. Pierce*, 72 N. H. 79; s. c. 54 Atl. Rep. 1014; *Date v. New York Glucose Co.*, 104 App. Div. (N. Y.) 207; s. c. 93 N. Y. Supp. 249; *Merrill v. Oregon Short Line R. Co.*, 29 Utah 264; s. c. 81 Pac. Rep. 85.

¹⁶⁷ *Dooling v. Deutscher Verein*, 97 App. Div. (N. Y.) 39; s. c. 89 N. Y. Supp. 580; *Madigan v. Oceanic Steam Nav. Co.*, 178 N. Y. 242; s. c. 70 N. E. Rep. 785; rev'g s. c. 81 N. Y. Supp. 705; *Ryan v. Third Ave. R. Co.*, 92 App. Div. (N. Y.) 306; s. c. 86 N. Y. Supp. 1070. The work of removing "clinkers" from a kiln used in roasting iron ore, by drilling into them and inserting and exploding dynamite, was operative, relating to the duty of employes, and not to that of the master, and he was not liable for the negligence of plaintiff's fellow servants: *Klos v. Hudson River Ore & Co.*, 77 App. Div. (N. Y.) 566; s. c. 79 N. Y. Supp. 156.

¹⁶⁸ That a servant charged with these duties is a vice-principal and

not a fellow servant, see generally: *Alabama & C. R. Co. v. Vall*, 142 Ala. 134; s. c. 38 South. Rep. 124; *Flickner v. Lambert*, 36 Ind. App. 524; s. c. 74 N. E. Rep. 263 (master liable for failure to instruct inexperienced servant regardless of rank of person to whom the duty of instruction was assigned); *Jones v. Kansas City & C. R. Co.*, 178 Mo. 528; s. c. 77 S. W. Rep. 890; *Burns v. Delaware & C. Tel. & C. Co.*, 70 N. J. L. 745; s. c. 59 Atl. Rep. 220, 592; 67 L. R. A. 956; *Merrill v. Oregon Short Line R. Co.*, 29 Utah 264; s. c. 81 Pac. Rep. 85.

¹⁶⁹ *McKean v. Colorado Fuel & Co.*, 18 Colo. App. 285; s. c. 71 Pac. Rep. 425 (workman in this case placed a plank across an open space in the room and fellow servant injured by reason of the plank slipping).

¹⁷⁰ *Shea v. Pacific Power Co.*, 145 Cal. 680; s. c. 79 Pac. Rep. 373.

¹⁷¹ *Louisville & C. R. Co. v. Pointer*, 113 Ky. 952; s. c. 69 S. W. Rep. 1108; 24 Ky. L. Rep. 772.

¹⁷² *Beal v. Bryant*, 99 Me. 112; s. c. 58 Atl. Rep. 428.

¹⁷³ *Czarecki v. Seattle & C. R. & Co.*, 30 Wash. 288; s. c. 70 Pac. Rep. 750 (lack of ventilation).

§ 4928. Master Cannot Devolve this Duty upon Others, so as to Exonerate Himself.¹⁷⁴—One of the duties imposed on the master is that of exercising due care to see that water coolers furnished for the use of employes are in a reasonably safe condition for use, and in one case an employer was imputed with the negligence of a subordinate to whom he delegated this duty.¹⁷⁵ So it has been held that the duty of using due care in the original construction of the roadway of a railroad, including stock gaps along the way, is one which the railroad company is without power to delegate so as to relieve itself of the consequences of its negligence in a case where an employe exercising due care for his safety was injured by collision with such a stock gap in dangerous proximity to the engine out of which he leaned to watch a hot box.¹⁷⁶

§ 4929. Fellow Servant Charged with this Duty Becomes a Vice-Principal of the Master.¹⁷⁷—Thus, for example, a foreman of a crew given the duty of inspecting telephone poles before a lineman climbs the same is not a fellow servant of the lineman in that regard but a vice-principal, and the company is liable to the lineman for an injury due to an insufficient inspection.¹⁷⁸

§ 4932. Negligence of Master in Failing to Perform a Non-Assignable Duty Commingling with Negligence of Fellow Servant—Master Liable.—During the absence of a flagman his watch box was moved temporarily by other servants of the railroad to be repaired, and on being replaced was put too close to one of the tracks, in consequence of which it was afterward struck by a train, and the flagman was injured. The court held that the box was an appliance or place which

¹⁷⁴ That the master cannot devolve the duty of inspection and repair on others so as to exonerate himself, see generally: *Bunker Hill & C. Min. & C. Co. v. Jones*, 130 Fed. Rep. 813; *Spring Valley Coal Co. v. Robizas*, 111 Ill. App. 49; *Smith v. New York R. Co.*, 86 App. Div. (N. Y.) 188; s. c. 83 N. Y. Supp. 259; s. c. aff'd, 178 N. Y. 635; 71 N. E. Rep. 1139; *Simone v. Kirk*, 173 N. Y. 7; s. c. 65 N. E. Rep. 739; rev'g s. c. 67 N. Y. Supp. 1019.

¹⁷⁵ *Geller v. Briscoe Mfg. Co.*, 136 Mich. 330; s. c. 99 N. W. Rep. 281; 11 Det. Leg. N. 31.

¹⁷⁶ *Northern Alabama R. Co. v. Mansell*, 138 Ala. 548; s. c. 36 South. Rep. 459.

¹⁷⁷ That the person to whom a master delegates the duty to inspect and repair is a vice-principal whose

neglect is that of the employer, see: *Dill v. Marmon*, 164 Ind. 507; s. c. 73 N. E. Rep. 67; *Merritt v. Victoria Lumber Co.*, 111 La. 159; s. c. 35 South. Rep. 497; *Twombly v. Consolidated Electric Light Co.*, 98 Me. 353; s. c. 57 Atl. Rep. 85; *Hopwood v. Benjamin Atha & C. Co.*, 68 N. J. L. 707; s. c. 54 Atl. Rep. 435; *Franck v. American Tartar Co.*, 91 App. Div. (N. Y.) 571; s. c. 87 N. Y. Supp. 219; *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okl. 356; s. c. 75 Pac. Rep. 537; 64 L. R. A. 145; *Lillie v. American Car & C. Co.*, 209 Pa. 161; s. c. 58 Atl. Rep. 272; *Bailey v. Cascade Timber Co.*, 35 Wash. 295; s. c. 77 Pac. Rep. 377 (logging hook).

¹⁷⁸ *Cumberland Tel. Co. v. Bills*, 128 Fed. Rep. 272; s. c. 62 C. C. A. 620.

the railroad was personally bound to exercise reasonable care to construct and maintain in a safe condition, and it was liable for its negligent replacing by a fellow servant of the flagman.¹⁷⁹

§ 4933. Various Applications of the Foregoing Doctrine.¹⁸⁰

§ 4938. Superiority in Rank not a Controlling Test, but Superior and Inferior Servants may be Fellow Servants.¹⁸¹

§ 4939. Foreman of Work and the Workmen Under Him Deemed Fellow Servants.¹⁸²—It is a generally recognized rule that a master is

¹⁷⁹ Philadelphia &c. R. Co. v. Devers, 101 Md. 341; s. c. 61 Atl. Rep. 418.

¹⁸⁰ An employé erecting under the direction of the superintendent a hanger on which a pulley shaft is placed is not, while doing such work, a fellow servant of an operative: *Chambers v. American Tin Plate Co.*, 129 Fed. Rep. 561 (servant to whom master delegated duty of erecting scaffold not a fellow employé of a bricklayer working thereon); *McLean v. Pere Marquette R. Co.*, 137 Mich. 482; s. c. 100 N. W. Rep. 748; 11 Det. Leg. N. 358 (railroad station agent selecting defective freight car for transportation of mill refuse not fellow servant of employé on a car derailed by running over pieces of this refuse that had fallen on the track); *D'Agostino v. Pennsylvania R. Co.*, — N. J. L. —; s. c. 60 Atl. Rep. 1113 (failure of foreman to warn trackmen of approach of trains imputable to common employer); *McManus v. St. Regis Paper Co.*, 107 App. Div. (N. Y.) 29; s. c. 94 N. Y. Supp. 932 (neglect of superintendent to replace safeguard after repairs are made is negligence of master); *Crandall v. Stafford Mfg. Co.*, 24 R. I. 555; s. c. 54 Atl. Rep. 52. The fact that a railroad company, which permits an engine to start out on a trip without any chimney for its headlight, in consequence of which a collision results, provides a chimney at a station along the route, which the engineer neglects to obtain, does not relieve the company from liability, since the engineer stands in its place, and not in that of a fellow servant, with respect to the duty of obtaining the chimney: *Sutter v. New York &c. R. Co.*, 79 App. Div. (N. Y.) 362; s. c. 79 N. Y. Supp. 1106.

¹⁸¹ In support of the proposition that an employé who is vice-principal becomes a fellow servant where he undertakes the duties of a mere operative, see: *Fordyce v. Key*, 74 Ark. 19; s. c. 84 S. W. Rep. 797; *Consolidated Coal Co. v. Fleischbein*, 109 Ill. App. 509; s. c. aff'd, 207 Ill. 593; 69 N. E. Rep. 963; *Shickle-Harrison &c. Iron Co. v. Beck*, 212 Ill. 268; s. c. 72 N. E. Rep. 423; *Collingwood v. Illinois &c. Fuel Co.*, 125 Iowa 537; s. c. 101 N. W. Rep. 283; *Hoffman v. Holt*, 186 Mass. 572; s. c. 72 N. E. Rep. 87.

¹⁸² That a mere foreman of work is generally regarded as a fellow servant with those under his control while performing acts of service as distinguished from those acts which it is the master's primary duty to perform, see: *Fournier v. Pike*, 128 Fed. Rep. 991; *Lach v. Burnham*, 134 Fed. Rep. 688; *Pistoner v. American Can Co.*, 119 Fed. Rep. 496; *Leonard v. Mallory*, 75 Conn. 433; s. c. 53 Atl. Rep. 778; *Peterson v. New York &c. R. Co.*, 77 Conn. 351; s. c. 59 Atl. Rep. 502; *Baier v. Selke*, 211 Ill. 512; s. c. 71 N. E. Rep. 1074; rev'g s. c. 112 Ill. App. 568; *Shepherd v. Southern Pine Co.*, 118 Ga. 292; s. c. 45 S. E. Rep. 220; *Dill v. Marmon*, 164 Ind. 507; s. c. 73 N. E. Rep. 67; *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689; s. c. 68 N. E. Rep. 262; rev'g s. c. 66 N. E. Rep. 1016 (foreman in charge of construction of bridge); *Standard Pottery Co. v. Moudy*, 35 Ind. App. 427; s. c. 73 N. E. Rep. 188; 74 N. E. Rep. 242; *McQueeney v. Chicago &c. R. Co.*, 120 Iowa 522; s. c. 94 N. W. Rep. 1124 (foreman in charge of steam shovel a fellow servant while assisting in replacing a chain on a pulley of the shovel); *Mulligan v. McCaffrey*, 182 Mass. 420; s. c. 65 N. E. Rep. 831

not liable for the act of a mere foreman in giving directions concerning the work to a servant working under him where the place and appliances furnished by the master are proper, and the master has otherwise performed his duty in the premises,¹⁸³ including the duty of exercising due care to employ a competent foreman.¹⁸⁴ So where a railroad company employed in its repair shops an adequate number of servants who were skillful in doing certain work, the master was held not liable for the act of the foreman in negligently detailing on such work an unskillful servant whose lack of skill caused an injury to another servant.¹⁸⁵ In Kentucky the courts refuse a recovery for injuries to an employé engaged in common service, received through the negligence of a superior unless the negligence of such superior was gross.¹⁸⁶

§ 4946. Servant Vested with Exclusive Supervision, Direction and Control of the Work or of any Department thereof is a Vice-Principal and Not a Fellow Servant.—It is another form of stating the doctrine of the main section to say that persons engaged in the service of the master, who are intrusted by him with the management or direction of his general work, or with some particular part thereof, are not fellow servants with the subordinate employés, but they are vice-princi-

(foreman of electrical pole-setting gang a fellow servant of members of crew); *Dixon v. Union Iron Works*, 90 Minn. 492; s. c. 97 N. W. Rep. 375; *Depuy v. Chicago & C. R. Co.*, 110 Mo. App. 110; s. c. 84 S. W. Rep. 103; *Mitchell v. Wabash R. Co.*, 97 Mo. App. 411; s. c. 76 S. W. Rep. 647 (laborer employed in the reconstruction of an abandoned railroad track and the foreman engaged in the same service); *Enright v. Oliver & Burr*, 69 N. J. L. 357; s. c. 55 Atl. Rep. 277; *Hall v. United States Canning Co.*, 76 App. Div. (N. Y.) 475; s. c. 78 N. Y. Supp. 617; *Riola v. New York & C. R. Co.*, 97 App. Div. (N. Y.) 252; s. c. 89 N. Y. Supp. 945; *Vogel v. American Bridge Co.*, 180 N. Y. 373; s. c. 73 N. E. Rep. 1; rev'g s. c. 88 App. Div. (N. Y.) 68; 84 N. Y. Supp. 799; *Wootton v. Flatbush Gas Co.*, 102 App. Div. (N. Y.) 294; s. c. 92 N. Y. Supp. 380; *Duffy v. Platt*, 205 Pa. 296; s. c. 54 Atl. Rep. 1000 (foreman of carding room in mill a fellow servant while cleaning a revolving cylinder and negligently leaving it open causing injury to operative); *Ohio River & C. R. Co. v.*

Edwards, 111 Tenn. 31; s. c. 76 S. W. Rep. 897; *Houston Ice & C. Co. v. Pisch*, 33 Tex. Civ. App. 684; s. c. 77 S. W. Rep. 1047; *St. Louis & C. R. Co. v. Arnett*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 599; *Sartin v. Oregon Short Line R. Co.*, 27 Utah 447; s. c. 76 Pac. Rep. 219 (foreman of railroad fence gang on one hand-car fellow servant with member of gang riding on another car with which foreman's car collided).

¹⁸³ *Dill v. Marmon*, 164 Ind. 507; s. c. 73 N. E. Rep. 67.

¹⁸⁴ *Southern Indiana R. Co. v. Martin*, 160 Ind. 280; s. c. 66 N. E. Rep. 886; *Brabham v. American Tel. & C. Co.*, 71 S. C. 53; s. c. 50 S. E. Rep. 716.

¹⁸⁵ *Hilton v. Fitchburg R. Co.*, 73 N. H. 116; s. c. 59 Atl. Rep. 625.

¹⁸⁶ *Board v. Chesapeake & C. R. Co.* (Ky.), 70 S. W. Rep. 625; s. c. 24 Ky. L. Rep. 1079; *Illinois Cent. R. Co. v. Elliott*, 82 S. W. Rep. 374; s. c. 26 Ky. L. Rep. 669; *Kentucky Distilleries & C. Co. v. Schreiber* (Ky.), 73 S. W. Rep. 769; s. c. 24 Ky. L. Rep. 2236.

pals.¹⁸⁷ It is the holding of one case that to constitute a manager of a manufacturing plant a vice-principal, for whose negligence the master will be liable for personal injury to an employé subject to his control, the master must confer on him the absolute management, exercising no discretion as to the conduct of his business except in providing safe tools and a safe place to work.¹⁸⁸ It has been held that a mate of a ship, intrusted with the work of discharging the cargo on a wharf, and having control and supervision of the ship's appliances for that purpose, the entire manner of using which was left to his judgment and discretion, is a vice-principal of the defendant vessel owner.¹⁸⁹ In one case a brakeman engaged with a train crew in switching to make up a train had the switching list from which he learned what cars were to be taken into the train and the position which each was to occupy. On the basis of the list the train was made up. It was his duty to uncouple the cars as required. The crew acted solely in response to signals given by him. It was held that he was a vice-principal, rendering the railway company liable for injuries to members of the crew occasioned by his negligence.¹⁹⁰

§ 4948. Application of this Doctrine in Case of Corporations.¹⁹¹

§ 4950. Servant whose Duty is Exclusively Supervision, Direction and Control Deemed a Vice-Principal, and Not a Fellow Servant.¹⁹²—A

¹⁸⁷ See generally: *Chicago House Wrecking Co. v. Birney*, 117 Fed. Rep. 72; s. c. 54 C. C. A. 458 (superintendent of wrecking company with power to hire and discharge men and laborer employed in wreck); *Allen B. Wrisley Co. v. Burke*, 203 Ill. 250; s. c. 67 N. E. Rep. 818; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145; s. c. 69 N. E. Rep. 12; aff'g s. c. 106 Ill. App. 649; *Evans v. Louisiana Lumber Co.*, 111 La. 534; s. c. 35 South. Rep. 736 (sawyer in charge of saw mill and employés therein); *Meagher v. Crawford Laundry Mach. Co.*, 187 Mass. 586; s. c. 73 N. E. Rep. 853; *Milbourne v. Arnold Electric Power & Co.*, 140 Mich. 316; s. c. 103 N. W. Rep. 821; 12 Det. Leg. N. 177; *Barrett v. Reardon*, 95 Minn. 425; s. c. 104 N. W. Rep. 309; *Depuy v. Chicago & C. R. Co.*, 110 Mo. App. 110; s. c. 84 S. W. Rep. 103; *New v. Milligan*, 27 Pa. Super. Ct. 516; *Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36; s. c. 79 S. W. Rep. 869; *Roberts v. Fielder Salt Works* (Tex. Civ. App.), 72 S. W. Rep. 618; *Galveston & C. R. Co. v. Roth*, — Tex.

Civ. App. —; s. c. 84 S. W. Rep. 1112; *Johnson v. Union Pac. Coal Co.*, 28 Utah 46; s. c. 76 Pac. Rep. 1089. A complaint was held sufficiently to show that a master mechanic was a vice-principal which alleged that such master mechanic had full charge of the work in which plaintiff was engaged when injured, and had been intrusted by the employer with the duty of keeping the ways, plant, tools and machinery in proper condition: *American Rolling Mill Co. v. Hullinger*, 161 Ind. 673; s. c. 67 N. E. Rep. 986.

¹⁸⁸ *Ruemmeli-Braun Co. v. Cahill*, 14 Okla. 422; s. c. 79 Pac. Rep. 260.

¹⁸⁹ *Gibson v. Canadian Pac. Nav. Co.*, 1 Alaska 407.

¹⁹⁰ *Struble v. Burlington & C. R. Co.*, 128 Iowa 158; s. c. 103 N. W. Rep. 142.

¹⁹¹ *Consumers' Paper Co. v. Eyer*, 160 Ind. 424; s. c. 66 N. E. Rep. 994 (president of corporation held to have authority to order performance of an act in absence of superintendent of plant).

¹⁹² See generally: *Bonnin v. Crowley*, 112 La. 1025; s. c. 36 South. Rep.

servant charged with the duty of supervision, direction and control is a vice-principal, though subject to the orders of another while engaged in the work at hand.¹⁹³

§ 4951. **General Superintendent is a Vice-Principal and Not a Fellow Servant.**¹⁹⁴—Status as vice-principal has been ascribed in recent cases to the superintendents of mills,¹⁹⁵ quarries,¹⁹⁶ and mines.¹⁹⁷ It is the holding of a Massachusetts case that though the laying of a conduit is under the general charge of a master mechanic, yet one who is a foreman of a particular portion of the work, who is generally present, gives orders under which the work is done, employs and discharges men, and only performs manual labor to show the method of operating, is a superintendent, for whose negligence the master is liable under the employer's liability act.¹⁹⁸ It is to be noted, however, that the master will be liable only for acts legitimately included in the duties of superintendence. Thus, a master was absolved from liability for injuries the result of a playful disposition of a superintendent which induced him to tickle a workman while he was working over revolving knives, and as a consequence the employé suffered severe injuries by coming in contact with knives.¹⁹⁹

§ 4954. **Power to Employ or Discharge as a Test of Relation of Fellow Servant or Vice-Principal.**²⁰⁰—It is the doctrine of one case that where a superior servant is without power to hire or discharge the workmen under him and is merely a fellow servant of a superior grade or class, the mere fact that he had power temporarily to suspend workmen will not render him a vice-principal so as to charge the master with the knowledge of such superior servant as to the incom-

842; *Murphy v. New York &c. R. Co.*, 187 Mass. 18; s. c. 72 N. E. Rep. 330 (section foreman in charge of gang engaged in transferring freight having the duty to select the cars that were unloaded and check the freight as transferred, held a superintendent); *Jancko v. West Coast Mfg. &c. Co.*, 34 Wash. 556; s. c. 76 Pac. Rep. 78 (employé given duty to instruct inexperienced workman a vice-principal); *Sandquist v. Independent Telephone Co.*, 38 Wash. 313; s. c. 80 Pac. Rep. 539 (foreman in charge of the lowering of telephone poles).

¹⁹³ *Illinois Cent. R. Co. v. Elliott*, 82 S. W. Rep. 374; s. c. 26 Ky. L. Rep. 669; *Hooe v. Boston &c. R. Co.*, 187 Mass. 67; s. c. 72 N. E. Rep. 341.

¹⁹⁴ See generally: *Borden v. Falk*

Co., 97 Mo. App. 566; s. c. 71 S. W. Rep. 478; *Hall v. Marshutz & Cantrell* (Cal.), 71 Pac. Rep. 692.

¹⁹⁵ *Hunt v. Desloge Consol. Lead Co.*, 104 Mo. App. 377; s. c. 79 S. W. Rep. 710.

¹⁹⁶ *Southern Indiana R. Co. v. Moore*, 34 Ind. App. 154; s. c. 71 N. E. Rep. 516.

¹⁹⁷ *Beresford v. American Coal Co.*, 124 Iowa 34; s. c. 98 N. W. Rep. 902.

¹⁹⁸ *Pierce v. Arnold Print Works*, 182 Mass. 260; s. c. 65 N. E. Rep. 368.

¹⁹⁹ *Western R. Co. v. Milligan*, 135 Ala. 205; s. c. 33 South. Rep. 438.

²⁰⁰ That a master is not liable for negligence of a foreman unless foreman had power to employ or discharge, see: *Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36; s. c. 79 S. W. Rep. 869.

petency of a fellow servant by whose negligence an employé was injured.¹ Another court holds that this power is not controlling on the question, and hence the mere fact that a superintendent or boss does not have authority to hire and discharge hands does not necessarily make him a fellow servant, and not a vice-principal.²

§ 4955. Servant Vested with General Superintendence and with Authority to Employ or Discharge Workmen Deemed a Vice-Principal.³

§ 4956. Workman Discharging the Duties of Superintendent in his Absence.—It is held that a deck hand on a steamer, who has been selected by the officer in command to act as captain of the watch, and to exercise authority and control over other deck hands, is for the time being an officer of the vessel, and the owner cannot avoid liability for an assault committed by him upon another deck hand while so acting, on the ground that the two were fellow servants.⁴ There is authority that one having the right to act as foreman in a manufacturing plant in the absence of the proprietor will be held to have such authority when the proprietor is in a remote part of the plant.⁵ It is to be observed, however, that a fellow servant, without the master's knowledge, cannot, by assumption of authority, convert himself into a vice-principal.⁶ Neither will mere passive consent by an employer that one employé direct another, when unaccompanied with a duty on the part of the directed employé to obey the directions given, fix liability on the employer for negligent directions of such employé.⁷

¹ Weeks v. Scharer, 129 Fed. Rep. 333.

² Lamb v. Littman, 132 N. C. 978; s. c. 44 S. E. Rep. 646.

³ See generally: Hilton &c. Lumber Co. v. Ingram, 119 Ga. 652; s. c. 46 S. E. Rep. 895 (employé with power to hire, discharge and assign laborers a vice-principal); Collingwood v. Illinois &c. Fuel Co., 125 Iowa 537; s. c. 101 N. W. Rep. 283 (boss driver in charge of all drivers, directing them when, where, and how to work, with power to hire and discharge for cause, a vice-principal); Maryland Steel Co. v. Engleman, 101 Md. 661; s. c. 61 Atl. Rep. 314; Carter v. Baldwin, 107 Mo. App. 217; s. c. 81 S. W. Rep. 204 (mine superintendent hiring, discharging and directing men a vice-principal, although he works with the men

and performs same character and grade of labor that they perform); Vogel v. American Bridge Co., 88 App. Div. (N. Y.) 68; s. c. 84 N. Y. Supp. 799; Ruemmeli-Braun Co. v. Cahill, 14 Okla. 422; s. c. 79 Pac. Rep. 260; Buttermann v. McClintic Marshall Const. Co., 206 Pa. 82; s. c. 55 Atl. Rep. 839; Kamp v. Coxe Bros. & Co., 122 Wis. 206; s. c. 99 N. W. Rep. 366.

⁴ Memphis &c. Packet Co. v. Hill, 122 Fed. Rep. 246; s. c. 58 C. C. A. 610.

⁵ Browning v. Kasten, 107 Mo. App. 59; s. c. 80 S. W. Rep. 354.

⁶ Hilton &c. Lumber Co. v. Ingram, 119 Ga. 652; s. c. 46 S. E. Rep. 895.

⁷ Texas &c. Coal Co. v. Manning, 34 Tex. Civ. App. 322; s. c. 78 S. W. Rep. 545.

§ 4958. **When Foreman Not Deemed a Fellow Servant with Those Working Under Him.**⁸

§ 4961. **When Knowledge of Foreman or Vice-Principal is the Knowledge of the Master.**—The knowledge of the vicious disposition of a horse, assigned to a servant, possessed by another servant having authority to direct employés is deemed knowledge of the master.⁹

§ 4963. **Servant Injured by Superintendent or Other Superior while Performing Work of Servant.**¹⁰

§ 4964. **Contrary Doctrine that Even the Acts of Service of a Vice-Principal are Imputable to the Master.**—In support of this doctrine these holdings are encountered in recent decisions:—That a street railway barn foreman was a vice-principal in starting a car whereby a motorman getting sand for his trip was crushed against the sand bin;¹¹ that a railroad foreman in charge of a hand-car did not lose his status as a foreman or vice-principal and become a fellow servant of a section-man by assisting in moving the car;¹² that a superintendent directing the moving of a bar of iron on a truck does not cease to be engaged in an act of superintendence when, in furtherance of the work, he helps raise a wheel of the truck,¹³ that the general manager of a factory, though at the time feeding a planing machine, was acting as vice-principal in directing an employé to empty a hopper under the

* *Fox v. Jacob Dold Packing Co.*, 96 Mo. App. 173; s. c. 70 S. W. Rep. 164 (head of gang of men employed to operate an ice plant at night and given entire charge of the business during that time a vice-principal); *Kelly v. Stewart*, 93 Mo. App. 47 (common laborer not fellow servant of foreman under whose directions he worked); *Goe v. Northern Pac. R. Co.*, 30 Wash. 654; s. c. 71 Pac. Rep. 182 (foreman of round-house). In a case where the employer introduced an employé to a workman and told such workman to set the employé to work, and he thereby set him to work, it was held that such employé stood in the relation of foreman to plaintiff, and he represented the company, and was bound to see that a scaffold on which he was directed to work was safe: *Henry J. Spieker Co. v. Ferguson*, 25 Ohio Cir. Ct. R. 671.

* *Wysocki v. Wisconsin Lakes Ice & Co.*, 121 Wis. 96; s. c. 98 N. W. Rep. 950.

¹⁰ That vice-principal while per-

forming acts of service is a fellow servant, see: *Florence & C. R. Co. v. Whipps*, 138 Fed. Rep. 13; *Chicago Hair & Co. v. Mueller*, 203 Ill. 558; s. c. 68 N. E. Rep. 51; aff'g s. c. 106 Ill. App. 21; *Illinois Southern R. Co. v. Marshall*, 112 Ill. App. 514; s. c. aff'd, 210 Ill. 562; 71 N. E. Rep. 597; *Randa v. Detroit Screw Works*, 134 Mich. 343; s. c. 96 N. W. Rep. 454; 10 Det. Leg. N. 504 (selection of emery wheel); *Stevens v. Deatherage Lumber Co.*, 110 Mo. App. 398; s. c. 86 S. W. Rep. 481; *McManus v. St. Regis Paper Co.*, 107 App. Div. (N. Y.) 29; s. c. 94 N. Y. Supp. 932 (neglect of superintendent to place guards on machinery after having removed the same to make repairs).

¹¹ *Bien v. St. Louis Transit Co.*, 108 Mo. App. 399; s. c. 83 S. W. Rep. 986.

¹² *Missouri & C. R. Co. v. Smith*, 31 Tex. Civ. App. 332; s. c. 72 S. W. Rep. 418.

¹³ *Meagher v. Crawford Laundry Mach. Co.*, 187 Mass. 586; s. c. 73 N. E. Rep. 853.

machine, it not being a function of the feeder to direct any one to empty hoppers;¹⁴ that a foreman of a crew of miners is not a fellow servant with the men while taking part in their work, so as to relieve the master from the liability of his negligence in doing the work.¹⁵ In a case where an employé's injury resulted from the negligence of the master in leaving from a machine a necessary protective attachment and the act of the vice-principal in starting the machine without warning such employé of her dangerous situation, the court refused to say as a matter of law that in the particular act causing the injury the vice-principal was acting as a fellow servant.¹⁶

§ 4967. Difference in Salary Not Important.¹⁷

§ 4971. **The Illinois Doctrine of Con-Association.**—It is essential to the operation of this doctrine that at the time of the injury the servants shall be directly co-operating in the particular business in hand or that their usual duties shall bring them in habitual con-association, so that they may exercise an influence on each other promotive of proper caution.¹⁸ Employés may be fellow servants under this doctrine, though they are employed in different departments,¹⁹ if their usual duties require co-operation or actual association.²⁰ Furthermore, the relation does not rest in any degree upon personal acquaintance or actual previous association between servants, but upon the relation of their duties to each other and the respective positions they hold.²¹

§ 4974. This Con-Association Doctrine Generally Denied.²²

§ 4975. **Cases Where there is No Con-Association or Common Employment and where the Employés are Deemed Not to be Fellow Servants.**—It may be said generally, that co-employés are not fellow serv-

¹⁴ *Horne v. La Crosse Box Co.*, 123 Wis. 399; s. c. 101 N. W. Rep. 935.

¹⁵ *Donnelly v. Aida Min. Co.*, 103 Mo. App. 349; s. c. 77 S. W. Rep. 130; *Strode v. Conkey*, 105 Mo. App. 12; s. c. 78 S. W. Rep. 678.

¹⁶ *Bradford v. Taylor*, 85 Miss. 409; s. c. 37 South. Rep. 812.

¹⁷ *Fritz v. Western Union Tel. Co.*, 25 Utah 263; s. c. 71 Pac. Rep. 209.

¹⁸ *Indiana &c. R. Co. v. Otstot*, 212 Ill. 429; s. c. 72 N. E. Rep. 387; aff'g s. c. 113 Ill. App. 37; *Voigt v. Anglo-American Provision Co.*, 202 Ill. 462; s. c. 66 N. E. Rep. 1054; aff'g s. c. 104 Ill. App. 423; *Spring Valley Coal Co. v. Patting*, 112 Ill. App. 4; s. c. aff'd, 210 Ill. 342; 71 N. E. Rep. 371; *Aurora Boiler Works v. Colligan*, 115 Ill. App. 527; *Chicago &c. R. Co. v. Brooks*, 115 Ill. App. 5; *Chicago*

City R. Co. v. Leach, 104 Ill. App. 30; *Chicago &c. R. Co. v. Mikesell*, 113 Ill. App. 146; *Gardner-Wilmington Coal Co. v. Knott*, 115 Ill. App. 515; *Otstot v. Indiana &c. R. Co.*, 103 Ill. App. 136.

¹⁹ *Chicago &c. R. Co. v. White*, 209 Ill. 124; s. c. 70 N. E. Rep. 588.

²⁰ *Chicago City R. Co. v. Leach*, 208 Ill. 198; s. c. 70 N. E. Rep. 222; rev'g s. c. 104 Ill. App. 30.

²¹ *Chicago City R. Co. v. Leach*, 208 Ill. 198; s. c. 70 N. E. Rep. 222; rev'g s. c. 104 Ill. App. 30; *Chicago &c. R. Co. v. White*, 209 Ill. 124; s. c. 70 N. E. Rep. 588.

²² See generally: *Levins v. Bancroft &c. Co.*, 114 La. 105; s. c. 38 South. Rep. 72; *Atchison &c. Bridge Co. v. Miller*, 71 Kan. 13; s. c. 80 Pac. Rep. 18.

ants if they are in no way associated and if they are unacquainted with the duties of each other.²³ Thus it has been held that a section-hand working on the tracks of a railroad company under one foreman is not a fellow servant with a hostler employed by such company in another department and under another foreman.²⁴ And it has been held that an engineer and a coal miner were not fellow servants where they were not at the time of the injury directly co-operating with each other, and their usual duties did not bring them into habitual association.²⁵

§ 4978. Illustrations of what is Common Employment.²⁶

§ 4983. Persons Invited by the Servants of a Master to Assist Them.²⁷

§ 4987. Servant Inflicting the Injury when Acting Outside the Line of his Duty.—A master is not liable for an injury resulting to a servant through the negligent departure by fellow servants from the usual method in which the work in which he was engaged was performed.²⁸ In a case where the master was engaged in superintending the demolition of a building, and during his absence for an hour the workmen departed from the plan of the work which he was pursuing, and, to facilitate the work, battered a pier of the building with an iron pipe, so that the building fell down in a heap and injured the plaintiff, one of the workmen, it was held that the negligence, if any, was that of the employé's fellow servants, and the defendant was not responsible therefor.²⁹ In another case a servant engaged in driving a wagon carrying rock from an excavation was injured while waiting for his wagon to be unloaded, owing to the negligence of the foreman

²³ Illinois Third Vein Coal Co. v. Cioni, 115 Ill. App. 455; s. c. aff'd, 215 Ill. 583; 74 N. E. 751.

²⁴ Indiana &c. R. Co. v. Otstot, 113 Ill. App. 37; s. c. aff'd, 212 Ill. 429; 72 N. E. Rep. 387.

²⁵ Spring Valley Coal Co. v. Buzis, 115 Ill. App. 196; s. c. aff'd, 213 Ill. 341; 72 N. E. Rep. 1060.

²⁶ It is the holding of one case that a servant whose ordinary duties were to make repairs about the shops of his employer, and who, in the ordinary progress of the work in the shops, was called upon to repair a crane in one of them, not for the purpose of making the shop safe, but in order to carry on the usual work of the shop, was, while engaged in repairing the crane, although usually employed in another shop, a fellow servant with a com-

mon laborer working in the shop: Koszowski v. American Locomotive Co., 96 App. Div. (N. Y.) 40; s. c. 89 N. Y. Supp. 55. Two servants tamping the floor of a furnace, one of them holding a block of wood on the floor, and the other pounding it with a sledge hammer, are fellow servants: Wilkinson Co-Op. Glass Co. v. Dickinson, 35 Ind. App. 230; s. c. 73 N. E. Rep. 957.

²⁷ That a master will not be liable for injuries to a person called in to assist an employé having authority to engage assistance, see: Longa v. Stanley Hod Elevator Co., 69 N. J. L. 31; s. c. 54 Atl. Rep. 251.

²⁸ Gardner-Wilmington Coal Co. v. Knott, 115 Ill. App. 515.

²⁹ Beatty v. Weed, 186 Mass. 99; s. c. 70 N. E. Rep. 1008.

in charge of those unloading the stone, who was engaged at the time in operating the hoisting engine, in the absence of the regular engineer,—a work outside the scope of his duties. Here it was held that the servant and the foreman were fellow servants.³⁰

§ 4990. Servant Injured by Fellow Servant Outside of Working-Hours.³¹

§ 4996. General Rule that Servants of Different Masters are Not Fellow Servants.³²

§ 4997. Servant of Contractor and Servant of Proprietor.³³

§ 4998. Servants of Different Railway Companies.—The servants of a railroad operating its cars on the tracks of another company under a contract between the roads are not, in the absence of evidence of any agreement showing joint operation of the trains, fellow servants of the employés of the road owning the tracks.³⁴ In a case where a flagman at a railroad crossing occupied by several railroads was employed and paid by one of them, and was not advised of a traffic arrangement between his employer and the other roads by which they paid a portion of his wages, and he was directed by his employer to flag for all such

³⁰ *Randall v. Holbrook &c. Co.*, 95 App. Div. (N. Y.) 336; s. c. 88 N. Y. Supp. 681.

³¹ *Dishon v. Cincinnati &c. R. Co.*, 126 Fed. Rep. 194 (section-men crossing track through a train which has been opened, and injured by the train closing, held fellow servants with operatives of train, though the injuries were inflicted after the day's work had been finished).

³² *Wagner v. Boston Elevated R. Co.*, 188 Mass. 437; s. c. 74 N. E. Rep. 919; *Moran v. Carlson*, 95 App. Div. (N. Y.) 116; s. c. 88 N. Y. Supp. 520 (engineer of steam hoist for elevating building material operated under separate contract and employé of contractor on the building); *Mills v. Thomas Elevator Co.*, 54 App. Div. (N. Y.) 124; s. c. 66 N. Y. Supp. 398; s. c. aff'd, 172 N. Y. 660; 65 N. E. Rep. 1119 (operator of hod elevator company and employé on building); *Hopper v. Southern Exp. Co.*, 133 N. C. 375; s. c. 45 S. E. Rep. 771 (railroad station agent and employé of express company).

³³ *Norman v. Middlesex &c. Trac-tion Co.*, 71 N. J. L. 652; s. c. 60 Atl. Rep. 936 (servant of contractor for repair of railroad and servant of railroad company not fellow servants).

³⁴ *Chicago Terminal Transfer R. Co. v. Vandenberg*, 164 Ind. 470; s. c. 73 N. E. Rep. 990. But see *Looney v. Metropolitan R. Co.*, 24 App. (D. C.) 510, where it was held that the use of each other's tracks by street railways under contract with each other, as authorized by act of Congress authorizing certain street railway companies to contract with each other for the use of their respective routes, will be held an adoption by such companies of the appliances of each other for the running of their cars so far as is necessary for such use; and for that use the employés of the one become the employés of the other, and all the employés become the fellow employés of each other, so that one of such employés cannot recover for injuries resulting from the negligence of an employé in the service of another contracting company.

railroads, he was not a fellow servant of the employés of one of such participating railroads.³⁵

§ 4999. Servants of Different Contractors Engaged on the Same Work.³⁶

§ 5001. Servants of Stevedores and Servants of Other Employers.—In one case it was held that a longshoreman, loaned by one lighterage company to another, was not a fellow servant of the workmen of stevedores while on the lighter belonging to the lightermen to whom he was loaned, stowing freight being unloaded by the stevedores from a ship into the lighter, since these employés were not under the direction of one master, as required by the definition of a fellow servant.³⁷ In another case the conclusion was reached that a seaman and a derrick engineer were not fellow servants where the seaman was injured by the falling of a mast caused by its being struck by a bucket of ore being hoisted from the hold of the vessel by a derrick engineer employed by a different master from the owner of the vessel.³⁸ In another case it was held that a longshoreman engaged in loading a vessel was a fellow servant of the driver of a horse on the dock by which the merchandise was raised from a lighter to the vessel by means of a block and tackle, though the horse belonged to another person who had a general arrangement with the stevedores to supply horses when needed, and the driver was in the general employ of such persons.³⁹

§ 5004. When One Servant may Become, pro hac vice, the Servant of Another Master, so that the Servants of the Latter will be his Fellow Servants.⁴⁰

§ 5005. One Employer Lending his Servants to Another Employer.—In a case where a railroad company constructed a switch in the yards of a manufacturer, connecting the same with its main track, and every day, on the arrival of a certain train, sent it into the yards to take away cars loaded therein for shipment, it was held that the crew of this

³⁵ *Louisville &c. R. Co. v. Martin*, 113 Tenn. 266; s. c. 87 S. W. Rep. 418.

³⁶ *Grace & Hyde Co. v. Probst*, 208 Ill. 147; s. c. 70 N. E. Rep. 12 (carpenter's helper and employés of iron workers on building not fellow servants); *Dale v. Hill-O'Meara Const. Co.*, 108 Mo. App. 90; s. c. 82 S. W. Rep. 1092 (employé of subcontractor and employé of contractor not fellow servants); *Carlson v. White Star S. S. Co.*, 39 Wash. 394; s. c. 81 Pac. Rep. 838 (servants of lighterage company and ship's crew en-

gaged in unloading vessel were fellow servants).

³⁷ *Thornton v. Hogan*, 82 App. Div. (N. Y.) 500; s. c. 81 N. Y. Supp. 544.

³⁸ *Robinson v. Pittsburg Coal Co.*, 129 Fed. Rep. 324; s. c. 63 C. C. A. 258.

³⁹ *Breslin v. Sparks*, 97 App. Div. (N. Y.) 69; s. c. 89 N. Y. Supp. 627.

⁴⁰ *Laporte v. Pittsburg &c. R. Co.*, 209 Pa. 469; s. c. 58 Atl. Rep. 860 (car shifter employed by coke company to shift cars on side track of company a fellow servant with operatives of train delivering cars).

train while in the yards was not loaned to the manufacturer so as to make the members of the crew fellow servants with an employé of the manufacturer injured by the negligence of the crew.⁴¹

§ 5015. General Statements as to Who are Deemed Fellow Servants in Railway Service.—Generally speaking, the relation of fellow servant does not exist between employés engaged in operating the cars, locomotives, or trains of a railroad and servants not so engaged.⁴²

§ 5016. Doctrine that Trainmen upon Different Railway Trains are Fellow Servants of Each Other.⁴³—Under the doctrine of the main section the fellow-servant relation has been held to exist between the engineers of different trains, so as to relieve the railroad company from liability for injuries to an engineer received while leaning out of the cab window of his engine by coming in contact with another engine negligently placed in dangerous proximity to the track on which the injured engineer was passing.⁴⁴ The relation has been held to exist between the trainmen of one train which they had failed to protect and a trainman on the following train injured in a collision caused by a failure to take this precaution.⁴⁵

§§ 5020-5028. Trainmen and Employés Not Working on Trains.⁴⁶—Recent decisions hold that the fellow-servant relation does not exist between the foreman of a switching crew and the person handling the gates at a street crossing,⁴⁷ a brakeman employed on a freight train and a station porter working around a depot and unloading freight trains,⁴⁸ a flagman and trainmen on passing trains.⁴⁹ On the con-

⁴¹ *Harrington v. Erie R. Co.*, 79 App. Div. (N. Y.) 26; s. c. 79 N. Y. Supp. 930.

⁴² *Galveston & C. R. Co. v. McAdams*. — Tex. Civ. App. —; s. c. 84 S. W. 1076.

⁴³ See generally *Rosnev v. Erie R. Co.*, 135 Fed. Rep. 311; s. c. 68 C. C. A. 155; *Crosby v. Lehigh Valley R. Co.*, 137 Fed. Rep. 765.

⁴⁴ *Pittsburg & C. R. Co. v. Gipe*, 160 Ind. 360; s. c. 65 N. E. Rep. 1034.

⁴⁵ *Sutter v. New York & C. R. Co.*, 79 App. Div. (N. Y.) 362; s. c. 79 N. Y. Supp. 1106; *Quinn v. Galveston & C. R. Co.*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 395.

⁴⁶ That a train dispatcher is a vice-principal and not a fellow servant with train operatives, see: *Northern Pac. R. Co. v. Mix*, 121 Fed. Rep. 476; s. c. 57 C. C. A. 592; *Santa Fé Pac. R. Co. v. Holmes*, 136 Fed. Rep. 66; s. c. 68 C. C. A. 634;

Phinney v. Illinois Cent. R. Co., 122 Iowa 488; s. c. 98 N. W. Rep. 358; *Wallace v. Boston & C. R.*, 72 N. H. 504; s. c. 57 Atl. Rep. 913; *McHugh v. Manhattan R. Co.*, 179 N. Y. 378; s. c. 72 N. E. Rep. 312; rev'g s. c. 88 App. Div. (N. Y.) 554; 85 N. Y. Supp. 184; *Brommer v. Philadelphia & R. R. Co.*, 205 Pa. 432; s. c. 54 Atl. Rep. 1092; *Virginia & C. R. Co. v. Clowers*, 102 Va. 867; s. c. 47 S. E. Rep. 1003.

⁴⁷ *Chicago & A. R. Co. v. Wise*, 206 Ill. 453; 69 N. E. Rep. 500; aff'g s. c. 106 Ill. App. 174.

⁴⁸ *Gulf & C. R. Co. v. Elmore*, 35 Tex. Civ. App. 56; s. c. 79 S. W. Rep. 891.

⁴⁹ *Erickson v. Kansas City & C. R. Co.*, 171 Mo. 647; s. c. 71 S. W. Rep. 1022; *Louisville & C. R. Co. v. Martin*, 113 Tenn. 266; s. c. 87 S. W. Rep. 418.

troverted question whether a telegraph operator is a fellow servant with the trainmen it is the view of the supreme court of the United States that the negligence of a local telegraph operator and station agent of a railway company in observing and reporting by telegraph to the train dispatcher the movement of trains past his station, which causes the death of a fireman on such railway, without any fault or negligence of the train dispatcher, is the negligence of a fellow servant of the fireman, the risk of which the latter assumes.⁵⁰

§§ 5030-5037. **Conductor.**⁵¹—The conductors in charge of freight and construction trains and brakemen thereon are not generally regarded as fellow servants, so as to charge the brakeman with the results of the conductor's negligence in ordering a coupling to be made.⁵² It has been held that the conductor of a freight train is in charge or control of such train, although at the time he is temporarily absent, if nothing is done meanwhile contrary to his orders.⁵³ There is authority that a conductor of a passenger train is not a vice-principal, nor engaged in a different department of the master's service, in relation to a brakeman on a freight train, over whom he has no control, and with respect to whom he is charged with no duty of the master, but is a fellow servant with such brakeman.⁵⁴

§§ 5039-5058. **Engineer.**⁵⁵—Recent cases hold that the relation of fellow servant exists between the engineer and laborers on a construc-

⁵⁰ Northern Pac. R. Co. v. Dixon, 194 U. S. 338; s. c. 24 Sup. Ct. Rep. 683; 48 L. Ed. 1006.

⁵¹ That the conductor of a train and the trainmen thereon are not fellow servants, see: Rhodes v. Southern R. Co., 68 S. C. 494; s. c. 47 S. E. Rep. 689; Alabama Great Southern R. Co. v. Baldwin, 113 Tenn. 409; s. c. 82 S. W. Rep. 487; 67 L. R. A. 340. That a conductor is not the fellow servant of a fireman on the engine drawing the train, see: Howe v. Northern Pac. R. Co., 30 Wash. 569; s. c. 70 Pac. Rep. 1100; Virginia &c. R. Co. v. Bailey, 103 Va. 205; s. c. 49 S. E. Rep. 33.

⁵² Grout v. Tacoma Eastern R. Co., 33 Wash. 524; s. c. 74 Pac. Rep. 665; Alabama Great Southern R. Co. v. Baldwin, 113 Tenn. 409; s. c. 82 S. W. Rep. 487; 67 L. R. A. 340.

⁵³ Carroll v. New York &c. R., 182 Mass. 237; s. c. 65 N. E. Rep. 69.

⁵⁴ Louisville &c. R. Co. v. Dillard, 114 Tenn. 240; s. c. 86 S. W. Rep. 313.

⁵⁵ That the engineer and brakeman are fellow servants, see: Cleveland &c. R. Co. v. Shanower, 70 Ohio St. 166; s. c. 71 N. E. 279. *Contra*, Gulf &c. R. Co. v. Wilder, 33 Tex. Civ. App. 72; s. c. 75 S. W. Rep. 546. That fireman and engineer on same train are fellow servants, see: Sanks v. Chicago &c. R. Co., 112 Ill. App. 385; Shugart v. Atlanta &c. R., 133 Fed. Rep. 505; s. c. 66 C. C. A. 379; Baird v. New York &c. R. Co., 64 App. Div. (N. Y.) 14; s. c. 71 N. Y. Supp. 734; s. c. aff'd, 172 N. Y. 637; 65 N. E. Rep. 1113. That the engineer of one train and flagman of another are fellow servants, see: Miller v. Central R. Co., 69 N. J. L. 413; s. c. 55 Atl. Rep. 245; Conine v. Olympia Logging Co., 36 Wash. 345; s. c. 78 Pac. Rep. 932 (employé of logging train engaged in attaching logs to a cable to be dragged to camp by an engine is not fellow servant of engineer, where he is remote from and out of sight of the engineer, and there is no provision for signal-

tion train,⁵⁶ an engine wiper,⁵⁷ and the foreman of a switching crew.⁵⁸ The relation has been held not to exist between the engineer and the brakeman on another train,⁵⁹ nor between the engineer of a detached engine and the foreman of the water supply.⁶⁰ In regard to broken trains the courts of Ohio take a view different from that indicated in the main section. There it is held that the conductor of a train, being in control of the same and the other employes thereon, in the absence of rules or express authority to the contrary, is not deposed from such control by the accidental parting of the train, nor is the engineer thereby made superior in control of a brakeman who is with him on a section of such divided train.⁶¹ Under the Indiana statute making a railroad liable to an employé for injuries suffered by him while in its service, and resulting from the negligence of any person in the service of the railroad having charge of any locomotive engine or train, a railroad is liable for injuries to a conductor on a train caused by the negligence of the engineer in charge of the engine on the same train.⁶² The cases are not harmonious on the question whether the engineer and fireman on the same train are fellow servants. There is authority that a fireman, being subject to the orders of his engineer whom he is obliged to obey, is not imputed with the negligence of such engineer.⁶³ This position is particularly well fortified by statutes making a railroad company liable where the injury results from the negligence of a superior or one having the right to control the services of the party injured. In such a case a fireman may recover for injuries occasioned by the negligence of his engineer.⁶⁴

§§ 5062-5085. **Switchmen, Yardmen, Roundhouse-Men, etc.**⁶⁵—According to a decision of a subordinate court in Ohio a yardmaster en-

ing from the engine to advise such employé when it would start).

⁵⁶ *La Barre v. Grand Trunk Western R. Co.*, 133 Mich. 192; s. c. 94 N. W. Rep. 735; 10 Det. Leg. N. 146; *Overton v. McCabe & Steen*, 35 Tex. Civ. App. 133; s. c. 79 S. W. Rep. 861.

⁵⁷ *Streets v. Grand Trunk R. Co.*, 76 App. Div. (N. Y.) 480; s. c. 78 N. Y. Supp. 729; s. c. aff'd, 178 N. Y. 553; 70 N. E. Rep. 1109. But see *contra*, *Mullin v. Northern Pac. R. Co.*, 38 Wash. 550; s. c. 80 Pac. Rep. 814.

⁵⁸ *Chicago & C. R. Co. v. Wise*, 206 Ill. 453; s. c. 69 N. E. Rep. 500; aff'g s. c. 106 Ill. App. 174.

⁵⁹ *Morrison v. Northern Pac. R. Co.*, 34 Wash. 70; s. c. 74 Pac. Rep. 1064.

⁶⁰ *Stuber v. Louisville & C. R. Co.*, 113 Tenn. 305; s. c. 87 S. W. Rep. 411.

⁶¹ *Cleveland & C. R. Co. v. Shanower*, 70 Ohio St. 166; s. c. 71 N. E. Rep. 279.

⁶² *Pittsburgh & C. R. Co. v. Collins*, 163 Ind. 569; s. c. 71 N. E. Rep. 661.

⁶³ *Southern Indiana Ry. Co. v. Davis*, 32 Ind. App. 569; s. c. 69 N. E. Rep. 550.

⁶⁴ *Cheaves v. Southern R. Co.*, 82 Miss. 48; s. c. 33 South. Rep. 649; 34 South. Rep. 385.

⁶⁵ That hostler at roundhouse and his helper are fellow servants when engaged in similar duties, see: *Galveston & C. R. Co. v. Cloyd* (Tex. Civ. App.), 78 S. W. Rep. 43; *Cloyd v. Galveston & C. R. Co.*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 408;

gaged in the yards of a railroad company with other persons cleaning the yard is engaged in a different branch of service from an engineer operating a locomotive therein.⁶⁸ But the yardmaster in charge of switch yards of a railroad, who is subordinate to a general yardmaster, who is in turn subordinate to a trainmaster, and he to a superintendent, is not a vice-principal, but a fellow servant, in his relation to other employes engaged in switching in the yard.⁶⁷

§§ 5089-5098. Inspectors and Repairers of Cars and Locomotives.⁶⁸

—There is a holding that a yardmaster of a car manufacturing and repairing company, whose duty it is to receive and discharge cars, and to tell those in charge of incoming engines on which tracks to come, and also to warn the men working under the cars of the approach of trains, is a fellow servant of the men working under the cars.⁶⁹ It is held that a rule requiring brakemen to inspect the train does not impose the duty of inspection on the brakemen equally with the car inspectors, or constitute them fellow servants, and a failure to discover defects which might constitute negligence in the car inspectors does not necessarily establish contributory negligence on the part of the brakemen.⁷⁰

§§ 5101-5112. Section-Master, Section-Foreman, Section-Boss, Section-Man.⁷¹—It is the holding of one case that a railroad company,

Gulf & C. R. Co. v. Howard, 97 Tex. 513; s. c. 80 S. W. Rep. 229; rev'g s. c. 75 S. W. Rep. 803. That a subordinate yardmaster and fireman are fellow servants, see: *Pennsylvania Co. v. Fishack*, 123 Fed. Rep. 465; s. c. 59 C. C. A. 269; *Chicago & C. R. Co. v. Driscoll*, 207 Ill. 9; s. c. 69 N. E. Rep. 620; aff'g s. c. 107 Ill. App. 615 (a question for the jury whether an assistant yardmaster while giving an order to a switching crew on a stub switch is a fellow servant with the members of the crew).

⁶⁸ *New York & C. R. Co. v. Roe*, 25 Ohio Cir. Ct. R. 628.

⁶⁷ *Pennsylvania Co. v. Fishack*, 123 Fed. Rep. 465; s. c. 59 C. C. A. 269.

⁶⁸ *Marsh v. Lehigh Valley R. Co.*, 206 Pa. 558; s. c. 56 Atl. Rep. 52 (boiler inspector and fireman not fellow servants); *Fullmer v. New York & C. R. Co.*, 208 Pa. 598; s. c. 57 Atl. Rep. 1062 (inspector of air brakes at work under car a fellow servant of brakeman through whose negligence he is injured); *McDonald v. Michigan Cent. R. Co.*, 132

Mich. 372; s. c. 93 N. W. Rep. 1041; 9 Det. Leg. N. 700 (car inspector and conductor not fellow servants); *Louisville & C. R. Co. v. Lowe*, 118 Ky. 260; s. c. 80 S. W. Rep. 768; 25 Ky. L. Rep. 2317; 65 L. R. A. 122 (car inspector and hostler of switch engine not fellow servants).

⁶⁹ *State v. South Baltimore Car works*, 99 Md. 461; s. c. 58 Atl. Rep. 447.

⁷⁰ *Newton v. New York & C. R. Co.*, 96 App. Div. (N. Y.) 81; s. c. 89 N. Y. Supp. 23.

⁷¹ That the section boss is a vice-principal, see: *Illinois Cent. R. Co. v. Atwell*, 198 Ill. 200; s. c. 64 N. E. Rep. 1095; aff'g s. c. 100 Ill. App. 513; *International & C. R. Co. v. Tisdale*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 1063. That a section-man is a fellow servant with those in charge of passing train, see: *O'Connor v. Atchison & C. R. Co.*, 137 Fed. Rep. 503; *Swartz v. Great Northern R. Co.*, 93 Minn. 339; s. c. 101 N. W. Rep. 504.

having furnished its section crew with flags to be sent ahead to signal approaching trains of the presence of the crew has performed its whole duty, and it is not required to see that the flags are so sent ahead so as to make it liable for injuries to a section-hand caused by the failure of the foreman to do this, but his negligence in this respect will be regarded as that of a fellow servant.⁷² An employé engaged under the direction of an engineer in the work of shoveling snow is not regarded, as a matter of law, as a fellow servant with a section-foreman or his helper who is engaged in the work of throwing off ties from a railroad train.⁷³

§§ 5119-5123. **Master Mechanic, Division Superintendent, Roadmaster, etc.**⁷⁴—A division supervisor of bridges helping operate a derrick to load a car is a fellow servant of the employé he assists, so that any negligence of his in failing to anchor the derrick car whereby it was tipped over, and the other killed, was the negligence of a fellow servant under the rule exempting the master from liability for injuries thus occasioned.⁷⁵

§§ 5125-5147. **Various Other Illustrations In Railroad Service.**—The fellow-servant relation has been held to exist between the head and rear brakemen on freight trains⁷⁶ and between trainmen and employés on the train in course of transportation to or from their work.⁷⁷ It has been held not to exist between a freight brakeman and a fireman temporarily performing the duties of the engineer;⁷⁸ a track walker

⁷² Whittlesey v. New York & C. R. Co., 77 Conn. 100; s. c. 58 Atl. Rep. 459.

⁷³ Chicago & C. R. Co. v. Mikesell, 113 Ill. App. 146.

⁷⁴ Hamilton v. Michigan Cent. R. Co., 135 Mich. 95; s. c. 97 N. W. Rep. 392; 10 Det. Leg. N. 711 (inspector of roadbed not fellow servant with engineer); Missouri & C. R. Co. v. Keefe, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 679 (roadmaster discharging duty of keeping tracks clear of clinkers not a fellow servant with the brakeman); McDaniel v. Charleston & C. R. Co., 70 S. C. 95; s. c. 49 S. E. Rep. 2 (roadmaster in control of operations of wrecking train a fellow servant with the conductor of the train); La Barre v. Grand Trunk Western R. Co., 133 Mich. 192; s. c. 94 N. W. Rep. 735; 10 Det. Leg. N. 146 (assistant roadmaster in charge of unloading cars a vice-principal and not a fellow servant of section-men engaged in the work).

⁷⁵ Wagner v. New York & C. R. Co., 76 App. Div. (N. Y.) 552; s. c. 78 N. Y. Supp. 696.

⁷⁶ Higgins v. Atchison & C. R. Co., 70 Kan. 814; s. c. 79 Pac. Rep. 679.

⁷⁷ Baltimore & C. R. Co. v. Clapp, 35 Ind. App. 403; s. c. 74 N. E. Rep. 267; Baltimore & C. R. Co. v. Henderson, 31 Ind. App. 441; s. c. 68 N. E. Rep. 308 (section-men returning from their day's work on different hand-cars); Indianapolis & C. Co. v. Andis, 33 Ind. App. 625; s. c. 72 N. E. Rep. 145; Indianapolis & C. Co. v. Foreman, 162 Ind. 85; s. c. 69 N. E. Rep. 669. But see Illinois Cent. R. Co. v. Leiner, 202 Ill. 624; s. c. 67 N. E. Rep. 398; aff'g s. c. 103 Ill. App. 438, where it is held that a freight conductor, not on duty, but riding on one of the master's trains, on his way to his home, is not a fellow servant with servants who are operating the master's trains.

⁷⁸ Louisville & C. R. Co. v. Sullivan, 76 S. W. Rep. 525; s. c. 25 Ky. L. Rep. 854 (a holding that a brakeman

and the trainmen of a passing train;⁷⁹ a towerman and the operators of trains running over the crossing.⁸⁰ It is the general view that the motorman and conductor of a street car are fellow servants,⁸¹ and decisions are not wanting that hold that this relation exists between the conductor of one car and the motorman⁸² or gripman of another car.⁸³ The relation has been held to exist between a conductor not on duty and riding on a car while ill without payment of fare and the driver of the street car.⁸⁴ Furthermore, the relation of fellow servant has been held to exist between a car starter and a conductor,⁸⁵ so as to prevent recovery for injuries resulting from the car starter sending out a defective car bearing marks indicating its condition.⁸⁶

§§ 5151-5172. **Illustrations of the Fellow-Servant Doctrine in Mines and Mining, Quarries and Quarrying.**—The fellow-servant relation has been held to exist between the operator of a steam drill and his helper;⁸⁷ between an employé engaged in charging holes in rock with dynamite and exploding the same and an employé drilling the holes for the charges;⁸⁸ between a workman charged with the duty of preparing the blast and of giving notice that it was about to be exploded and the other members of his party at work in blasting operations;⁸⁹ between the engineer of a "coal tippie" and a "hooker";⁹⁰ between the employé at the mouth of the shaft and his fellow at the bottom of the shaft employed as "tub hustlers,"⁹¹ and between quarry

on a freight train is not a fellow servant of the fireman while the latter is temporarily performing the duties of the engineer).

⁷⁹ *Louisville & N. R. Co. v. Davis*, 115 Ky. 270; s. c. 71 S. W. Rep. 658; 24 Ky. L. Rep. 1415; *Erie R. Co. v. McCormick*, 24 Ohio Cir. Ct. R. 86.

⁸⁰ *Chicago & C. R. Co. v. Wise*, 106 Ill. App. 174; s. c. *affd*, 206 Ill. 453; 69 N. E. Rep. 500. Another case holds that a flagman employed by a railroad company and stationed at a street crossing, with the company's tracks on either side of him, necessarily assumes the risk incident to crossing such tracks in passing to and from his station, and until he has passed over them after his hours of work are over he remains a fellow servant with the employés running trains thereon, and cannot recover from the master for an injury due to their negligence: *O'Neil v. Pittsburg & C. R. Co.*, 130 Fed. Rep. 204.

⁸¹ *Houts v. St. Louis Transit Co.*, 108 Mo. App. 686; s. c. 84 S. W. Rep. 161.

⁸² *Stocks v. St. Louis Transit Co.*, 106 Mo. App. 129; s. c. 79 S. W. Rep. 1176.

⁸³ *Chicago R. Co. v. Leach*, 208 Ill. 198; s. c. 70 N. E. Rep. 222; *rev'd* s. c. 104 Ill. App. 30.

⁸⁴ *McLaughlin v. Interurban St. R. Co.*, 101 App. Div. (N. Y.) 134; s. c. 91 N. Y. Supp. 883.

⁸⁵ *Sams v. St. Louis & C. R. Co.*, 174 Mo. 53; s. c. 73 W. Rep. 686; 61 L. R. A. 475. *Contra*, *Quinn v. Brooklyn Heights R. Co.*, 91 App. Div. (N. Y.) 489; s. c. 86 N. Y. Supp. 883.

⁸⁶ *Shaw v. Manchester St. R.*, 73 N. H. 65; s. c. 58 Atl. Rep. 1073.

⁸⁷ *Livengood v. Joplin-Galena Consol. Lead & C. Co.*, 179 Mo. 229; s. c. 77 S. W. Rep. 1077.

⁸⁸ *Hoe v. Boston & C. R. Co.*, 187 Mass. 67; s. c. 72 N. E. Rep. 341.

⁸⁹ *Kelly Island Lime & C. Co. v. Pachuta*, 69 Ohio St. 462; s. c. 69 N. E. Rep. 988. But see *Hjelm v. Western Granite Contracting Co.*, 94 Minn. 169; s. c. 102 N. W. Rep. 384.

⁹⁰ *Froelich v. Toledo & C. R. Co.*, 24 Ohio Cir. Ct. R. 359.

⁹¹ *Jackson v. Lincoln Min. Co.*, 106

tagmen and employés engaged in moving stone.⁹² The relation has been held not to exist between miners and engineers operating cages,⁹³ between superintendents and mine workers;⁹⁴ between a furnace keeper at the air shaft and a track layer in the mine,⁹⁵ and between an employé charged with the duty of locating "missed shots" and a driller.⁹⁶ So, generally, mine-foremen and bosses having entire control of men, with the right to employ and discharge, and select the places for work, are regarded as vice-principals and not as fellow servants;⁹⁷ and they will retain this character, though at the time of an accident they may be engaged in operative work along with the men.⁹⁸ The status of such an employé is not altered by the fact that there is a general superintendent who has supervision over him.⁹⁹ It is the holding of one court that the foreman of one shift of men alternating with others in working in a mine is a fellow servant with the members of the other shifts, and the master is not liable for an injury to one of the men caused by the negligence of the foreman of the preceding shift.¹⁰⁰

§§ 5176-5198. **Illustrations of the Fellow-Servant Doctrine in Shipping and Navigation.**—The fellow-servant relation has been held to exist between a kitchen boy and a ship's carpenter;¹⁰¹ between an employé on a pile driver and the captain of the tug towing the same;¹⁰² between the operator of a marine derrick and a servant employed in loading the same;¹⁰³ between a captain of a vessel discharging an ordinary seaman's duty and a seaman injured by his negligence,¹⁰⁴ and between an engineer and an oiler in the engine room.¹⁰⁵ The relation

Mo. App. 441; s. c. 80 S. W. Rep. 727.

⁹² *O'Neal v. Clydesdale Stone Co.*, 207 Pa. 378; s. c. 56 Atl. Rep. 929.

⁹³ *Spring Valley Coal Co. v. Patting*, 210 Ill. 342; 71 N. E. Rep. 371; aff'g s. c. 112 Ill. App. 4; *Illinois Third Vein Coal Co. v. Cioni*, 215 Ill. 583; s. c. 74 N. E. Rep. 751; aff'g s. c. 115 Ill. App. 455.

⁹⁴ *Turrentine v. Wellington*, 136 N. C. 308; s. c. 48 S. E. Rep. 739; *Allen v. Bell*, 32 Mont. 69; s. c. 79 Pac. Rep. 582.

⁹⁵ *Angel v. Jellico Coal Min. Co.*, 115 Ky. 728; s. c. 74 S. W. Rep. 714; 25 Ky. L. Rep. 108.

⁹⁶ *Poorman Silver Mines v. Devling*, — Colo. —; s. c. 81 Pac. Rep. 252; *Hooe v. Boston & C. R. Co.*, 187 Mass. 67; s. c. 72 N. E. Rep. 341.

⁹⁷ *Mahoney v. Bay State Pink Granite Co.*, 184 Mass. 287; s. c. 68 N. E. Rep. 234; *Borgerson v. Cook-*

Stone Co., 91 Minn. 91; s. c. 97 N. W. Rep. 734.

⁹⁸ *Consolidated Coal Co. v. Fleischbein*, 207 Ill. 593; s. c. 69 N. E. Rep. 963; aff'g s. c. 109 Ill. App. 509; *Bane v. Irwin*, 172 Mo. 306; s. c. 72 S. W. Rep. 522.

⁹⁹ *Bane v. Irwin*, 172 Mo. 306; s. c. 72 S. W. Rep. 522.

¹⁰⁰ *Davis v. Trade Dollar Consol. Min. Co.*, 117 Fed. Rep. 122; s. c. 54 C. C. A. 636.

¹⁰¹ *The Esperanza*, 133 Fed. Rep. 1015.

¹⁰² *Belt v. Henry Du Bois' Sons Co.*, 97 App. Div. (N. Y.) 392; s. c. 89 N. Y. Supp. 1072.

¹⁰³ *Grams v. C. Reiss Coal Co.*, 125 Wis. 1; s. c. 102 N. W. Rep. 586.

¹⁰⁴ *Sievers v. Eyre*, 122 Fed. Rep. 734 (firing salute).

¹⁰⁵ *McCarron v. Dominion Atlantic R. Co.*, 134 Fed. Rep. 762.

has been held not to exist between winchmen and stevedores or their employés,¹⁰⁶ nor between laborers discharging a vessel and the foreman in charge of the work.¹⁰⁷

§§ 5202-5270. **Illustrations of the Fellow-Servant Doctrine In Other Cases.**—The fellow-servant relation has been held to exist between these employés:—A carpenter and a rubbish hauler;¹⁰⁸ the superintendent of an electric plant testing the operation of a dynamo and a repairman working upon the wires of the plant;¹⁰⁹ a bell-boy in a hotel and the hotel elevator boy;¹¹⁰ an elevator man running an elevator up and down the shaft to enable a janitor to clean the shaft from the top of the cage and the janitor so employed;¹¹¹ the engineer in a mill and employés working in the same room with him;¹¹² the builders of a material hoist and one employed to assist in its operation;¹¹³ the operators of a derrick on a building in course of construction and a mason's helper employed thereon;¹¹⁴ a machine repairer and a roustabout in the shop;¹¹⁵ a millwright and the engineer,¹¹⁶ and other workmen in the mill;¹¹⁷ the head sawyer operating the carriage of a circular saw and the edger men engaged in managing the saws for edging the lum-

¹⁰⁶ *The City of San Antonio*, 135 Fed. Rep. 879; *The Gladestry*, 128 Fed. Rep. 591; s. c. 63 C. C. A. 198; aff'g s. c. 124 Fed. Rep. 112; *The Elton*, 131 Fed. Rep. 562. In support of contrary view which makes these employés fellow servants, see: *Tydeman v. Prince Line*, 102 App. Div. (N. Y.) 279; s. c. 92 N. Y. Supp. 446. In one case a servant was employed at the time of his injury by a lighterage company, transporting sugar to the dock of defendant sugar refining company, and in such work a winch belonging to the refining company, operated by steam and an engineer furnished by it, was used by the lighterage company, which paid the refining company an agreed price per hour for such use. He was injured by the negligence of such engineer. It was held that, though the refining company was in a measure interested in the work, the engineer, under such circumstances, was the injured servant's fellow servant, for whose negligence the refining company was not liable: *Quinn v. National Sugar Refining Co.*, 102 App. Div. (N. Y.) 47; s. c. 92 N. Y. Supp. 95.

¹⁰⁷ *Ingham v. John B. Honor Co.*,

113 La. 1040; s. c. 37 South. Rep. 963.

¹⁰⁸ *Johnson v. Metropolitan St. R. Co.*, 104 Mo. App. 588; s. c. 78 S. W. Rep. 275.

¹⁰⁹ *Williams v. North Wisconsin Lumber Co.*, 124 Iowa 328; s. c. 102 N. W. Rep. 589.

¹¹⁰ *Kitchen Bros. Hotel Co. v. Dixon*, — Neb. —; s. c. 98 N. W. Rep. 816.

¹¹¹ *Tubelowish v. Lathrop*, 104 Ill. App. 82.

¹¹² *Deviny v. Planters' Oil Mill* (Miss.), 33 South. Rep. 492.

¹¹³ *Gittens v. William Porten Co.*, 90 Minn. 512; s. c. 97 N. W. Rep. 378.

¹¹⁴ *McQueeney v. Norcross*, 75 Conn. 381; s. c. 53 Atl. Rep. 780.

¹¹⁵ *Dickey v. Dickey*, 111 Mo. App. 304; s. c. 86 S. W. Rep. 909.

¹¹⁶ *Delory v. Blodgett*, 185 Mass. 126; s. c. 69 N. E. Rep. 1078; 64 L. R. A. 114.

¹¹⁷ *Consumers' Cotton Oil Co. v. Jonte*, 36 Tex. Civ. App. 18; s. c. 80 S. W. Rep. 847. But see *Lininger v. Westinghouse Air Brake Co.*, 210 Pa. 62; s. c. 59 Atl. Rep. 430, where it is held that the relation does not exist between the millwright and an oiler.

ber;¹¹⁸ a blacksmith's helper in a machine shop and a person working at an adjoining forge;¹¹⁹ a servant engaged in loading pieces of stone in a box attached to the arm of a derrick and one whose sole duty it is to observe when the box has been filled and to give notice to the engineer to elevate it;¹²⁰ a machine shop helper and an engine tester;¹²¹ a member of a pile-driving crew engaged in driving piles for the erection of bridge false work and a machinist employed by the same master to repair stationary engines located in the midst of the work on barges for hoisting material and driving piles in the progress of the general work,¹²² between an elevator operator and an envelope addresser.^{122a} The relation has been held not to exist between an elevator inspector and one whose duties required him to ride on the elevator,¹²³ nor between servants employed in digging a conduit and the masons engaged in constructing a conduit in the ditch,¹²⁴ nor between the head sawyer in a lumber mill and the tail sawyer,¹²⁵ nor between an employé whose duty it is to set "dogs" in a log to hold it firmly on the saw carriage and another employé whose duty it was to inspect the logs before they came to the carriage, for the purpose of removing spikes driven into the logs for rafting,¹²⁶ nor between the "sealer" of freight cars and an employé engaged in unloading cars,¹²⁷ nor between a "breaker" whose duty it was to load goods on trucks and the employé who wheeled the trucks from the car,¹²⁸ nor between a girl employed in a woolen mill to empty boxes in which the weavers threw empty bobbins and the weavers in the room,¹²⁹ nor between the foreman of a pile driver and an employé at work thereon and injured by the failure of such foreman to furnish a chock for the pile driver.¹³⁰

¹¹⁸ *Grant v. Keystone Lumber Co.*, 119 Wis. 229; s. c. 96 N. W. Rep. 535.

¹¹⁹ *Duff v. Willamette Iron & C. Works*, 45 Or. 479; s. c. 78 Pac. Rep. 363.

¹²⁰ *Shaw v. Bambrick-Bates Const. Co.*, 102 Mo. App. 666; s. c. 77 S. W. Rep. 96.

¹²¹ *Millett v. Puget Sound Iron & C. Works*, 37 Wash. 438; s. c. 79 Pac. Rep. 980.

¹²² *Atchison & E. Bridge Co. v. Miller*, 71 Kan. 13; s. c. 80 Pac. Rep. 18.

^{122a} *Zilver v. Robert Graves Co.*, 106 App. Div. (N. Y.) 582; s. c. 94 N. Y. Supp. 714.

¹²³ *Cudahy Packing Co. v. Anthes*, 117 Fed. Rep. 118; s. c. 54 C. C. A. 504.

¹²⁴ *Eichholz v. Niagara Falls & C.*

Power & C. Co., 68 App. Div. (N. Y.) 441; s. c. 73 N. Y. Supp. 842; s. c. aff'd, 174 N. Y. 519; 66 N. E. Rep. 1107.

¹²⁵ *Hendricks v. Lesure Lumber Co.*, 92 Minn. 318; s. c. 99 N. W. Rep. 1125; 100 N. W. Rep. 638.

¹²⁶ *Covington Sawmill & C. Co. v. Clark*, 116 Ky. 461; s. c. 76 S. W. Rep. 348; 25 Ky. L. Rep. 694.

¹²⁷ *Missouri & C. R. Co. v. Hutchens*, 35 Tex. Civ. App. 343; s. c. 80 S. W. Rep. 415.

¹²⁸ *Missouri & C. R. Co. v. Hutchens*, 35 Tex. Civ. App. 343; s. c. 80 S. W. Rep. 415.

¹²⁹ *Mayfield Woolen Mills v. Frazier*, 80 S. W. Rep. 456; s. c. 25 Ky. L. Rep. 2263.

¹³⁰ *Swanson v. Oakes*, 93 Minn. 404; s. c. 101 N. W. Rep. 949.

§ 5280. **Negligence of Person to whose Orders the Injured Person was Bound to and Did Conform Within the Employer's Liability Statutes.**—The Indiana statute predicates liability on the condition indicated. As the statute is construed in that State it must appear that the servant was obeying some special order or direction of the person to whose order he was bound to conform when injured. It is not enough to show that he was performing his general duties. The statute is without application to orders which are as broad as the whole service.¹³¹ The servant giving the order must have had authority to issue such an order.¹³² No recovery can be had where the employé is injured while conforming to the order or direction of one employé and his injury is caused by the negligence of another employé who had no such authority.¹³³ Under this statute an employé who, as an incident to the execution of an order of a superior, goes to a place of danger is deemed to be at such place in conformity to the order of the superior.¹³⁴ The Indiana statute is so framed that it is without application unless the master is a corporation.¹³⁵ A complaint under this statute has met with judicial approval which alleged that the defendant's superintendent of wreckage, to whom was delegated the authority to control the work of clearing away wreckage, had full power to order and control the defendant's servants, including the plaintiff; that the plaintiff conformed to such orders, and was at the time of his injuries performing his duties in obedience thereto; and that the plaintiff's injuries were caused wholly by reason of the negligence of the superintendent in failing to use a derrick to hoist a car bolster which was too heavy to be loaded by hand, and in ordering the plaintiff, with other employés, to take hold of such car bolster and load the same, and in failing to warn the plaintiff of the danger, of which the plaintiff did not know.¹³⁶

§ 5281. **Negligence of Persons Engaged in Superintendence.**—Under the New York employers' liability act an employer is liable for the negligence of a foreman whose principal duty is that of superintendence to the same extent that he would be liable at common law for his own personal negligence.¹³⁷

¹³¹ Clear Creek Stone Co. v. Carmichael, — Ind. App. —; s. c. 73 N. E. Rep. 935; Indiana Mfg. Co. v. Burkirk, 32 Ind. App. 414; s. c. 68 N. E. Rep. 925; Southern Indiana R. Co. v. Harrell, 161 Ind. 689; s. c. 68 N. E. Rep. 262; 63 L. R. A. 460; rev'g s. c. 66 N. E. Rep. 1016.

¹³² Muncie Pulp Co. v. Davis, 162 Ind. 558; s. c. 70 N. E. Rep. 875.

¹³³ Indianapolis & C. R. Co. v. Foreman, 162 Ind. 85; s. c. 69 N. E. Rep. 669.

¹³⁴ Clear Creek Stone Co. v. Carmichael, — Ind. App. —; s. c. 73 N. E. Rep. 935.

¹³⁵ Acme Bedford Stone Co. v. McPhetridge, 35 Ind. App. 79; s. c. 73 N. E. Rep. 838; Ft. Wayne Gas Co. v. Nieman, 33 Ind. App. 178; s. c. 71 N. E. Rep. 59.

¹³⁶ Baltimore & C. R. Co. v. Hunsucker, 33 Ind. App. 27; s. c. 70 N. E. Rep. 556.

¹³⁷ Hayward v. Key, 138 Fed. Rep. 34.

§ 5282. Who are "Engaged in Superintendence" within the Meaning of these Statutes.—A superior servant may be charged with superintendence though he has over him a general superintendent.¹³⁸ These employés have been deemed to be "engaged in general superintendence":—A foreman in charge of a gang of men engaged in unloading stone from wagons and as such gave orders for the prosecution of the work;¹³⁹ a foreman whose duties were to direct drillers where to drill holes and to set off the blasts and who had immediate control of the work and of the men with authority to discharge;¹⁴⁰ a foreman in a tailoring establishment having charge of cloth-cutting machines with authority to set the operatives to work;¹⁴¹ the superintendent of a derrick negligent in failing to guy the derrick in front after his attention had been called to the necessity for this precaution;¹⁴² a yard-master in control of cars in a yard whose orders to the switching crew are obeyed.¹⁴³ In a case where the negligence complained of consisted in starting a hoisting engine under the existing circumstances, and not in the manner in which the engine was started, it was held that the decision of the superintendent that the engine should be started was an act of superintendence, for which the master was responsible under the employers' liability act, although the superintendent also did the manual work of setting the engine in motion.¹⁴⁴

§ 5283. Who Not "Engaged in Superintendence" within the Meaning of these Statutes.—These persons have been held not to be "engaged in superintendence" within the meaning of the statute:—The engineer of a steam shovel with reference to his fireman;¹⁴⁵ the conductor of a street car in directing a conductor off duty as to the seat he should occupy;¹⁴⁶ an employé whose duty it is to signal another employé in charge of a crane to operate the crane, and who gives directions for the carrying out of the orders of a superior;¹⁴⁷ a railroad

¹³⁸ *McBride v. New York Tunnel Co.*, 101 App. Div. (N. Y.) 448; s. c. 92 N. Y. Supp. 282.

¹³⁹ *Randall v. Holbrook & Co. Contracting Co.*, 95 App. Div. (N. Y.) 336; s. c. 88 N. Y. Supp. 681.

¹⁴⁰ *McBride v. New York Tunnel Co.*, 101 App. Div. (N. Y.) 448; s. c. 92 N. Y. Supp. 282.

¹⁴¹ *Braunberg v. Solomon*, 102 App. Div. (N. Y.) 330; s. c. 92 N. Y. Supp. 506.

¹⁴² *Bellegarde v. Union Bag & Co.*, 41 Misc. (N. Y.) 106; s. c. 83 N. Y. Supp. 925; s. c. aff'd, 90 App. Div. (N. Y.) 577; 86 N. Y. Supp. 72.

¹⁴³ *Brady v. New York & C. R. Co.*, 184 Mass. 225; s. c. 68 N. E. Rep. 227.

¹⁴⁴ *McPhee v. New England Structural Co.*, 188 Mass. 141; s. c. 74 N. E. Rep. 303.

¹⁴⁵ *Freeman v. Sloss Sheffield Steel & Co.*, 137 Ala. 481; s. c. 34 South. Rep. 612.

¹⁴⁶ *McLaughlin v. Interurban St. R. Co.*, 101 App. Div. (N. Y.) 134; s. c. 91 N. Y. Supp. 883.

¹⁴⁷ *Quinlan v. Lackawanna Steel Co.*, 107 App. Div. (N. Y.) 176; s. c. 94 N. Y. Supp. 942.

conductor under rules which required him to run his train in conformity to orders of the train dispatcher.¹⁴⁸

§ 5285. **Negligence of Person Having Charge or Control of Any Car, Train, Locomotive, etc., on a Railway.**—The Alabama statute is construed not to apply to a fireman moving the engine under command of the engineer, at work under the engine, so as to make the railroad company liable to the engineer for injuries due to the fireman's misunderstanding these orders.¹⁴⁹ A pile driver consisting of a steam engine placed on a flat car at one end and a driver used in raising the hammer at the other end, all forming one machine, capable of self-propulsion by means of a sprocket wheel on the axle under the boiler, connected by a chain with the engine, the chain being removed while driving a pile, is not a "locomotive engine" within the meaning of the Indiana statute.¹⁵⁰

§ 5285a. **Negligence of Any Person Having Charge of "Any Part of the Track of a Railway."**—Under a statute making a master liable for negligence of persons having these duties it is held not essential that the defective track occasioning injury to a brakeman should be finished or in charge of the regular section foreman. It is sufficient if the track has reached such a stage of construction as to become "the track of the railway" and has been adopted for use, though in charge of a construction foreman instead of a section foreman.¹⁵¹

§ 5286. **Negligence of Person Having Charge or Control of Any Signal, Points, Switch, etc.**—A brakeman required to place and keep one or more red lights at the end of a train is in charge of a signal within the meaning of a statute making a railway company liable for personal injury suffered by an employé because of the negligence of an employé in charge of a signal.¹⁵²

§ 5287. **Negligence of Person Having Charge or Control of Any Switch-Yard.**—A statute making a railroad company liable for the negligence of a person having charge or control of a switch-yard is inapplicable in a case of injury due to the negligence of an employé in charge of a switch.¹⁵³

§ 5288. **Defects in Ways, Works, Machinery, or Plant.**¹⁵⁴

¹⁴⁸ Crosby v. Lehigh Valley R. Co., 137 Fed. Rep. 765.

¹⁴⁹ Louisville & C. R. Co. v. Goss, 137 Ala. 319; s. c. 34 South. Rep. 1007.

¹⁵⁰ Jarvis v. Hitch, 161 Ind. 217; s. c. 67 N. E. Rep. 1057.

¹⁵¹ Southern R. Co. v. Howell, 135 Ala. 639; s. c. 34 South. Rep. 6.

¹⁵² Chicago & C. R. Co. v. Wicker, 34 Ind. App. 215; s. c. 72 N. E. Rep. 614.

¹⁵³ Indianapolis & C. R. Co. v. Foreman, 162 Ind. 85; s. c. 69 N. E. Rep. 669; Indianapolis & C. Transit Co. v. Andis, 33 Ind. App. 625; s. c. 72 N. E. Rep. 145.

¹⁵⁴ A statute predicating liability

§ 5289. **Liability for Injuries Resulting from the Wanton, Willful, or Intentional Misconduct of an Employé.**—The words wanton, willful, or intentional misconduct in a statute using these words are held to mean the conscious failure to use reasonable care to avoid the injury after discovering the servant's danger.¹⁵⁵

§ 5292. **Under the Florida Code.**—The Florida statute¹⁵⁶ limits the rule that an employé cannot recover for the injury occasioned by the negligence of a fellow servant to cases where the person injured is guilty of contributory negligence, and the word "employé" as used means such an employé as would be a fellow servant under the rules.¹⁵⁷

§ 5294. **Under the Iowa Code.**—It has been held that a railroad construction company using a temporary track along the line of the grade for the handling of dump cars was engaged in "operating a railway" within the meaning of the statute.¹⁵⁸ Another case holds that a servant employed by a railroad company in unloading rails from a car in a repair train by means of a cable is also connected in his employment with the "use and operation" of a railway.¹⁵⁹ The Missouri courts have held the Iowa statute without application to members of a bridge gang engaged in loading a standing train,¹⁶⁰ and to servants employed in the reconstruction of an abandoned railway track.¹⁶¹ A Federal court has held that the statute does not alter the character of the relation between the railroad company and the injured person, nor the rules of evidence appropriate to such relation upon an issue as to negligence.¹⁶²

§ 5299. **Under the Minnesota Code.**—The statute of this State is binding upon a company operating a railroad in connection with its mining business, though not carrying passengers or freight.¹⁶³ The

of the master on defects of this character is plainly inapplicable where there is no evidence that the place where the injured employé was working was defective or any appliances were out of order or that any precaution was omitted by the master that was possible to protect such employé in the performance of his work: *McHugh v. Manhattan Ry. Co.*, 88 App. Div. (N. Y.) 554; s. c. 85 N. Y. Supp. 184.

¹⁵⁵ *Alabama Great Southern R. Co. v. Williams*, 140 Ala. 230; s. c. 37 South. Rep. 255.

¹⁵⁶ Florida Acts 1891, p. 114, c. 4071, § 3.

¹⁵⁷ *Louisville & C. R. Co. v. Wade*,

46 Fla. 197; s. c. 35 South. Rep. 863.

¹⁵⁸ *Mace v. H. A. Boedker & Co.*, 127 Iowa 721; s. c. 104 N. W. Rep. 475.

¹⁵⁹ *Williams v. Iowa Cent. R. Co.*, 121 Iowa 270; s. c. 96 N. W. Rep. 774.

¹⁶⁰ *Williams v. Chicago & C. R. Co.*, 106 Mo. App. 61; s. c. 79 S. W. Rep. 1167.

¹⁶¹ *Mitchell v. Wabash R. Co.*, 97 Mo. App. 411; s. c. 76 S. W. Rep. 647.

¹⁶² *Chicago & C. R. Co. v. O'Brien*, 132 Fed. Rep. 593; s. c. 67 C. C. A. 421.

¹⁶³ *Kline v. Minnesota Iron Co.*, 93 Minn. 63; s. c. 100 N. W. 681.

act of sorting and discarding waste material from the coal by the fireman while firing the engine is held to be work in connection with the operation of a railroad within the statute.¹⁶⁴ This statute has been construed to warrant a recovery for injuries to a carpenter struck by a moving train while he was standing at his work on a railroad warehouse adjoining the track, as these injuries were from a risk or hazard peculiar to the operation of a railroad.¹⁶⁵

§ 5300. **Under the Mississippi Constitution and Code.**—Here it is held that the employé's right to recover is not limited to cases where he is injured whilst executing at the very time of his injury some special command or order given by his superior officer, but he is entitled to recover if injured by the negligence of a superior officer, or a person having the right to direct his services, whether he is at the time obeying any special command, or engaged merely in the discharge of his ordinary duties.¹⁶⁶ The constitutional provision is held to be without application to an action founded on the negligence of the railroad company itself in not providing a safe roadbed.¹⁶⁷ A declaration was held to state a cause of action under the statute which alleged that the train on which the plaintiff, a brakeman, was injured, was under the direction and control of the conductor and engineer, who were his superior officers, and that while the plaintiff was between the rails to turn the angle cock and apply the air brakes to a heavy train on a down grade, as was his duty, the engineer suddenly, and without signal or warning to the plaintiff, violently backed the engine against the train, so as to cause a cowcatcher on the rear of the tender to strike the plaintiff, by reason of which his arm was caught between the cowcatcher and drawhead and crushed.¹⁶⁸

§ 5301. **Under the Missouri Statute.**—The statute of this State is not limited in its application to the servants of the railroad company actually engaged in the operation of trains thereon, but includes all servants whose work is directly necessary for the running of trains over the track, and hence includes section-hands engaged in repairing the road,¹⁶⁹ and section-hands riding on hand-cars in the prosecution of

¹⁶⁴ Swartz v. Great Northern R. Co., 93 Minn. 339; s. c. 101 N. W. 504.

¹⁶⁵ Bain v. Northern Pac. R. Co., 120 Wis. 412; s. c. 98 N. W. Rep. 241.

¹⁶⁶ Southern R. Co. v. Cheaves, 84 Miss. 565; s. c. 36 South. Rep. 691.

¹⁶⁷ Gulf &c. R. Co. v. Bussy, 82 Miss. 616; s. c. 35 South. Rep. 166.

¹⁶⁸ Moore v. Illinois Cent. R. Co.,

135 Fed. Rep. 67; s. c. 67 C. C. A. 541.

¹⁶⁹ Thompson v. Chappell, 91 Mo. App. 297; Callahan v. St. Louis &c. R. Co., 170 Mo. 473; s. c. 71 S. W. Rep. 208; 60 L. R. A. 249 (section-hand, stationed in street to warn the members of a section-gang when to throw ties taken from the railroad in a street and to warn pedes-

their work.¹⁷⁰

§ 5303. **Under the North Carolina Statute.**—The statute of this State allows a recovery for an injury to a servant by the negligence of a fellow servant while engaged in repairing a railroad bridge.¹⁷¹ It does not cover an injury to a servant assisting in the construction of a railroad at a point five or six miles from the completed track, and still further from the track on which trains were being operated.¹⁷² It is held to be without application to injuries sustained by the servant of an independent contractor of a railroad company by reason of the negligence of a fellow servant.¹⁷³

§ 5304. **Under the Ohio Statute.**—The effect of the Ohio statute is to divide all of the employes of a railroad company, with respect to those working in separate branches or departments, constructively into superiors and subordinates, the superiors being all those having authority over any co-employé whatever, and subordinates those having none. Under the decisions of the supreme court of that State separate trains are separate “branches or departments” within the meaning of the statute. Thus construed a railroad company is liable for injuries to or death of a fireman through the negligence of the engineer of another train having authority over his own fireman, although he is himself subject to the control of the conductor of his train.¹⁷⁴

§ 5307. **Under the Texas Statute.**—The Texas statute abrogating the fellow-servant doctrine in cases of injury to railroad employes through the negligence of fellow servants engaged in operating cars, locomotives, or trains¹⁷⁵ is constitutional,¹⁷⁶ and does not violate the commerce clause of the Federal Constitution, though enforced against a railroad engaged in interstate commerce at the time of an accident.¹⁷⁷ Logging railroads are “railroads” within the meaning of the statute.¹⁷⁸ The term “engaged in operating trains or cars” has been held to include

trains and to remove the ties from the street, injured by a tie negligently thrown by the gang without notification); *St. Louis Merchants' &c. R. Co. v. Callahan*, 194 U. S. 628; s. c. 24 Sup. Ct. Rep. 857; 48 L. Ed. 1157.

¹⁷⁰ *Rice v. Wabash R. Co.*, 92 Mo. App. 35; *Overton v. Chicago &c. R. Co.*, 111 Mo. App. 613; s. c. 86 S. W. Rep. 503.

¹⁷¹ *Sigman v. Southern R. Co.*, 135 N. C. 181; s. c. 47 S. E. Rep. 420.

¹⁷² *Nicholson v. Transylvania R. Co.*, 138 N. C. 516; s. c. 51 S. E. Rep. 40.

¹⁷³ *Avery v. Oliver*, 137 N. C. 130; s. c. 49 S. E. Rep. 91.

¹⁷⁴ *Kane v. Erie R. Co.*, 142 Fed. Rep. 682.

¹⁷⁵ *Texas &c. R. Co. v. Putman*, 120 Fed. Rep. 754; s. c. 57 C. C. A. 58; *Galveston &c. R. Co. v. McAdams*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 1076.

¹⁷⁶ *International &c. R. Co. v. Still*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 257.

¹⁷⁷ *Missouri &c. R. Co. v. Nelson*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 706.

¹⁷⁸ *Lodwick Lumber Co. v. Taylor*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 358.

employés engaged in loading flat cars and hauling the same to make a fill,¹⁷⁹ a section crew placing a hand-car on the track,¹⁸⁰ employés transporting ballast on a push-car for the repair of the track,¹⁸¹ employés operating locomotives in yards, at stations, roundhouses, or coal chutes,¹⁸² and the act of a railroad foreman in requiring the employés under him to run a hand-car on the time of a passenger train over the same track.¹⁸³ On the other hand, it has been held that the term "operating" is without application to a roundhouse hostler while on his way to take charge of a locomotive, but before he began to perform the act of operating the machinery,¹⁸⁴ or to employés taking rails from a car and laying them on ties and heeling them ready for the spikers.¹⁸⁵ Under a section of the statute defining fellow servants, it is held that employés engaged in cleaning and preparing an engine need not be in actual contact with each other, or engaged in cleaning the same wheel or piece, or each know exactly what the other is doing, in order to constitute them fellow servants.¹⁸⁶ A section foreman is entitled, under these statutes, to recover for injuries caused by the negligence of the workmen under his control.¹⁸⁷ Under the earlier statute making a railroad company liable for damages sustained by an employé while operating its locomotive through the negligence of another employé, though they be fellow servants, a company was held liable for injury to a fireman caused by negligence of the engineer in not keeping a lookout to see the condition of the track ahead such as an ordinarily prudent person would have kept under the circumstances.¹⁸⁸ The statute is devoted solely to the subject of fellow servants in the employ of railway companies and is without application to other lines of employment.¹⁸⁹ The neglect by the foreman of a bridge gang of his duty to see that the workmen under him performed their duty to leave a clear track for an approaching train is held to amount to a neglect of duty, which he owes, not as a fellow servant with such workmen, but as a vice-principal of the railroad company, and the

¹⁷⁹ *Texas Cent. R. Co. v. Pelfrey*, 35 Tex. Civ. App. 501; s. c. 80 S. W. Rep. 1036.

¹⁸⁰ *Houston &c. R. Co. v. Jennings*, 36 Tex. Civ. App. 375; s. c. 81 S. W. Rep. 822.

¹⁸¹ *Seery v. Gulf &c. R. Co.*, 34 Tex. Civ. App. 39; s. c. 77 S. W. Rep. 950; *Texas &c. R. Co. v. Webb*, 31 Tex. Civ. App. 498; s. c. 72 S. W. Rep. 1044.

¹⁸² *Gulf &c. R. Co. v. Howard*, 96 Tex. 582; s. c. 75 S. W. Rep. 805.

¹⁸³ *San Antonio &c. R. Co. v. Stevens*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 235.

¹⁸⁴ *Gulf &c. R. Co. v. Howard*, 97 Tex. 513; s. c. 80 S. W. Rep. 229; rev'g s. c. 75 S. W. Rep. 803.

¹⁸⁵ *Lakey v. Texas &c. R. Co.*, 33 Tex. Civ. App. 44; s. c. 75 S. W. Rep. 566.

¹⁸⁶ *Galveston &c. R. Co. v. Cloyd* (Tex. Civ. App.), 78 S. W. Rep. 43.

¹⁸⁷ *Galveston &c. R. Co. v. Perry*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 62.

¹⁸⁸ *Missouri &c. R. Co. v. Keaveney* (Tex. Civ. App.), 80 S. W. Rep. 387.

¹⁸⁹ *Consumers' Cotton Oil Co. v. Jonte*, 36 Tex. Civ. App. 18; s. c. 80 S. W. Rep. 847.

company will be liable to a workman injured through the negligence of such foreman in the performance of this duty.¹⁹⁰

§ 5308a. **Under the Virginia Constitution.**—It is held that the constitutional provision relaxing the fellow-servant doctrine as to railway employes is not to be strictly construed, but the true method of construction is to discover the intention of the framers of the constitution.¹⁹¹

§ 5309. **Under the Wisconsin Statute.**—A complaint has been held sufficient, under the statute, which alleged that the plaintiff was a switchman belonging to a crew of five men, and that it was the duty of the foreman of the gang before moving the train to test the air, and that signals were given to move the train, and that the foreman discovered that a switch was improperly set, when the plaintiff, in the performance of his duty, stepped from the train to adjust the switch, and that in passing across the track two hundred feet ahead of the cars, his foot was caught, and that the plaintiff signaled the foreman to stop, that the air failed to work, and that the foreman negligently failed to set the hand brakes, as was his duty, whereby the plaintiff was injured.¹⁹²

§ 5312. **Whether Statutes Imposing a Special Liability on Railway Companies Apply to Street Railway Companies.**¹⁹³

§ 5313. **Whether such Statutes Apply to Logging-Railways.**¹⁹⁴

§ 5316. **Contributory Negligence as a Defense under these Statutes.**¹⁹⁵

¹⁹⁰ Texas & P. R. Co. v. Carlin, 189 U. S. 354; s. c. 23 Sup. Ct. Rep. 585; 47 L. Ed. 849.

¹⁹¹ Virginia & C. R. Co. v. Clowers, 102 Va. 867; s. c. 47 S. E. Rep. 1003 (railroad company liable for injuries to engineer caused by the failure of a telegraph operator to transmit an order sent out from the train dispatcher's office in regard to the movement of trains).

¹⁹² Pope v. Great Northern R. Co., 94 Minn. 429; s. c. 103 N. W. Rep. 331.

¹⁹³ That statutes imposing a special liability on railroad companies do not apply to street railroad companies, see: Indianapolis & G. Rapid Transit Co. v. Andis, 33 Ind. App. 625; s. c. 72 N. E. Rep. 145; McLeod v. Chicago & C. R. Co., 125 Iowa 270; s. c. 101 N. W. Rep. 77; Sams v. St. Louis & C. R. Co., 174 Mo. 53; s. c. 73

S. W. Rep. 686; 61 L. R. A. 475; Godfrey v. St. Louis Transit Co., 107 Mo. App. 193; s. c. 81 S. W. Rep. 1230; Johnson v. Metropolitan St. R. Co., 104 Mo. App. 588; s. c. 78 S. W. Rep. 275. *Contra*, Savannah & C. R. v. Williams, 117 Ga. 414; s. c. 43 S. E. Rep. 751; 61 L. R. A. 249.

¹⁹⁴ That these statutes apply only to railroads engaged in general railroad business for the carriage of passengers and freight and are without application to private railroads operated in connection with a logging and lumber business, see: McKivergan v. Alexander & C. Co., 124 Wis. 60; s. c. 102 N. W. Rep. 332. But see *contra*, Lodwick Lumber Co. v. Taylor, —Tex. Civ. App. —; s. c. 87 S. W. Rep. 358.

¹⁹⁵ That contributory negligence is a defense under these statutes, see: Sievers v. Eyre, 122 Fed. Rep. 734.

PART FOUR.

CONTRIBUTORY NEGLIGENCE OF THE SERVANT.

[§§ 5325-5746.]

§ 5325. Contributory Negligence of Servant Defeats a Recovery.¹

§ 5326. Both Master and Servant at Fault, no Recovery by Servant.²—An instruction in a case of injuries caused by the breaking of a scaffold, in which the defendant claimed that the plaintiff was guilty of contributory negligence in overloading the scaffold, which told the jury that, if the plaintiff did so overload it and that this was the proximate cause of its giving way, the plaintiff could not recover, provided the scaffold was properly constructed and maintained, was held fatally defective because it was open to the construction that the plaintiff could not be guilty of contributory negligence unless the defendant was free from negligence.³

§ 5327. Negligence of Master After Discovering Peril of Servant Produced by Servant's Contributory Negligence.—Here the doctrine is well supported in the later cases, that the master may not escape liability, though the servant was guilty of contributory negligence if the master, after discovering the servant's negligence and peril, could have prevented the injury by the exercise of ordinary care.⁴ This

¹See generally: *Karczewski v. Wilmington City R. Co.*, — Del. —; s. c. 54 Atl. Rep. 746; *Little v. Southern R. Co.*, 120 Ga. 347; s. c. 47 S. E. Rep. 953; *Illinois Steel Co. v. Rolewicz*, 113 Ill. App. 312; *National Brass Mfg. Co. v. Rawlings*, 71 Kan. 246; s. c. 80 Pac. Rep. 628; *McGinn v. McCormick*, 109 La. 396; s. c. 33 South. Rep. 382; *Fay v. Chicago & C. R. Co.*, — Neb. —; s. c. 96 N. W. Rep. 638; *Steeple v. Panel & Co.*, 33 Wash. 359; s. c. 74 Pac. Rep. 475.

²In support of principle see: *Charging v. Toxaway Mills*, 70 S. C. 470; s. c. 50 S. E. Rep. 186; *Tomaczewski v. Dobson*, 208 Pa. 324; s. c. 57 Atl. Rep. 718; *Texas Cent. R. Co. v. Yarbo*, 32 Tex. Civ. App. 246; s. c. 74 S. W. Rep. 357; *St. Louis Southwestern R. Co. of Texas v. Arnold*,

— Tex. Civ. App. —; s. c. 87 S. W. 173.

³*Wadsworth v. Bugg*, 71 Ark. 501; s. c. 76 S. W. Rep. 549.

⁴*Alabama Great Southern R. Co. v. Williams*, 140 Ala. 230; s. c. 37 South. Rep. 255; *Louisville & C. R. Co. v. Lowe*, 118 Ky. 260; s. c. 80 S. W. Rep. 768; 25 Ky. L. Rep. 2317; *Davenport v. F. B. Dubach Lumber Co.*, 112 La. 943; s. c. 36 South. Rep. 812; *Payne v. Missouri Pac. R. Co.*, 105 Mo. App. 155; s. c. 79 S. W. Rep. 719; *Lassiter v. Raleigh & C. R. Co.*, 133 N. C. 244; s. c. 45 S. E. Rep. 570; *Smith v. Atlanta & C. R. Co.*, 132 N. C. 819; s. c. 44 S. E. Rep. 663; *Erie R. Co. v. McCormick*, 24 Ohio Cir. Ct. R. 86; *Burns v. Chronister Lumber Co.*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 163 (evidence

doctrine does not require the master to anticipate the negligence of his servant.⁵ But the master may be charged with this want of ordinary care where his failure to note the dangerous situation of the servant is due to an omission to supply himself with ordinary and well-recognized facilities for this purpose. Thus where an employé, while riding a railroad tricycle, was injured by being struck by an engine approaching from the rear without a headlight burning, it was held that the injured employé was entitled to recover, notwithstanding those in charge of the engine used every endeavor to avoid striking the plaintiff after discovering him on the track, if the negligent omission to have a headlight burning on the engine caused their failure sooner to discover the plaintiff and thereby avoid the collision.⁶ The doctrine does not apply in the case of servants discovered on a railroad track by the engineer of an approaching locomotive until he has good reason to believe that such employés will not get off the track.⁷

§ 5329. Servant held to the Exercise of Ordinary or Reasonable Care.—The employé is held only to the exercise of ordinary diligence

insufficient to raise issue of discovered peril). A brakeman whose duty it was, when his train went onto a siding, to lock a switch and to remain within ten feet of it, after his train went onto a siding retired to the caboose; and another train ran into the switch, which was open, whereby he was killed. It appeared that the engineer of the approaching train, running at a speed of forty miles per hour, could not have seen the standing train until within seventy or eighty yards of it, owing to a curve at that point. It was held that the doctrine of "last clear chance" was not applicable as against the railroad: *Holland v. Seaboard Air Line R. Co.*, 137 N. C. 368; s. c. 49 S. E. Rep. 359. In a case where a crossing flagman was struck by an engine backing over a crossing and killed, the evidence tended to show that the deceased was not on the track at all until the engine, which had previously been standing still just beyond the crossing, started to move, nor until the engineer approached the deceased so close that he was not within the range of vision of the operatives of the engine, when he suddenly stepped onto the track while flagging the driver of a team approaching the crossing. It was held that plaintiff was not entitled to recover, notwithstanding the decedent's con-

tributory negligence under this doctrine, it not appearing that the accident could have been avoided by the exercise of reasonable care by the engineer: *Koons v. Kansas City Suburban Belt R. Co.*, 178 Mo. 591; s. c. 77 S. W. Rep. 755.

⁵ *Illinois Cent. R. Co. v. Jones*, 118 Ky. 158; s. c. 80 S. W. Rep. 484; 26 Ky. L. Rep. 31.

⁶ *Payne v. Missouri Pac. R. Co.*, 105 Mo. App. 155; s. c. 79 S. W. Rep. 719.

⁷ *Evans v. Wabash R. Co.*, 178 Mo. 508; s. c. 77 S. W. Rep. 515. In one case plaintiff, employed to patrol a railroad track, built a fire near it, placed a white light on the track—a signal that it was clear—went to sleep lying on the ends of the ties, and was struck by a train. He testified that, if the engineer had been on the lookout, he could have discovered his presence, and stopped the train in time to avoid striking him. The engineer and fireman testified that they discovered the lantern, and whistled to have it removed, but did not discover plaintiff till they were within fifty or sixty feet, too late to avoid striking him. It was held that there was no evidence of negligence on the part of defendant: *Illinois Cent. R. Co. v. Mencer*, 80 S. W. Rep. 816; s. c. 25 Ky. L. Rep. 2250.

and care to prevent injury to himself;⁸ he is not required to exercise the highest degree of care.⁹ Where the servant is a person of less than average intelligence the degree of care required of him is such as men of his capacity and understanding generally exercise under like circumstances, and not such as men of average intelligence exercise.¹⁰

§ 5330. This Reasonable or Ordinary Care Defined and Explained.

—The measure of a servant's diligence is the probable conduct of a man of ordinary prudence under like circumstances, and if he fails to exercise such care and this failure contributes to or causes his injuries he cannot recover.¹¹ He is not required to use the best judgment and do the best thing under the circumstances; all that is asked is that he act as an ordinarily prudent man would have done.¹² The care intended is a care proportionate to the risk of the employment.¹³ Ordinarily this duty to exercise ordinary care to avoid the consequences of the negligence of another does not arise until such negligence is existing, or is apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence.¹⁴

⁸ *Central of Georgia R. Co. v. McClifford*, 120 Ga. 90; s. c. 47 S. E. Rep. 590; *Rock Island Sash & c. v. Pohlman*, 210 Ill. 133; s. c. 71 N. E. Rep. 428; aff'g s. c. 99 Ill. App. 670; *Erickson v. Monson Consol. Slate Co.*, 100 Me. 107; s. c. 60 Atl. Rep. 708; *Sours v. Great Northern R. Co.*, 88 Minn. 504; s. c. 93 N. W. Rep. 517; *Pressly v. Dover Yarn Mills*, 138 N. C. 410; s. c. 51 S. E. Rep. 69; *Turrentine v. Wellington*, 136 N. C. 308; s. c. 48 S. E. Rep. 739 (instruction held to sufficiently cover question of care required of servant where greater particularity had not been requested); *International & c. R. Co. v. Valandingham*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 847; *International & c. R. Co. v. Villareal*, 36 Tex. Civ. App. 532; s. c. 82 S. W. Rep. 1063; *Southern Kansas R. Co. v. Sage* (Tex. Civ. App.), 80 S. W. Rep. 1038. A motorman is not required to use more than ordinary care for his safety on the theory that his employer is a common carrier of passengers, and the motorman, being employed in such work, impliedly contracts to exercise the same degree of care that the law imposed on the carrier:

Cole v. St. Louis Transit Co., 183 Mo. 81; s. c. 81 S. W. Rep. 1138.

⁹ *Hester v. Jacob Dold Packing Co.*, 95 Mo. App. 16; s. c. 75 S. W. Rep. 695.

¹⁰ *Kasjeta v. Nashua Mfg. Co.*, 73 N. H. 22; s. c. 58 Atl. Rep. 874.

¹¹ *Southern R. Co. v. Howell*, 135 Ala. 639; s. c. 34 South. Rep. 6; *Wrightsville & c. R. Co. v. Lattimore*, 118 Ga. 581; s. c. 45 S. E. Rep. 453; *Florida Cent. & c. R. Co. v. Mooney*, 45 Fla. 286; s. c. 33 South. Rep. 1010; *Meily v. St. Louis & c. R. Co.*, 107 Mo. App. 466; s. c. 81 S. W. Rep. 639; *Loid v. J. S. Rogers Co.*, 68 N. J. L. 713; s. c. 54 Atl. Rep. 837; *Creech v. Wilmington Cotton Mills*, 135 N. C. 680; s. c. 47 S. E. Rep. 671; *Galveston & c. R. Co. v. Manns*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 254; *Jancko v. West Coast Mfg. & c. Co.*, 34 Wash. 556; s. c. 76 Pac. Rep. 78.

¹² *Baltimore & c. R. Co. v. Cavanaugh*, 35 Ind. App. 32; s. c. 71 N. E. Rep. 239.

¹³ *Wrightsville & c. R. Co. v. Lattimore*, 118 Ga. 581; s. c. 45 S. E. Rep. 453.

¹⁴ *Freeman v. Nashville & c. R. Co.*, 120 Ga. 469; s. c. 47 S. E. Rep. 931.

§ 5331. **A Care Correlative with That of the Master.**—On this subject one court has thus spoken:—"The relations that necessarily exist between master and servant are largely reciprocal, and the law imposes upon each of them the duty of using care, diligence, and caution. Men must use the senses with which they are endowed, and where one fails to do so, he alone must suffer the consequences, and he is not excused where he fails to discover danger, if he made no attempt to employ the faculties that he possessed."¹⁵

§ 5332. **Correlative Duty of Master and Servant with Regard to Hidden Defects and Dangers.**—Generally speaking, a servant has primarily the right to assume that the appliances and place to work furnished by his employer are reasonably safe, and he is not called upon to inspect them with great care to discover whether or not they are defective and dangerous, unless the danger is apparent on ordinary observation.¹⁶ Thus it has been held that a locomotive fireman had the right to assume that his employers would exercise reasonable care to furnish him a safe lantern, and it was not his duty to inspect it for hidden defects.¹⁷

§ 5333. **Obvious and Latent Dangers.**—Here the law holds the servant to the exercise of reasonable care in the use of his faculties to know and understand that which is apparent and obvious, and refuses him a recovery for injuries the result of a failure to use such care.¹⁸ The rule does not impose upon an electric lineman the duty to inspect for hidden defects in poles,¹⁹ nor does it require him to fasten a pole with guy ropes, braces, etc., before climbing it, unless the danger of proceeding otherwise is obvious.²⁰ So an employé engaged in mov-

¹⁵ Wiley, J., in *Baltimore & C. R. Co. v. Hunsucker*, 33 Ind. App. 27; s. c. 70 N. E. Rep. 556.

¹⁶ *Rock Island Sash & C. Works v. Pohlman*, 210 Ill. 133; s. c. 71 N. E. Rep. 428; aff'g s. c. 99 Ill. App. 670; *Barnett & C. Co. v. Schlapka*, 208 Ill. 426; s. c. 70 N. E. Rep. 343; aff'g s. c. 110 Ill. App. 672.

¹⁷ *Gulf & C. R. Co. v. Larkin*, 98 Tex. 225; 82 S. W. Rep. 1026; rev'g s. c. 80 S. W. Rep. 94.

¹⁸ *Wiggins Ferry Co. v. Hill*, 112 Ill. App. 475; *Brooks v. W. T. Joyce Co.*, 127 Iowa 266; s. c. 103 N. W. Rep. 91 (lumber pile); *Corbett v. American Screen Door Co.*, 133 Mich. 669; s. c. 95 N. W. Rep. 737; 10 Det. Leg. N. 305 (injuries from collapse of rack for storage of lumber that was obviously dangerous); *Blundell v. William A. Miller Elevator Mfg.*

Co., 189 Mo. 552; s. c. 88 S. W. Rep. 103; *Durell v. Hartwell & C.*, 26 R. I. 125; s. c. 58 Atl. Rep. 448 (injury to decorator thrown from staging one end of which projected into an elevator shaft and was struck by elevator in operation—danger obvious). The negligence of a master in permitting lubricating oil to accumulate on the factory floor is no ground for recovery for injuries sustained by a servant by slipping on the oil, the presence of the oil being obvious: *Yess v. Chicago Brass Co.*, 124 Wis. 406; s. c. 102 N. W. Rep. 932.

¹⁹ *Walsh v. New York & C. R. Co.*, 80 App. Div. (N. Y.) 316; s. c. 80 N. Y. Supp. 767; s. c. aff'd, 178 N. Y. 588; 70 N. E. Rep. 1111.

²⁰ *Walsh v. New York & C. R. Co.*, 80 App. Div. (N. Y.) 316; s. c. 80

ing safes, killed by the breaking of timber used therein, which was affected with dry rot, not observable from the outside, was held not charged with negligence in failing to discover the defects.²¹ In this connection it is proper to note the existence of a doctrine that, where the servant had equal means with the master of ascertaining the defective condition of appliances causing his injury, no recovery for such injuries can be had.²²

§ 5335. **Failure of Servant to Anticipate the Negligence of his Master.**—Where nothing dangerous is apparent to the servant in connection with his employment he has the right to presume that it is reasonably safe, and that he will be notified of special elements of danger not open to ordinary observation, but which are known to his employer.²³ It is another expression of the same doctrine to say that where machinery has been used with safety under given circumstances,

N. Y. Supp. 767; s. c. aff'd, 178 N. Y. 588; 70 N. E. Rep. 1111.

²¹ *Meehan v. Atlas Safe Moving &c. Co.*, 94 App. Div. (N. Y.) 306; s. c. 87 N. Y. Supp. 1031.

²² *Hobbs v. Bowie & Terhune*, 121 Ga. 421; s. c. 49 S. E. Rep. 285; *O'Brien v. Missouri &c. R. Co.*, 36 Tex. Civ. App. 528; s. c. 82 S. W. Rep. 319 (defective wrench).

²³ *Lebeau v. Dyerville Mfg. Co.*, 26 R. I. 34; s. c. 57 Atl. Rep. 1092; *E. E. Jackson Lumber Co. v. Cunningham*, 141 Ala. 206; s. c. 37 South. Rep. 445 (engineer entitled to rely on presumption that employer had provided a track reasonably safe for the running of trains). See generally *Momence Stone Co. v. Turrell*, 205 Ill. 515; s. c. 68 N. E. Rep. 1078; aff'g s. c. 106 Ill. App. 160; *Chicago &c. R. Co. v. Huff*, 104 Ill. App. 594; *Wilder v. Great Western Cereal Co.*, — Iowa —; s. c. 104 N. W. Rep. 434; *Kentucky Freestone Co. v. McGee*, 118 Ky. 306; s. c. 80 S. W. Rep. 1113; 25 Ky. L. Rep. 2211; *Burns v. Ruddock-Orleans Cypress Co.*, 114 La. 247; s. c. 38 South. Rep. 157; *Carter v. Fred W. Dubach Lumber Co.*, 113 La. 239; s. c. 36 South. Rep. 952; *Edgar v. New York &c. R. Co.*, 188 Mass. 420; s. c. 74 N. E. Rep. 911; *McCabe v. Montana Cent. R. Co.*, 30 Mont. 323; s. c. 76 Pac. Rep. 701 (presumption of proper construction of railroad); *St. Louis &c. R. v. Rea*, — Tex. —; s. c. 87 S. W. Rep. 324; rev'g s. c. 84 S. W. Rep. 428; *Hynson v. St. Louis &c. R. Co.*,

— Tex. Civ. App. —; s. c. 86 S. W. Rep. 928; *Missouri &c. R. Co. v. Hutchens*, 35 Tex. Civ. App. 343; s. c. 80 S. W. Rep. 415 (presumption that car door was safely attached). Where a superintendent personally takes control of a detail of the work, the servants performing that detail may, in the absence of obvious or known dangers, assume that it is being performed in a reasonably safe manner: *Meagher v. Crawford Laundry Mach. Co.*, 187 Mass. 586; s. c. 73 N. E. Rep. 853. Where a master called a servant on an upper floor to the elevator shaft, to speak to her, and she leaned out into the shaft, to answer the call, she had a right to presume that he would not move the elevator, then at a floor above her: *Guthrie v. Carney*, 86 S. W. Rep. 1126; s. c. 27 Ky. L. Rep. 861. The law does not require a miner, employed to operate a drill in a mine, to inspect the timbering or the condition of the rock above him, but justifies him in assuming that the master has performed his duty in making the place where he is directed to work reasonably safe, and proceeding with his work in reliance on that assumption, unless a reasonably prudent and intelligent man in the performance of his work would have learned facts from which he would have apprehended danger to himself: *Bunker Hill &c. Mining &c. Co. v. Jones*, 130 Fed. Rep. 813; s. c. 65 C. C. A. 363.

a servant using it is warranted in acting on the assumption that the master will fulfill his duty to see that the machinery can be used with safety, unless it is apparent to the servant that the master has failed to perform his duty.²⁴ But the servant cannot act on this presumption where it contradicts his knowledge and observation of existing conditions.²⁵ There is authority that a servant is not required to use ordinary care to ascertain whether the master has performed his duty of exercising ordinary care to furnish him with reasonably safe instrumentalities with which to perform his duties.²⁶ The principle governing in this section finds application in a case where an employer furnished water coolers out of which his employes could drink, and poison was placed in one of them for the purpose of cleansing it, without any notice to warn employes not to use the cooler. It was very properly held that an employe was not to be imputed with contributory negligence in drinking from one of these coolers where he was ignorant of the fact of the poison.²⁷ So a miner has the right to presume that the room to which he is sent to work is in a reasonably safe condition, until by the use of ordinary care he may discover the contrary.²⁸

§ 5336. Right to Rely on Statement of Master or of his Representative that Repair has been or will be made.²⁹—The servant, in relying on the master's promise to make these repairs, is not absolved from the duty of exercising due care for his safety under the dangerous circumstances by which he is surrounded.³⁰

²⁴ *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787; s. c. 49 S. E. Rep. 788.

²⁵ *Erie &c. Transp. Co. v. Gaines*, 112 Ill. App. 189; *Sykes v. St. Louis &c. R. Co.*, 88 Mo. App. 193; *Missouri &c. R. Co. v. Hutchens*, 35 Tex. Civ. App. 343; s. c. 80 S. W. Rep. 415.

²⁶ *Texas &c. R. Co. v. Hartnett*, 33 Tex. Civ. App. 103; s. c. 75 S. W. Rep. 809.

²⁷ *Geller v. Briscoe Mfg. Co.*, 136 Mich. 330; s. c. 99 N. W. Rep. 281; 11 Det. Leg. N. 31.

²⁸ *Diamond Block Coal Co. v. Cuthbertson* (Ind. App.), 67 N. E. Rep. 558. See also *Wilson v. Alpine Coal Co.*, 118 Ky. 463; s. c. 81 S. W. Rep. 278; 26 Ky. L. Rep. 337. So a miner has the right to rely on a mark made on the entry to the mine by the inspector, that the room was free from gas: *Mt. Nebo Anthracite Coal Co. v. Williamson*, 73 Ark. 530; s. c. 84 S. W. Rep. 779.

²⁹ That the servant has a right to rely on the statement of the master

or his representatives that repair has been or will be made, see: *Anderson v. Seropian*, 147 Cal. 201; s. c. 81 Pac. Rep. 521; *Lynch v. M. T. Stevens & Sons Co.*, 187 Mass. 397; s. c. 73 N. E. Rep. 478. The principle of the main section is illustrated by a case, where a defective step on a locomotive was discovered by the engineer and he informed his fireman, who had to use the step, of this fact and he told him that he would have the step repaired, and the fireman was injured by using the step after the locomotive had passed an intervening station at which car repairers were kept and the step could have been repaired and he supposed it had been repaired at this place. The fireman was not imputed with contributory negligence: *Gulf &c. R. Co. v. Garren* (Tex. Civ. App.), 72 S. W. Rep. 1028.

³⁰ *Louisville Hotel Co. v. Kaltenbrun*, 80 S. W. Rep. 1163; s. c. 26 Ky. L. Rep. 208; *Shemwell v. Owens-*

§ 5338. **General Notice of Danger.**³¹—The servant will be charged with knowledge of the danger where he has been warned against it,³² and in cases where the physical facts are such as to show that he knew or should have known of its existence.³³ It is the duty of the employé to avail himself of his opportunities to become familiar with his surroundings and note the location of places of special danger in his line of work. Thus where a railroad employé was injured by falling into a culvert in the freight yard of his master, though he had full opportunity prior thereto to acquaint himself with its position, it was held that he could not claim that, though he knew of its existence, he did not know exactly where it was, and that the master should have notified him of the danger before sending him out in the night to attend to his duties on an engine left directly over the culvert.³⁴ It has been held that the presence of a fellow employé in a doorway, apparently for the purpose of removing the door, and being actually engaged in doing so, is not notice to one coming there that the stairs inside the door have been removed, so as to make him negligent, as a matter of law, in not understanding this to be the case.³⁵

§ 5339. **Effect of Knowledge of the Danger on the Part of the Servant.**—Generally speaking, contributory negligence in the use of a defective appliance or in continuing to work in a defective or dangerous place will not be imputed to a servant merely because he knows of

boro & c. R. Co., 117 Ky. 556; s. c. 78 S. W. Rep. 448; 25 Ky. L. Rep. 1671; Crooker v. Pacific Lounge & Co., 34 Wash. 191; s. c. 75 Pac. Rep. 632; Johnson v. Anderson & c. Co., 31 Wash. 554; s. c. 72 Pac. Rep. 107.

³¹On the general proposition that the servant will not be imputed with contributory negligence unless he had knowledge, actual or constructive, of the defect causing his injury, see: Osborne v. Alabama Steel & c. Co., 135 Ala. 571; s. c. 33 South. Rep. 687; Central of Georgia R. Co. v. Price, 121 Ga. 651; s. c. 49 S. E. Rep. 683; Montgomery Coal Co. v. Barringer, 109 Ill. App. 185; Harp v. Cumberland Tel. & Teleg. Co., 80 S. W. Rep. 510; s. c. 25 Ky. L. Rep. 2133 (unexploded charge of dynamite concealed in mud and exploded by servant excavating hole for telephone pole without knowledge of its presence); Smith v. Minden Lumber Co., 114 La. 1035; s. c. 38 South. Rep. 821; Caven v. Bodwell Granite Co., 99 Me. 278; s. c. 59 Atl. Rep. 285; Gaudie v. Northern Lumber Co.,

34 Wash. 34; s. c. 74 Pac. Rep. 1009. While knowledge of a defect is not conclusive evidence of contributory negligence of a servant, yet when it appears the servant's cause of action must be considered in reference to his knowledge, and something must be shown to excuse or rebut the presumed assumption of risk: Cangois v. Dunn Worsted Mills, 25 R. I. 645; s. c. 57 Atl. Rep. 910.

³²Punkowski v. New Castle Leather Co., — Del. —; s. c. 57 Atl. Rep. 559; Schlemmer v. Buffalo & c. R. Co., 207 Pa. 198; s. c. 56 Atl. Rep. 417.

³³Mullen v. Metropolitan St. R. Co., 89 App. Div. (N. Y.) 21; s. c. 85 N. Y. Supp. 134; Missouri & c. R. Co. v. Barnes, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 1006 (lye vats).

³⁴Central of Georgia R. Co. v. Price, 121 Ga. 651; s. c. 49 S. E. Rep. 683.

³⁵Preuschoff v. B. Stroh Brewing Co., 132 Mich. 107; s. c. 92 N. W. Rep. 945; 9 Det. Leg. N. 549.

these defects, unless the danger therefrom is so apparent that a person of ordinary prudence would not encounter it.³⁶ The question is to be determined from the conduct of the employé, and cannot be adjudged from the mere fact alone that he knew of the defect by which he was injured.³⁷ Thus in an action for the death of a locomotive engineer, whose engine collided with cars that had escaped from the main track from a siding, it was held that the mere fact that he had continued in the service of the railroad company with knowledge that there was no derailing switch at the siding in question did not impute him with contributory negligence as a matter of law.³⁸ So in a case where the likelihood that a servant would be thrown through certain trap doors in a trestle on which a derrick was operated while winding a chain upon the derrick was so remote that no ordinary man could have foreseen it, the plaintiff's failure to close the doors before beginning such work was held not to impute him with contributory negligence, as a matter of law, and prevent a recovery for injuries sustained by his being thrown through such doors to a dock below because of a defect in the derrick.³⁹ New York⁴⁰ and Virginia⁴¹ have statutes which expressly provide that a servant's continuance in his employment with knowledge of the defective conditions in his surroundings will not impute him with contributory negligence, as a matter of law, but that the question is one for the jury.

³⁶ *Gibson v. Canadian Pac. Nav. Co.*, 1 Alaska 407; *Going v. Alabama Steel & Co.*, 141 Ala. 537; s. c. 37 South. Rep. 784; *Osborne v. Alabama Steel & Co.*, 135 Ala. 571; s. c. 33 South. Rep. 687; *Chicago Hair & Co. v. Mueller*, 106 Ill. App. 21; s. c. aff'd, 203 Ill. 558; 68 N. E. Rep. 51; *Riverton Coal Co. v. Shepherd*, 207 Ill. 395; s. c. 69 N. E. Rep. 921; *Baltimore & C. R. Co. v. Cavanaugh*, 35 Ind. App. 32; s. c. 71 N. E. Rep. 239; *Brinkmeier v. Missouri Pac. R. Co.*, 69 Kan. 738; s. c. 77 Pac. Rep. 586; *Depuy v. Chicago & C. R. Co.*, 110 Mo. App. 110; s. c. 84 S. W. Rep. 103; *Houts v. St. Louis Transit Co.*, 108 Mo. App. 686; s. c. 84 S. W. Rep. 161; *Viohl v. North Pac. Lumber Co.*, — Or. —; s. c. 80 Pac. Rep. 112; *Galveston & C. R. Co. v. Manns*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 254; *International & C. R. Co. v. Jourdan*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 266 (defective chain). Thus it has been held that the danger of walking on a slippery floor in a laundry was not so apparent and imminent that none but a

reckless person would have used the floor, where other employés were walking on it at the same time, and did not fall: *Louisville Hotel Co. v. Kaltenbrun*, 80 S. W. Rep. 1163; s. c. 26 Ky. L. Rep. 208.

³⁷ *Southern R. Co. v. Sittasen*, — Ind. App. —; s. c. 74 N. E. Rep. 898.

³⁸ *Jones v. Kansas City & C. R. Co.*, 178 Mo. 528; s. c. 77 S. W. Rep. 890.

³⁹ *Bernard v. Pittsburg Coal Co.*, 137 Mich. 279; s. c. 100 N. W. Rep. 396; 11 Det. Leg. N. 246.

⁴⁰ New York Laws 1902, p. 1750, c. 600, § 3. See also *McBride v. New York Tunnel Co.*, 101 App. Div. (N. Y.) 448; s. c. 92 N. Y. Supp. 282. Under this provision a servant was not barred of recovery as a matter of law because of his knowledge of the defect and his failure for two weeks after he knew of it to inform his employer, where there was evidence that the employer's superintendent had seen the defect prior to the accident: *Keating v. Coon*, 102 App. Div. (N. Y.) 112; s. c. 92 N. Y. Supp. 474.

⁴¹ Const. of Va., § 162 (Va. Code

§ 5340. Knowledge of Danger on the Part of the Servant Usually Makes the Question of his Contributory Negligence One for the Jury.⁴²

§ 5342. Precautions Against Known Dangers.⁴³

§ 5343. Forgetfulness of Known Dangers.⁴⁴—On the question whether a servant is to be charged with contributory negligence in forgetting the existence of a known danger, the jury may take into consideration the fact that he was absorbed with the work in hand at the time of the accident.⁴⁵ Furthermore the jury may take into consideration the fact, if proved, that the master compelled the servant to work continuously for such a length of time as to have dulled his faculties at the time of receiving the injuries.⁴⁶ One humane court addressing itself to this matter has said:—"The laws of humanity declare that every man, fit to be a member of a train crew, must have three meals, some rest, and eight hours' sleep a day."⁴⁷

1904, p. cclix), and Acts 1901-02, p. 335 (Va. Code 1904, p. 707, § 1294k), provides that a railroad employé's knowledge of defects in appliances shall not bar a recovery for injuries caused by such defects. See also *Norfolk & c. R. Co. v. Cheatwood*, 103 Va. 356; s. c. 49 S. E. Rep. 489.

⁴² See generally: *Hartrich v. Hawes*, 103 Ill. App. 433; s. c. *aff'd*, 202 Ill. 334; 67 N. E. Rep. 13; *Republic Iron & c. Co. v. Jones*, 32 Ind. App. 189; s. c. 69 N. E. Rep. 191; *Atchison & c. R. Co. v. Sledge*, 68 Kan. 321; s. c. 74 Pac. Rep. 1111 (question for jury whether defect in appliance was so obvious and danger therefrom so imminent that none but a reckless man would continue in the service); *Vant Hul v. Great Northern R. Co.*, 90 Minn. 329; s. c. 96 N. W. Rep. 789 (defective hammer).

⁴³ See generally: *Crane v. Chicago & c. R. Co.*, 124 Iowa 81; s. c. 99 N. W. Rep. 169 (engineer charged with contributory negligence in failing to adopt any precautionary measures to prevent injury from chemical fuses packed loosely in a box on his engine, and he should have known that the motion of the engine would cause the loose fuses to move around in the box); *Ward v. Connor*, 182 Mass. 170; s. c. 64 N. E. Rep. 968 (servant charged with contributory negligence in attempting to mend a belt without taking any precautions

to see whether machinery was liable to start while he was at work); *Donohoe v. Lonsdale Co.*, 25 R. I. 187; s. c. 55 Atl. Rep. 326 (female clerk charged with contributory negligence where she failed to examine seat to see whether it was safe before seating herself and she knew of its likelihood to fall when touched by a passerby); *St. Louis Southwestern R. Co. v. Barrett* (Tex. Civ. App.), 72 S. W. Rep. 884 (railroad employé loading cotton in car charged with negligence where he failed to nail cleats on gang plank to prevent slipping from its position).

⁴⁴ That servant will be charged with contributory negligence where injury is the result of forgetfulness or inattention to his duties, see: *Gaudet v. Stansfield*, 182 Mass. 451; s. c. 65 N. E. Rep. 850; *Langlois v. Dunn Worsted Mills*, 25 R. I. 645; s. c. 57 Atl. Rep. 910.

⁴⁵ *Republic Iron & c. Co. v. Jones*, 32 Ind. App. 189; s. c. 69 N. E. Rep. 191; *Viohl v. North Pac. Lumber Co.*, — Or. —; s. c. 80 Pac. Rep. 112.

⁴⁶ *Republic Iron & c. Co. v. Ohler*, 161 Ind. 393; s. c. 68 N. E. Rep. 901 (employé required to work continuously for forty-eight hours without sleep).

⁴⁷ *Dailey, J.*, in *Pennsylvania R. Co. v. McCaffrey*, 139 Ind. 430; s. c. 38 N. E. Rep. 67; 29 L. R. A. 104.

§ 5347. Contributory Negligence in Getting into Danger in Unlighted Places.—It is clear that a servant cannot recover for injuries caused by working in an insufficiently lighted place where the want of light is due to his own negligence in failing to use facilities that are at hand.⁴⁸ It has been held a question for the jury whether a lumber company's servant was guilty of contributory negligence in working in its drying kiln, where he was required to work rapidly, with a limited supply of light.⁴⁹

§ 5350. Contributory Negligence in Failing to Notify Employer of Danger or Defect.⁵⁰

§ 5352. Contributory Negligence of Servant Entrusted with Exclusive Duty of Keeping Ways, Works, Machinery, and Plant in Repair.⁵¹

§ 5353. Contributory Negligence in Violating Statutes.—It is the doctrine of one case that an employé cannot recover damages for an injury caused by his violation of a penal statute, though the employer may have directed such violation.⁵²

§ 5357. Doctrine of Proximate and Remote Cause Applied to Contributory Negligence of Servants.⁵³—The fact that a brakeman was

⁴⁸ *Anderson v. Forrester-Nace Box Co.*, 103 Mo. App. 382; s. c. 77 S. W. Rep. 486; *Earle v. Clyde S. S. Co.*, 103 App. Div. (N. Y.) 21; s. c. 92 N. Y. Supp. 839; rev'g s. c. 43 Misc. Rep. 535; 89 N. Y. Supp. 500; *Behsmann v. Waldo*, 38 Misc. (N. Y.) 820; 78 N. Y. Supp. 1108; aff'g s. c. 36 Misc. (N. Y.) 863; 74 N. Y. Supp. 929 (servant refused to take a candle but took matches and was injured by proceeding in the darkness after the matches were extinguished); *Steeple v. Panel & Co.*, 33 Wash. 359; s. c. 74 Pac. Rep. 475 (night watchman furnished by his employer with a lantern which he did not use injured by falling off an unguarded platform). See also: *Carbury v. Eastern Nut & Co.*, 27 R. I. 116; s. c. 60 Atl. Rep. 773.

⁴⁹ *Gaudie v. Northern Lumber Co.*, 34 Wash. 34; s. c. 74 Pac. Rep. 1009. See also *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467; s. c. 71 Pac. Rep. 1091.

⁵⁰ An employé will be imputed with contributory negligence where he knows that the appliance with which he works has operated improperly for several months and that

a break would naturally result from its condition and he has failed to call the attention of his employer to the defect: *Glasscock v. Swoford Bros. Dry Goods Co.*, 106 Mo. App. 657; s. c. 80 S. W. Rep. 364.

⁵¹ A night foreman charged with the duty to replace cleats on a gangway to prevent employés from slipping while passing over the way, negligently failed to do so and he slipped and suffered the injuries upon which action was brought. He was held guilty of such contributory negligence as to defeat a recovery by his representative for his death: *Baker v. Empire Wire Co.*, 102 App. Div. (N. Y.) 125; s. c. 92 N. Y. Supp. 355.

⁵² *Little v. Southern R. Co.*, 120 Ga. 347; s. c. 47 S. E. Rep. 953.

⁵³ On the general proposition that the action will be defeated on the ground of contributory negligence only where such negligence was the proximate cause of the injuries, see: *Northern Pac. R. Co. v. Tynan*, 119 Fed. Rep. 288; s. c. 56 C. C. A. 192; *St. Louis & C. R. Co. v. Rea*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 324; rev'g s. c. 84 S. W. Rep. 428; *Con-*

reclining on the top of a moving car with his feet hanging over the side, though negligence, was held not the proximate cause of his injuries received by being caught by a looped rope which hung over the car from a water pipe when he suddenly raised himself, so as to be thus caught, on hearing the conductor shout to him to "look out."⁵⁴

§ 5359. Contributory Negligence of Servant in Case of Willful Injury by Master.—In one case the act of a brakeman of a freight train on a side-track in leaving the switch open, knowing that a passenger train was nearly due, was declared an act showing such reckless, wanton and criminal disregard for the safety of the employés and passengers on the passenger train that the contributory negligence, if any, of an employé on the passenger train in leaping from the train to avoid a collision, could not be urged as a defense to an action by him against the railroad company for the injuries.⁵⁵

§ 5360. Effect of Statutes and Municipal Ordinances on Question of Contributory Negligence.⁵⁶—A Connecticut statute provides that no person shall procure, transport, or use any compound more explosive than gun powder without first obtaining a written permit therefor signed by the officers of the town where the explosive is to be used, specifying the name of the purchaser, the amount to be purchased, and the purpose for which it is to be used.⁵⁷ It has been held that the object of this statute was not to restrict the use of explosives for legitimate purposes, but to prevent their use for unlawful purposes. Hence there was no merit in a contention that a laborer injured by the explosion of frozen dynamite furnished him by his employer could not maintain his action because the master failed to procure the statutory permit.⁵⁸

sumers' Cotton Oil Co. v. Gentry, 35 Tex. Civ. App. 445; s. c. 80 S. W. Rep. 394; Houston &c. R. Co. v. Turner, 34 Tex. Civ. App. 397; s. c. 78 S. W. Rep. 712. A servant whose fall against a saw was caused by his stumbling over pieces of plank which he had placed on the floor without direction from any one, was denied a recovery for injuries sustained by his contact with the saw, on the ground that his own negligence was the proximate cause of such injuries: Witten v. Bell &c. Co. (Ky.), 85 S. W. Rep. 1094; s. c. 27 Ky. L. Rep. 580.

⁵⁴ Lindsay v. Norfolk &c. R. Co., 132 N. C. 59; s. c. 43 S. E. Rep. 511.

⁵⁵ Yazoo &c. R. Co. v. Block, 86 Miss. 426; s. c. 38 South. Rep. 372.

⁵⁶ That statutes prescribing rules governing the relation of master and servant do not abrogate the defense of contributory negligence, see: Denver &c. R. Co. v. Arrighi, 129 Fed. Rep. 347; s. c. 63 C. C. A. 649 (automatic couplers); Gilbert v. Burlington &c. R. Co., 128 Fed. Rep. 529; s. c. 63 C. C. A. 27; aff'g s. c. 123 Fed. Rep. 832 (automatic couplers); Pittsburgh &c. R. Co. v. Collins, 163 Ind. 569; s. c. 71 N. E. Rep. 661; Norfolk &c. R. Co. v. Cheatwood, 103 Va. 356; s. c. 49 S. E. Rep. 489. But see, *contra*: Illinois Cent. R. Co. v. Jordan, 117 Ky. 512; s. c. 78 S. W. Rep. 426; 25 Ky. L. Rep. 1610.

⁵⁷ Gen. St. Conn. 1902, § 2618.

⁵⁸ Currelli v. Jackson, 77 Conn. 115; s. c. 58 Atl. Rep. 762.

§ 5365. **Degree of Care Required of Children.**—A child is bound to exercise only such care and prudence as reasonably might be expected of a person of his age and capacity and in the same circumstances. The law does not require as high care from a person of tender years and imperfect discretion as from one of mature years.⁵⁹ The jury should be charged to consider the child's age and appearance on the question of contributory negligence and the amount of the instruction and care he was entitled to receive. It is not sufficient to charge generally on his duty to exercise reasonable care.⁶⁰ A statute prohibiting the employment of children under a certain age in factories amounts to a determination in effect that children under that age do not possess the judgment and discretion necessary for the pursuit of a dangerous employment, and hence are not, as a matter of law, capable of contributory negligence.⁶¹

§ 5369. **Question of Contributory Negligence of Child a Question of Fact for the Jury.**⁶²

§ 5371. **Mistakes of Judgment as to Methods of Work.**⁶³

§ 5371a. **Methods of Work in Use in Like Lines of Employment.**—A servant will not generally be imputed with contributory negligence in his method of work where the method adopted is similar to

⁵⁹ *Rogers v. Samuel Meyerson Printing Co.*, 103 Mo. App. 683; s. c. 78 S. W. Rep. 79. See also *Evans v. Josephine Mills*, 119 Ga. 448; s. c. 46 S. E. Rep. 674; *La Porte Carriage Co. v. Sullender*, — Ind. App. —; s. c. 71 N. E. Rep. 922; *Sachau v. J. K. Milner & Co.*, 123 Iowa 387; s. c. 98 N. W. Rep. 900; *Itnner Brick Co. v. Killian*, 67 Neb. 589; s. c. 93 N. W. Rep. 951; *Fitzgerald v. Alma Furniture Co.*, 131 N. C. 636; s. c. 42 S. E. Rep. 946; *Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36; s. c. 79 S. W. Rep. 869.

⁶⁰ *Keating v. Coon*, 102 App. Div. (N. Y.) 112; s. c. 92 N. Y. Supp. 474.

⁶¹ *Marino v. Lehmaier*, 173 N. Y. 530; s. c. 66 N. E. Rep. 572; aff'g s. c. 72 N. Y. Supp. 1118.

⁶² See generally: *Sachau v. J. K. Milner & Co.*, 123 Iowa 387; s. c. 98 N. W. Rep. 900 (boy of thirteen years injured by contact with circular saw obscured by sawdust at bench where he had worked but once before); *Gallenkamp v. Garvin Mach. Co.*, 91 App. Div. (N. Y.) 141;

s. c. 86 N. Y. Supp. 378 (boy of fifteen years injured while employed around a machine for conveying tools from one floor to another in a factory); *Dynes v. Bromley*, 208 Pa. 633; s. c. 57 Atl. Rep. 1123 (boy of thirteen injured by having his clothes wrapped around shaft revolving so rapidly as to give the appearance of being stationary); *Doyle v. Pittsburg Waste Co.*, 204 Pa. 618; s. c. 54 Atl. Rep. 363 (boy sixteen years old injured in rag-cutting machine—had received no instructions as to manner of cleaning the machine nor how to stop a revolving cylinder connected with it); *Moyes v. Ogden Sewer Pipe & Co.*, 28 Utah 148; s. c. 77 Pac. Rep. 610 (boy of fourteen had arm amputated in clay-working machine when prematurely started).

⁶³ *Mullins v. Manhattan Brass Co.*, 47 Misc. Rep. (N. Y.) 138; s. c. 93 N. Y. Supp. 635 (servant adopted a new method of work the day he was injured and accident was due to the changed method of operation).

that followed by other servants in a like line of employment,⁶⁴ unless the method is unsafe.⁶⁵

§ 5372. Selecting the more Dangerous of Two Ways of Discharging a Duty.⁶⁶

§ 5374. When Contributory Negligence will Not Necessarily be Imputed to the Mistake of Choosing the More Dangerous Way or Method.—So where the servant has the choice of several ways in which to do his work, and he adopts one which a reasonably prudent man would adopt and would not be regarded as negligent in adopting, he will not be imputed with contributory negligence, though the other ways may be absolutely safe.⁶⁷ So it has been held that the mere fact that it would have been safer for workmen to use ladders instead of a material hoist, which fell while the workmen were descending in it, by reason of a defect not apparent to the eye, did not make them negligent, as a matter of law, in using the hoist.⁶⁸ In a case where an

⁶⁴ *Riverside Mills v. Jones*, 121 Ga. 33; s. c. 48 S. E. Rep. 700; *Broadfoot v. Shreveport Cotton Oil Co.*, 111 La. 467; s. c. 35 South. Rep. 643; *Ham v. Lake Shore & C. R. Co.*, 23 Ohio Cir. Ct. R. 496.

⁶⁵ *Leard v. International Paper Co.*, 100 Me. 59; s. c. 60 Atl. Rep. 700.

⁶⁶ See generally in support of the principle that a servant knowingly selecting the more dangerous of two ways of discharging a duty is guilty of contributory negligence: *Gilbert v. Burlington & C. R. Co.*, 128 Fed. Rep. 529; s. c. 63 C. C. A. 27; aff'g s. c. 123 Fed. Rep. 832; *Illinois Steel Co. v. McNulty*, 105 Ill. App. 594; *Ætna Powder Co. v. Earlandson*, 33 Ind. App. 251; s. c. 71 N. E. Rep. 185; *Chamberlain v. Waymire*, 32 Ind. App. 442; s. c. 68 N. E. Rep. 306; 70 N. E. Rep. 81 (servant fell while crossing over vat of boiling water and there was a safe way around); *Schoultz v. Eckardt Mfg. Co.*, 112 La. 568; s. c. 36 South. Rep. 593; *Connors v. Merchants' Mfg. Co.*, 184 Mass. 466; s. c. 69 N. E. Rep. 218; *Slade v. Beattie*, 186 Mass. 267; s. c. 71 N. E. Rep. 540; *Curtis v. McNair*, 173 Mo. 270; s. c. 73 S. W. Rep. 167; *Haber v. Jenkins Rubber Co.*, — N. J. L. —; s. c. 61 Atl. Rep. 382; *Patterson v. V. J. Hedden & Sons Co.*, 90 N. Y. Supp. 1069 (servant with choice of two ways of going to a boiler room selected the unsafe way and was injured); *Shee-*

han v. Standard Gaslight Co., 87 App. Div. (N. Y.) 174; s. c. 84 N. Y. Supp. 34; *Covington v. Smith Furniture Co.*, 138 N. C. 374; s. c. 5 S. E. Rep. 761; *Whitson v. Wrenn*, 134 N. C. 86; s. c. 46 S. E. Rep. 17; *Consumers' Cotton Oil Co. v. Jonte*, 36 Tex. Civ. App. 18; s. c. 80 S. W. Rep. 847; *Newport News Pub. Co. v. Beaumeister*, 102 Va. 677; s. c. 47 S. E. Rep. 821. Where a servant was given a general order to perform certain work, and left to his own discretion as to the method, and it appeared that the work could have been done in a safe way, the master was not liable for injuries to the servant caused by his selection of an unsafe way of doing the work, either through heedlessness, or because it involved less exertion: *Illinois Cent. R. Co. v. Swift*, 213 Ill. 307; s. c. 72 N. E. Rep. 737. That a servant leaving a safe place and going to a place of danger is guilty of contributory negligence: *Fox v. Clearfield Wooden Ware Co.*, 211 Pa. 645; s. c. 61 Atl. Rep. 245; *Stratton v. C. H. Nichols Lumber Co.*, 39 Wash. 323; s. c. 81 Pac. Rep. 831.

⁶⁷ *Florida & C. R. Co. v. Mooney*, 44 Fla. 557; s. c. 33 South. Rep. 1010; *Norris v. Cudahy Packing Co.*, 124 Iowa 748; s. c. 100 N. W. Rep. 853; *Brinkmeier v. Missouri Pac. R. Co.*, 69 Kan. 738; s. c. 77 Pac. Rep. 586.

⁶⁸ *Boyle v. Columbian Fireproofing Co.*, 182 Mass. 93; s. c. 64 N. E. Rep. 726.

engineer of a freight train negligently placed a brakeman in sudden peril, and the brakeman, acting under the stress of circumstances so created, chose one of two methods open to him to avoid the accident, and was injured, when he might have escaped had he chosen the other, it was held that the negligence of the engineer was the proximate cause of the injury and the brakeman was not guilty of contributory negligence in choosing the method of escape he did.⁶⁹ Furthermore, an employé will be relieved from the imputation of contributory negligence in performing his work in a dangerous way whereby he is injured if he follows the directions of another servant charged with the duty of instructing him.⁷⁰

§ 5376. Servant Selecting Something Insufficient where the Master had Provided Something Sufficient.⁷¹

§ 5378. Doctrine that the Order of the Master or his Representative does not Excuse the Servant where the Danger is Obvious.—In some jurisdictions the servant is charged with contributory negligence where his injury is received while obeying the order of a superior, and the danger is so plain that no prudent person would have obeyed the order.⁷² Here the mere fact that an employé would have been discharged from his employment had he disobeyed the command of his superior will not justify him in obeying the order if the dangers are plainly obvious.⁷³

§ 5379. When the Order of the Master or his Representative Does Excuse the Servant.—In other jurisdictions the holdings are numerous that where a servant engaged in dangerous work is directed by his superior to perform a given act, he may without negligence obey the command if the danger incident to obedience is not unusual or the

⁶⁹ *San Antonio &c. R. Co. v. Ankerson*, 31 Tex. Civ. App. 327; s. c. 72 S. W. Rep. 219.

⁷⁰ *Joyce v. American Writing Paper Co.*, 184 Mass. 230; s. c. 68 N. E. Rep. 213.

⁷¹ In support of the proposition that if the master has provided proper instrumentalities within the reach of his employés and they select poor ones, the master will not be liable for injuries resulting from this selection, see: *Gribben v. Yellow Aster &c. Co.*, 142 Cal. 248; s. c. 75 Pac. Rep. 839 (miner injured by the breaking of a rope on which he was descending to the bottom of a mine shaft and it appeared that the master had furnished sufficient ladders for this purpose); *Lee v. Kan-*

sas City Gas Co., 91 Mo. App. 612; *Campbell v. T. A. Gillespie Co.*, 69 N. J. L. 279; s. c. 55 Atl. Rep. 276; *McGrath v. Delaware &c. R. Co.*, 68 N. J. L. 425; s. c. 53 Atl. Rep. 207.

⁷² *Greeley v. Foster*, 32 Colo. 292; s. c. 75 Pac. Rep. 351; *Shemwell v. Owensboro & N. R. Co.*, 117 Ky. 556; s. c. 78 S. W. Rep. 448; 25 Ky. L. Rep. 1671 (employé directed to climb on roof insufficient to sustain him in compliance with orders of his superior and with knowledge of its weakened condition); *Ittner Brick Co. v. Killian*, 67 Neb. 589; s. c. 93 N. W. Rep. 951; *Luckey v. Sofield*, — N. J. L. —; s. c. 57 Atl. Rep. 870.

⁷³ *Lee v. Northern Pac. R. Co.*, 39 Wash. 388; s. c. 81 Pac. Rep. 834.

risk beyond that contemplated in his employment.⁷⁴ Here it is the view that the servant has the right to presume, in the absence of warning or notice to the contrary, that he will not, in obedience to an order, be subjected to injury.⁷⁵ The rule is the same where the order is given by another servant with the knowledge and acquiescence of the master or a vice-principal.⁷⁶

§ 5380. Rule where Special Orders Conflict with Standing Rules.—Generally speaking, a servant will not be imputed with contributory negligence in disobeying a rule of the master where he does so at the command of a representative of the master on the ground.⁷⁷

§ 5382. Right of Servant to Assume that the Order may be Obeyed with Safety.—The servant ordered to perform a particular service is not required to make a careful inspection of everything pertaining to the safety of the place or appliances.⁷⁸ The principle under this head is illustrated by a case where a laborer was injured while alighting from a flat car at the command of his foreman, and at the time of the injury he had only three or four days' experience as a railroad laborer and was inexperienced in getting on and off a work train. It was held that he was entitled to rely on the order of his foreman and presume that it was not dangerous to alight, and hence was not chargeable with contributory negligence as a matter of law.⁷⁹

§ 5383. Effect of Assurance of Master or his Representative that the Place or Appliance is Safe.⁸⁰—The assurance intended by this sec-

⁷⁴ *Wrightsville &c. R. Co. v. Lattimore*, 118 Ga. 581; s. c. 45 S. E. Rep. 453; *Illinois Steel Co. v. Olste*, 214 Ill. 181; s. c. 73 N. E. Rep. 422; *Illinois Cent. R. Co. v. Jones*, 118 Ky. 158; s. c. 80 S. W. Rep. 484; 26 Ky. L. Rep. 31 (brakeman directed to help make flying switch); *Texas &c. R. Co. v. Kelly*, 98 Tex. 123; s. c. 80 S. W. Rep. 79.

⁷⁵ *Republic Iron &c. Co. v. Berkes*, 162 Ind. 517; s. c. 70 N. E. Rep. 815.

⁷⁶ *Sipes v. Michigan Starch Co.*, 137 Mich. 258; s. c. 100 N. W. Rep. 447; 11 Det. Leg. N. 287.

⁷⁷ *Carson v. Southern R. Co.*, 68 S. C. 55; s. c. 46 S. E. Rep. 525.

⁷⁸ *Mahoney v. Bay State Pink Granite Co.*, 184 Mass. 287; s. c. 68 N. E. Rep. 234; *Motzing v. Excelsior Brewing Co.*, 107 App. Div. (N. Y.) 275; s. c. 94 N. Y. Supp. 1118.

⁷⁹ *Mitchell v. Chicago & A. R. Co.*, 108 Mo. App. 142; s. c. 83 S. W. Rep. 289.

⁸⁰ *Allen v. Gilman &c. Co.*, 127 Fed. Rep. 609 (assurance of superintendent that there was no danger in removing tamping from holes containing dynamite that had not exploded—master liable); *Nugent v. Cudahy Packing Co.*, 126 Iowa 517; s. c. 102 N. W. Rep. 442 (carpenter employed on building was entitled to rely on the assurance of the superintendent that cement was sufficiently set to allow the building to be lowered onto a pier made of cement); *St. Bernard Coal Co. v. Southard*, 76 S. W. Rep. 167; s. c. 25 Ky. L. Rep. 638 (miner assured of safety of room in mine by room dresser not negligent in relying on assurance); *Gregory v. American Thread Co.*, 187 Mass. 239; s. c. 72 N. E. Rep. 962 (a question for the jury whether a servant was guilty of negligence in working with a defective machine after she had been informed by the superintendent that he had repaired it).

tion may be given by a representative of the master in charge of the work and must be relied on by the servant. Thus where a motorman complained to two other employés, who had authority to direct a change of cars, that the brake on the car he was ordered to use was defective and unsafe, but both such employés assured him that the car could be used in safety, his act in continuing to use the same until he was injured by reason of the defect was held not so obviously dangerous as to charge him with contributory negligence, as a matter of law.⁸¹

§ 5386. Servant Ordered into Danger without being Properly Warned.—The principle of the main section is illustrated by a case where a servant, who was eighteen years of age and had worked in the carding room of a factory only three days prior to his injury, was instructed by his superior to lift up his sleeve and clean a wool carding machine while in motion, and to look out for the chain at the end of the shaft, which danger he avoided, but he pulled off the wool from the shaft in such a manner that it became caught in the cylinder and drew his hand in. It was held that he was not thereby guilty of contributory negligence as a matter of law.⁸² So generally the servant will be absolved from the charge of contributory negligence where he relies on instructions given him as to the performance of his duties by the master or his representative, particularly where he is inexperienced.⁸³

§ 5387. Servant Injured in Consequence of being Urged or Driven or by Obeying Orders to Hurry Up.—The authorities are numerous that a servant will not be imputed with contributory negligence where he obeys the positive commands and threats of the master to go on with the work under circumstances of peril.⁸⁴

§ 5391. When the Question whether the Servant was Negligent in Obeying the Order is a Question for the Jury.⁸⁵

⁸¹ *Cole v. St. Louis Transit Co.*, 183 Mo. 81; s. c. 81 S. W. Rep. 1138.

⁸² *Sauvageau v. River Spinning Co.*, 129 Fed. Rep. 961.

⁸³ *Koren v. National Conduit & Co.*, 82 App. Div. (N. Y.) 527; s. c. 81 N. Y. Supp. 614; s. c. aff'd, 179 N. Y. 552; 71 N. E. Rep. 1132 (employé injured while shifting belt with a stick in conformity with his instructions).

⁸⁴ *Williams v. Clark*, 204 Pa. 416; s. c. 54 Atl. Rep. 315; *Russell v. Riverside Worsted Mills*, 24 R. I. 591; s. c. 54 Atl. Rep. 375 (servant commanded in threatening language

to perform a dangerous service); *Kasjeta v. Nashua Mfg. Co.*, 73 N. H. 22; s. c. 58 Atl. Rep. 874 (foreigner of less than average intelligence put to work on cotton picker was directed by superintendent to clean same while knives were revolving, and command was accompanied by oaths and shaking of fist at him).

⁸⁵ *Western Mattress Co. v. Ostergaard*, — Neb. —; s. c. 99 N. W. Rep. 229; 101 N. W. Rep. 334 (where it is in evidence that an employé disobeyed the orders of his superior and that obedience would have

§ 5392. Instructions to Juries under this Head.⁸⁶

§ 5395. **Servant Violating Known Rules Intended for his Safety Cannot Recover Damages if Thereby Injured.**—It is another statement of the rule of the main section to say that an employé is bound to obey all the reasonable rules of his employer as to the conduct of his business; and, if disobedience thereof contributes directly to the injury of the employé, it charges him with negligence, barring recovery of damages for the injury received.⁸⁷ But in a case where an engineer, in violation of rules, took his engine, for necessary water, onto the main track on the time of a passenger train, which ran into him, he was held not guilty of contributory negligence, it appearing that he had

avoided the injury the question as to whether orders were actually given is for the jury); *Bernard v. Pittsburg Coal Co.*, 137 Mich. 279; s. c. 100 N. W. Rep. 396; 11 Det. Leg. N. 246 (whether servant guilty of contributory negligence in obeying directions of derrick engineer); *Hempstock v. Lackawanna Iron & Co.*, 98 App. Div. (N. Y.) 332; s. c. 90 N. Y. Supp. 663 (whether employé going on scaffold without knowing whether it had been repaired as promised was negligent); *O'Donnell v. Welz & Zerweck*, 97 App. Div. (N. Y.) 286; s. c. 89 N. Y. Supp. 959 (whether plaintiff charged with negligence in disregarding warnings of danger there being evidence to this effect).

⁸⁶ An instruction in an action for injuries to a servant by the breaking of a rope that if such servant protested against the sufficiency of the rope, and defendant's agent assured him that the rope was sufficient for the purpose intended, and the plaintiff relied on such assurance, and under the evidence an ordinarily prudent person would have relied thereon, and used the rope as the plaintiff did, then the plaintiff was not guilty of negligence, in so doing, has been held erroneous, in that it eliminated the plaintiff's knowledge, actual or constructive, of both the defects and the danger: *Ft. Worth Ironworks v. Stokes*, 33 Tex. Civ. App. 218; s. c. 76 S. W. Rep. 231.

⁸⁷ *Erie R. Co. v. Kane*, 118 Fed. Rep. 223; s. c. 55 C. C. A. 129; *Erickson v. Monson Consol. Slate Co.*, 100 Me. 107; s. c. 60 Atl. Rep. 708; *Tkac v. Maryland Steel Co.*, 101 Md. 179;

s. c. 60 Atl. Rep. 618 (miner injured by contact with ore car at place where employés were forbidden to go); *Nordquist v. Great Northern R. Co.*, 89 Minn. 485; s. c. 95 N. W. Rep. 322; *Scott v. Eastern R. Co.*, 90 Minn. 135; s. c. 95 N. W. Rep. 892; *Western Mattress Co. v. Ostergaard*, — Neb. —; s. c. 99 N. W. Rep. 229; 101 N. W. Rep. 334; *Whitson v. Wrenn*, 134 N. C. 86; s. c. 46 S. E. Rep. 17; *Morrow v. Gaffney Mfg. Co.*, 70 S. C. 242; s. c. 49 S. E. Rep. 573; *Texas & C. R. Co. v. Fields*, 32 Tex. Civ. App. 414; s. c. 74 S. W. Rep. 930. A conductor in charge of a freight train was held guilty of contributory negligence in not complying with the rule requiring him to send back a flagman on the happening of an accident to his train: *Burris v. Minneapolis & C. Co.*, 95 Minn. 30; s. c. 103 N. W. Rep. 717. A Canadian case holds that no recovery can be had for the death of a railway engineer who proceeded with his train over a switch at which both arms of an interlocking apparatus were down, indicating that the interlocker was out of order, without any signals from a switchman who was present at such switch, where the rules of the company required the engineers to stop when in doubt as to the meaning of a signal, and that a signal imperfectly displayed must be regarded as a danger signal, and that in all cases of doubt they must take the safe course and run no risk, and that when an interlocker was out of order trains might be flagged through the interlocker by the signal man: *Holden v. Grand Trunk R. Co.* (C. A.), 5 Ont. L. Rep. 301.

taken the steps prescribed by the rules for giving notice of his presence, by sending out a flagman with a torpedo and turning the switch light.⁸⁸

§ 5396. Servant Injured in Consequence of Violating Special or Particular Orders.—Broadly speaking, a servant will be charged with contributory negligence in disobeying a warning of danger given him by a superior, and cannot recover for injuries the proximate result of such a disobedience.⁸⁹

§ 5404. Abrogation of Rules by Suffering their Habitual Violation.⁹⁰—So where, to the knowledge of the railroad company, its rules are construed by the employés as inapplicable to certain situations in the operation of trains, this fact may relieve employés from what might otherwise be a violation of rules.⁹¹

§ 5406a. Whether Defense of Violation of Rule is Available to a Third Person.—In a case where an employé of a mining company was killed while using cars sent to the mines by a railroad company, which had negligently allowed them to remain in a defective condition, but the employé was guilty of contributory negligence in failing to observe rules prescribed by his immediate master, it was held that the defense of contributory negligence was available to the railroad company, though no contractual relation existed between it and the injured person.⁹²

§ 5407. Illustrations of Contributory Negligence in Violating Known Rules in the Case of Coupling or Uncoupling Cars.⁹³

⁸⁸ Illinois Cent. R. Co. v. Stith, — Ky. —; s. c. 85 S. W. Rep. 1173; 27 Ky. L. Rep. 596.

⁸⁹ Orman v. Salvo, 117 Fed. Rep. 233; s. c. 54 C. C. A. 265.

⁹⁰ See generally: Galveston &c. R. Co. v. Collins, 31 Tex. Civ. App. 70; s. c. 71 S. W. Rep. 560; Boyle v. Union Pac. R. Co., 25 Utah 420; s. c. 71 Pac. Rep. 988.

⁹¹ Michigan Cent. R. Co. v. Butler, 23 Ohio Cir. Ct. R. 459.

⁹² Smith v. Centennial Eureka Min. Co., 27 Utah 307; s. c. 75 Pac. Rep. 749.

⁹³ Gulf &c. R. Co. v. Cooper, 33 Tex. Civ. App. 319; s. c. 77 S. W. Rep. 263 (a rule that a brakeman should not place himself in a dangerous position until he knows that the engineer has seen and obeys his signal was held without application to a case where the brakeman had sig-

nalled the engineer to stop and the signal was obeyed, but the engineer backed his engine thereafter without signal from the brakeman and injured him while between the cars adjusting a drawhead); McMillan v. Grand Trunk R. Co. of Canada, 130 Fed. Rep. 827; s. c. 65 C. C. A. 165 (inexperienced brakeman disobeying admonition against going between cars charged with contributory negligence). In one case a brakeman mounted a moving car and attempted to set the brake, when "something slipped or gave way," and he fell in front of the car. There was evidence in an action for the injury that he was using a brake stick, contrary to the rules of the company. It was held that it was proper not to submit to the jury the question of negligence in delivering the car at a dangerous rate of

§ 5408. **Question for Court or Jury.**⁹⁴—Generally the question whether rules for the government and guidance of employés are reasonable is one of law for the court.⁹⁵

§ 5411. **Servant must have Knowledge or Notice of the Rule.**⁹⁶

§ 5414. **Contributory Negligence in Failing to Inspect Premises and Appliances.**—But a servant is bound to use his eyes to note obvious conditions, and he will be chargeable with a knowledge of the same where the exercise of reasonable care on his part would have revealed their existence.⁹⁷ He is not required to make a critical examination of appliances or surroundings to discover hidden dangers unless charged with that duty by the master or by the character of his work.⁹⁸

speed, since, if the brake was in proper condition, the speed could not have caused the injury, and, if defective, the speed was immaterial: *Hurt v. Louisville & C. R. Co.*, 116 Ky. 545; s. c. 76 S. W. Rep. 502; 25 Ky. L. Rep. 755.

⁹⁴That violation of rules is not negligence *per se* but a question for the jury, see: *Missouri & C. R. Co. v. Bodie*, 32 Tex. Civ. App. 168; s. c. 74 S. W. Rep. 100; *Texas Cent. R. Co. v. Bender*, 32 Tex. Civ. App. 568; s. c. 75 S. W. Rep. 561.

⁹⁵*Scott v. Eastern R. Co.*, 90 Minn. 135; s. c. 95 N. W. Rep. 892.

⁹⁶That servant will be charged with contributory negligence only where he has actual or constructive knowledge of the existence of the rule, see: *Humphries v. Raritan Copper Works*, — N. J. L. —; s. c. 60 Atl. Rep. 62.

⁹⁷*Chenall v. Palmer Brick Co.*, 117 Ga. 106; s. c. 43 S. E. Rep. 443; *Gruenendahl v. Consolidated Coal Co.*, 108 Ill. App. 644; *Baxter v. Lusher*, 159 Ind. 381; s. c. 65 N. E. Rep. 211 (an experienced carpenter with good eye sight charged with contributory negligence where his injuries were caused by a defect in a scaffold that was plainly visible to him); *Caven v. Bodwell Granite Co.*, 99 Me. 278; s. c. 59 Atl. Rep. 285; *Breeden v. Big Circle Min. Co.*, 103 Mo. App. 176; s. c. 76 S. W. Rep. 731; *McCarthy v. Emerson*, 77 App. Div. (N. Y.) 562; 79 N. Y. Supp. 180 (hod carrier thrown from plank on which he was walking by striking an overhead joist that he could have seen); *Steeple v. Panel & C. Co.*, 33 Wash. 359; s. c. 74 Pac.

Rep. 475; *Horton v. Ft. Worth Packing & C. Co.*, 33 Tex. Civ. App. 150; s. c. 76 S. W. Rep. 211. An employé will be charged with inattention to his duties where he works for several weeks around machinery without discovering a change made in the machinery during a temporary absence before this time: *Bryant v. Great Northern Paper Co.*, 100 Me. 171; s. c. 60 Atl. Rep. 797.

⁹⁸*Duke v. Bibb Mfg. Co.*, 120 Ga. 1074; s. c. 48 S. E. Rep. 408; *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787; s. c. 49 S. E. Rep. 788; *Barnett & Record Co. v. Schlapka*, 110 Ill. App. 672; s. c. aff'd, 208 Ill. 426; 70 N. E. Rep. 343; *Ehlen v. O'Donnell*, 205 Ill. 38; s. c. 68 N. E. Rep. 766; aff'g s. c. 102 Ill. App. 141; *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185; *Chicago & C. R. Co. v. Tackett*, 33 Ind. App. 379; s. c. 71 N. E. Rep. 524; *Flockhart v. Hocking Coal Co.*, 126 Iowa 576; s. c. 102 N. W. Rep. 494; *Ahrens Ott Mfg. Co. v. Rellihan*, 82 S. W. Rep. 993; s. c. 26 Ky. L. Rep. 919; *Caven v. Bodwell Granite Co.*, 99 Me. 278; s. c. 59 Atl. Rep. 285; *Walsh v. New York & C. R. Co.*, 80 App. Div. (N. Y.) 316; s. c. 80 N. Y. Supp. 767; s. c. aff'd, 178 N. Y. 588; 70 N. E. Rep. 1111; *Missouri & C. R. Co. v. Smith* (Tex. Civ. App.), 82 S. W. Rep. 787; *Peck v. Peck*, — Tex. —; s. c. 87 S. W. Rep. 248; aff'g s. c. 83 S. W. Rep. 257. In a case where a mere laborer called on to exert his strength in changing a heavy die, part of a power press, was injured by the falling of the plunger, it was held that he was not necessarily chargeable with the duty of a close

It has been held that these principles were not erroneously stated in an instruction that a fireman was bound to use his eyes, and if by their use he could see the defect, he was bound thereby, even though he had not observed it; but that he was not bound to make a careful examination of every part of an engine upon which he was fireman, in order to charge the railway company with negligence, or exonerate himself from the charge of contributory negligence.⁹⁹ The testimony of an employé that he did not appreciate any danger from the condition of an appliance has been held admissible in a case where the master claimed that from its appearance the servant ought to have known it was defective.¹⁰⁰

§ 5415. Degree of Care where the Servant is Charged with the Duty of Inspection by the Master.—In cases where the duty to make inspection and discover defects in the appliance devolves on the employé, the master will not be liable for a defect which the servant would have discovered by a reasonable inspection.¹⁰¹ For similar reasons the servant cannot recover for injuries occasioned by defects in appliances which it was his duty to repair.¹⁰² These rules must be reasonably construed. Thus, for example, a servant charged with the duty to look after belts in a factory cannot, as a matter of law, be held negligent in not inspecting the belts or not knowing the condition they were in, where there were over a hundred of these belts in the room, and he was kept busy with other duties previous to the occurrence of the accident.¹⁰³

§ 5420. Cleaning, Oiling or Unnecessarily Working About Machinery while in Motion.¹⁰⁴

inspection of the condition of the machinery near which he was set to work, but was entitled to assume that the person in immediate charge of the machine had properly performed his duty to make it safe before requiring plaintiff to work about it: *Kasadarian v. James Hill Mfg. Co.*, 130 Fed. Rep. 62.

⁹⁹ *Choctaw &c. R. Co. v. Holloway*, 191 U. S. 334; s. c. 24 Sup. Ct. Rep. 102; 48 L. Ed. 207.

¹⁰⁰ *Murphy v. Marston Coal Co.*, 183 Mass. 385; s. c. 67 N. E. Rep. 342.

¹⁰¹ *Keys v. Winnsboro Granite Co.*, 72 S. C. 97; s. c. 51 S. E. Rep. 549; *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54; s. c. 97 N. W. Rep. 1030; 93 N. W. Rep. 966.

¹⁰² *Keys v. Winnsboro Granite Co.*, 72 S. C. 97; s. c. 51 S. E. Rep. 549.

¹⁰³ *Boucher v. Robeson Mills*, 182 Mass. 500; s. c. 65 N. E. Rep. 819.

¹⁰⁴ Contributory negligence was ascribed to a servant in a case where such a servant in oiling machinery, accidentally dropped a funnel in a crank pit, and inserted his hand in the pit to remove it, knowing that the whole operation must be performed within the space of three seconds in order to avoid injury, and that the funnel might be easily and safely withdrawn by means of a twisted wire: *Doerr v. St. Louis Brewing Ass'n*, 176 Mo. 547; s. c. 75 S. W. Rep. 600. An oiler carelessly and unnecessarily stepping onto a wheel just as the engine turns the same, and is thereby injured, is guilty of contributory negligence: *El Paso &c. R. Co. v. Kelley*, — Tex. —; s. c. 87 S. W. Rep. 660; *rev'g s. c. 83 S. W. Rep. 855*.

§ 5421. Infants and Inexperienced Persons Getting Caught in Dangerous Machinery.¹⁰⁵

§ 5422. Injuries in Consequence of the Sudden Starting of Machinery.—It has been held that a repairman at work in a mine had a right to rely on the statement of the foreman of the mine that he was going to shut down for repairs, and hence, in an action for injuries caused by the negligent starting of the machinery without warning, it was held not reversible error to permit the servant to testify that he relied on this statement of the foreman.¹⁰⁶

§ 5423. Attempting to Adjust or Use Dangerous Machinery without Employing Safety-Devices.—A mill employé who threw a machine out of motion by moving a lever and was injured by the machine starting automatically while he was cleaning it, was held not imputable with contributory negligence on the ground that he failed to use a plug to fasten the lever in place, he having testified that no plug was furnished and he did not know one was used.¹⁰⁷

§ 5424. Contributory Negligence in Adjusting Shifting-Belts.—A factory hand subject to a millwright was instructed by him to assist in putting on a belt on a revolving shaft, and while holding the belt away from the shaft it caught and he was injured. It was held that this servant was not guilty of contributory negligence in failing to stop the machinery, since he was not in charge of the machinery and was employed in another department of the factory.¹⁰⁸ It is clear that the employé cannot recover for injuries of this character where the injury is caused solely by the negligence of the injured servant and his fellow servant.¹⁰⁹

§ 5425. Getting Caught in Dangerous Machinery, When Ascribed to Contributory Negligence.¹¹⁰

¹⁰⁵ *Richardson v. Mesker*, 171 Mo. 666; s. c. 72 S. W. Rep. 506 (boy fifteen years old at work in factory rested his hand on a cogwheel by which power was communicated to a machine and while his hand was in this position the operator started the machine and the servant's hand was crushed—servant charged with contributory negligence).

¹⁰⁶ *Mathews v. Daly West Min. Co.*, 27 Utah 193; s. c. 75 Pac. Rep. 722.

¹⁰⁷ *Lynch v. M. T. Stevens & Sons Co.*, 187 Mass. 397; s. c. 73 N. E. Rep. 478.

¹⁰⁸ *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467; s. c. 71 Pac. Rep. 1091.

¹⁰⁹ *Standard Pottery Co. v. Moudy*, 35 Ind. App. 427; s. c. 73 N. E. Rep. 188; 74 N. E. Rep. 242.

¹¹⁰ See generally: *Gardner v. Paine Lumber Co.*, 123 Wis. 338; s. c. 101 N. W. Rep. 700 (experienced servant injured by contact with knives in woodworking machine); *Kennedy v. Merrimack Pav. Co.*, 185 Mass. 442; s. c. 70 N. E. Rep. 437 (experienced machinist injured by his clothes being caught in a set screw on revolving shaft that was plainly visible); *Tiffaney v. Hathaway & Co.*, 182 Mass. 431; s. c. 65 N. E. Rep. 811 (factory woman acquainted with conditions in factory was injured by her clothes be-

§ 5427. **Getting Caught in Dangerous Machinery—Cases where Negligence was Not Imputed to the Servant as a Matter of Law.**¹¹¹

§ 5429. **Contributory Negligence in Case of Injuries Inflicted by Fellow Servants.**¹¹²

§ 5432. **Failing to Anticipate Negligence on the Part of Fellow Servants.**—The principle of the main section was applied in a case where a servant employed in the work of replacing a derailed car on the track was ordered by his foreman to go under the car, and while there the car was tipped over onto him by the negligent manipulation of the jacks. It was the holding of the court that the employé would be barred from a recovery by contributory negligence if he became aware of the negligence of his fellow workmen in time to escape from the danger, or should have known of this danger as a man of ordinary intelligence, but that he was not to be imputed with contributory negligence in merely failing to look and listen to discover if his foreman and fellow workmen were engaged in negligent conduct, as he had a right to rely on the assumption that these persons would not be guilty of any negligence that would expose him to peril.¹¹³

§ 5434. **Servant Acting Erroneously under the Appearance of Immediate Danger.**¹¹⁴—A declaration was held defective in failing to show impending peril so as to excuse an error of judgment, which alleged that in running a machine it suddenly became necessary for the plaintiff immediately to put a geared wheel out of gear, and that the plaintiff, startled by the occurrence, momentarily forgot the absence of a lever, and reached for the place where the lever should have been, intending to throw the wheel out of gear, and made the motions which would have been proper had the lever been in place, but, owing to the absence of the lever, his hand caught, etc.¹¹⁵

ing caught in a shaft under the bench at which she worked and which lacked the usual dress guard but this condition had existed for six months to her knowledge).

¹¹¹ Shickle-Harrison & Co. v. Beck, 212 Ill. 268; s. c. 72 N. E. Rep. 423 (a question for the jury whether a servant injured by being caught in the cogwheels of a crane had exercised due care, and whether danger was hidden or obvious); Buehner v. Creamery Package Mfg. Co., 124 Iowa 445; s. c. 100 N. W. Rep. 345 (question of contributory negligence for the jury in action for injuries by reason of hand of servant being caught in unguarded cogs).

¹¹² A servant is not obliged, in the

presence of apparent and obvious danger, to obey the directions of a fellow servant to rush the work unreasonably, and thereby put his life and limb in jeopardy: Bier v. Horsford, 35 Wash. 544; s. c. 77 Pac. Rep. 867.

¹¹³ International & C. R. Co. v. Royal, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 713.

¹¹⁴ See generally on proposition that servant in this situation will not be imputed with contributory negligence: Sandquist v. Independent Telephone Co., 38 Wash. 313; s. c. 80 Pac. Rep. 539; San Antonio & C. R. Co. v. Ankerson, 31 Tex. Civ. App. 327; s. c. 72 S. W. Rep. 219.

¹¹⁵ Langlois v. Dunn Worsted

§ 5435. **Servant Exposing his Own Life to Save the Life of Others.**

—In these cases it must be shown that the person whose rescue was attempted was in a position of peril from the negligence of the defendant, otherwise a recovery for negligence could be had against one not negligent, and furthermore, that the rescue was not attempted under such circumstances or in such a manner as to amount to recklessness.¹¹⁶ Where these conditions exist a recovery may be had though the negligence of the person whose rescue is attempted contributed to his peril.¹¹⁷

§ 5442. **Burden of Proof with Respect to the Contributory Negligence of the Servant.**¹¹⁸—It is not to be understood in any statement of the law as to the party carrying the burden of proof, that the jury are to consider only evidence on the question of contributory negligence adduced by the party so charged with the burden of proof.

Mills, 25 R. I. 645; s. c. 57 Atl. Rep. 910.

¹¹⁶ *Pittsburg &c. R. Co. v. Lynch*, 69 Ohio St. 123; s. c. 63 L. R. A. 504; 68 N. E. Rep. 703; *Saylor v. Parsons*, 122 Iowa 679; s. c. 98 N. W. Rep. 500. A flagman at a railroad grade crossing, prior to being struck, saw two women about to cross, and was engaged in warning them of their danger, in doing which he was required to turn his back to the approaching train, and he was prevented from appreciating his own danger by reason of his efforts to save the women from injury, and there was not sufficient time before he was struck to retire from the track to a place of safety. It was held that he was not guilty of such contributory negligence as barred a recovery for his death, occasioned by the negligent operation of the train: *Missouri &c. R. Co. v. Goss*, 31 Tex. Civ. App. 300; s. c. 72 S. W. Rep. 94. Contributory negligence was held lacking in a case where an employé of a telephone company attempted to rescue another employé, who had received a shock while on a pole, and in falling therefrom had caught his spurs on a spike in the pole and hung suspended, and the employé, catching hold of the wire of his own company which he had been using, and which was in contact with a defectively insulated wire, was, in going to the relief of his co-employé, instantly killed: *Whitworth v. Shreveport Belt R. Co.*, 112 La. 363;

s. c. 36 South. Rep. 414; 65 L. R. A. 129.

¹¹⁷ *Pittsburg &c. R. Co. v. Lynch*, 69 Ohio St. 123; s. c. 68 N. E. Rep. 703; 63 L. R. A. 504.

¹¹⁸ These cases place the burden of proof of contributory negligence on defendant: *Alabama Steel &c. Co. v. Wrenn*, 136 Ala. 475; s. c. 34 South. Rep. 970; *Brower v. Locke*, 31 Ind. App. 353; s. c. 67 N. E. Rep. 1015; *Chicago &c. R. Co. v. Stephenson*, 33 Ind. App. 95; s. c. 69 N. E. Rep. 270; *Benedict v. Chicago &c. R. Co.*, 104 Mo. App. 218; s. c. 78 S. W. Rep. 60; *Nord v. Boston &c. Min. Co.*, 30 Mont. 48; s. c. 75 Pac. Rep. 681; *Peoples v. North Carolina R. Co.*, 137 N. C. 96; s. c. 49 S. E. Rep. 87; *Bonn v. Galveston &c. R. Co.* (Tex. Civ. App.), 82 S. W. Rep. 808; *Bain v. Northern Pac. R. Co.*, 120 Wis. 412; s. c. 98 N. W. Rep. 241. In New York the plaintiff has the burden of proving his freedom from contributory negligence: *Hunt v. Dexter Sulphite Pulp &c. Co.*, 100 App. Div. (N. Y.) 119; s. c. 91 N. Y. Supp. 279. Where there were no eye witnesses to the transaction, mere proof that a servant's death was caused by the slipping of a plank over a vat containing hot liquor, causing deceased to fall into the vat, without more, was insufficient to establish absence of contributory negligence of deceased: *Schier v. Quirin*, 77 App. Div. (N. Y.) 624; s. c. 78 N. Y. Supp. 956; s. c. aff'd, 177 N. Y. 568; 69 N. E. Rep. 1130.

They are to look to all the testimony pertinent to this issue by whomsoever introduced, and this fact should be made clear in the instructions.¹¹⁹

§ 5443. **Evidence of Contributory Negligence.**—It may be said generally that a servant will not be charged with contributory negligence, as a matter of law, unless such negligence is shown by undisputed evidence or is so clearly proven that no reasonable inference can be drawn to the contrary.¹²⁰ On the question whether an employé, as, for instance, a fireman, acted with ordinary prudence in attempting to escape from an impending peril, evidence as to the extent of the ensuing casualty and the injuries to others thereby occasioned is pertinent and admissible.¹²¹ On the issue of contributory negligence remarks of the plaintiff showing his appreciation of the danger are admissible, as for example, that "he took chances in going" to the place where he received his injury.¹²² On this inquiry evidence of the custom and methods of work of others in like lines of employment is proper.¹²³

§ 5444. **Circumstantial Evidence of Contributory Negligence.**—The mere fact that another employé standing beside the plaintiff at the time he received his injuries escaped without injury is not conclusive evidence on the question of the plaintiff's contributory negligence.¹²⁴

§§ 5446-5457. **Contributory Negligence of Train Conductors.**¹²⁵
—The failure of a conductor to make an inspection will not impute

¹¹⁹ Pittsburgh &c. R. Co. v. Collins, 163 Ind. 669; s. c. 71 N. E. Rep. 661; Pittsburgh &c. R. Co. v. Lightheiser, 163 Ind. 247; s. c. 71 N. E. Rep. 218, 660; General Elec. Co. v. Murray, 32 Tex. Civ. App. 226; s. c. 74 S. W. Rep. 50; Gulf &c. R. Co. v. Hill, 29 Tex. Civ. App. 12; s. c. 70 S. W. Rep. 103.

¹²⁰ Revolinsky v. Adams Coal Co., 118 Wis. 324; s. c. 95 N. W. Rep. 122.

¹²¹ Southern Pac. Co. v. Huntsman, 118 Fed. Rep. 412; s. c. 55 C. C. A. 366.

¹²² Consumers' Cotton Oil Co. v. Jonte, 36 Tex. Civ. App. 18; s. c. 80 S. W. Rep. 847.

¹²³ International &c. R. Co. v. Penn (Tex. Civ. App.), 79 S. W. Rep. 624; Pierson v. Chicago &c. R. Co., 127 Iowa 13; s. c. 102 N. W. Rep. 149.

¹²⁴ Phinney v. Illinois Cent. R. Co., 122 Iowa 488; s. c. 98 N. W. Rep. 358.

¹²⁵ Nordquist v. Great Northern R. Co., 89 Minn. 485; s. c. 95 N. W. Rep. 322 (conductor imputed with contributory negligence in failing to inspect brakes as required by rules where defect discoverable by inspection); Scott v. Eastern R. Co., 90 Minn. 135; s. c. 95 N. W. Rep. 892 (conductor imputed with contributory negligence where he failed to require the brakeman to inspect car steps as provided by rules of his employer and he was injured by the breaking of a step which such inspection would have disclosed); McDannald v. Washington &c. R. Co., 31 Wash. 585; s. c. 72 Pac. Rep. 481 (whether conductor on his first trip injured by striking a cattle guard in close proximity to the track was guilty of contributory negligence under the circumstances a question for the jury). In a case where a conductor of a freight train was killed in a collision, by the negligence of

him with contributory negligence, as a matter of law, where the railroad company has provided an inspector and he inspected the train at the time it was turned over to the conductor.¹²⁶ The constitution of South Carolina provides that knowledge of defects in machinery shall be no defense in an action for injuries caused thereby except as to conductors in charge of unsafe cars voluntarily operated by them. Under this provision it is held that a conductor is not barred of his right to recover for injuries arising from defective cars, unless he would have regarded them as dangerous or unsafe if he had exercised ordinary prudence.¹²⁷ This case is also authority that it is the duty of a freight conductor after starting with a car and discovering defects in it, to exercise his best judgment as to whether he should carry it in his train or not.¹²⁸

§§ 5460-5476. **Locomotive Engineers.**¹²⁹—The engineer, like other employés, is held only to the exercise of ordinary care and prudence, under the circumstances, for his own safety.¹³⁰ He has a right to assume that the track is in good condition unless he has actual knowledge to the contrary.¹³¹ He may also act on the assumption that the locomotive and tender furnished him are reasonably safe, and he is not required to subject them to a critical examination to note defects.¹³² The railroad company has the burden of proof that the engineer knew of the existence of the defect.¹³³

§ 5462. **Engineer Sleeping at His Post.**—A railroad engineer had been on his run for sixteen hours, and had registered in accordance with his contract and the company's rules for eight hours' rest, and was asked and consented to make immediately another run, and after

his engineer, at a point where he was unable to control the engineer's actions by any signal that he could have given or act he could have done, the negligence of the engineer was not imputable to him: *St. Louis & C. R. Co. v. McFall*; 75 Ark. 30; s. c. 86 S. W. Rep. 824; 69 L. R. A. 217.

¹²⁶ *Barksdale v. Charleston & C. R. Co.*, 66 S. C. 204; s. c. 44 S. E. Rep. 743. See also *McDonald v. Michigan Cent. R. Co.*, 132 Mich. 372; s. c. 93 N. W. Rep. 1041; 9 Det. Leg. N. 700, where it is held that a conductor has satisfied the rule by subjecting brakes to ordinary tests after the car had been inspected by the inspector employed by the railroad company.

¹²⁷ *Barksdale v. Charleston & C. R. Co.*, 66 S. C. 204; s. c. 44 S. E. Rep. 743.

¹²⁸ *Barksdale v. Charleston & C. R. Co.*, 66 S. C. 204; s. c. 44 S. E. Rep. 743.

¹²⁹ *Quinn v. Galveston & C. R. Co.*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 395.

¹³⁰ *Gulf & C. R. Co. v. Boyce*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 395.

¹³¹ *Southern R. Co. v. Sittasen*, — Ind. App. —; s. c. 74 N. E. Rep. 898; *Southern Kansas R. Co. v. Sage* (Tex. Civ. App.), 80 S. W. Rep. 1038.

¹³² *Texas & C. R. Co. v. Hartnett*, 33 Tex. Civ. App. 103; s. c. 75 S. W. Rep. 809.

¹³³ *E. E. Jackson Lumber Co. v. Cunningham*, 141 Ala. 206; s. c. 37 South. Rep. 445.

having been in continuous service for over thirty-one hours was injured in a collision with another train because, in his exhausted condition, he kept his train on the main line instead of taking a siding for the other train to pass. It was held that his injuries were the result of his contributory negligence, and he could not recover, though a statute prohibited railroad companies from requiring employes who have worked more than sixteen consecutive hours to again go on duty or perform any work until they have at least nine hours' rest, except in case of casualty or actual necessity, and made a violation thereof a misdemeanor. In this case the engineer acted voluntarily, and the pleadings did not show that there was any actual necessity requiring the extra work.¹³⁴

§§ 5479-5486. **Locomotive-Firemen.**—A railroad fireman will not be imputed with contributory negligence, as a matter of law, in going under his engine to clean out the ash pan when necessary, though he fails to put out signals.¹³⁵ In his case the rules of the railroad company requiring car inspectors to place signals when inspecting cars are without application.¹³⁶

§§ 5488-5506. **Railway Brakemen.**¹³⁷—A brakeman passing along the roofs of cars on a siding was held not guilty of contributory negligence in assuming that the cars were coupled, as they appeared to be, and as a rule of the company required them to be.¹³⁸ It is not required that the brakeman should subject handholds on cars to a critical examination to discover whether they are reasonably safe for use.¹³⁹ It has been held that a brakeman's knowledge of the absence of a rung

¹³⁴ *Smith v. Atchison & Co. R. Co.*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 1052.

¹³⁵ *Chicago & Co. R. Co. v. Stephenson*, 33 Ind. App. 95; s. c. 69 N. E. Rep. 270.

¹³⁶ *Chicago & Co. R. Co. v. Stephenson*, 33 Ind. App. 95; s. c. 69 N. E. Rep. 270.

¹³⁷ Where a brakeman on a logging railroad was injured by the derailment of one of the cars while he was riding on the floor of the rear end of the engine, with his feet hanging between the engine and the first car, and there was no reason why he could not have occupied a seat in the cab of the engine, as he had been directed to do, where he would have been safer than in the place selected by him, he was guilty of contributory negligence, precluding recovery: *Demko v. Carbon Hill Coal Co.*, 136 Fed. Rep. 162; s. c.

69 C. C. A. 74: *Benson v. New York & Co. R. Co.*, 26 R. I. 405; s. c. 59 Atl. Rep. 79 (brakeman imputed with contributory negligence in running along edge of car roof, and injured by defect therein, instead of using the running-board).

¹³⁸ *St. Louis & Co. R. Co. v. Pope*, — Tex. —; s. c. 86 S. W. Rep. 5; s. c. rev'g, 82 S. W. Rep. 360; *Louisville & Co. R. Co. v. Ewing*, 117 Ky. 624; s. c. 78 S. W. Rep. 460; 25 Ky. L. Rep. 1712 (in this case it is held a question for the jury whether the brakeman was not to be charged with contributory negligence in failing to examine the cars on a side track to see if the brakes were properly set).

¹³⁹ *Missouri & Co. R. Co. v. Hoskins* (Tex. Civ. App.), 79 S. W. Rep. 369; *El Paso & Co. R. Co. v. Vizard*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 457.

from a car ladder would not exonerate the railway company from liability for injuries caused by another defect in the ladder, unless it appeared that the brakeman with the knowledge he had, under the circumstances acted imprudently in using the same.¹⁴⁰ A brakeman, injured while asleep in a caboose at the end of his run, by a sudden bump against the caboose, was held not imputable with contributory negligence by reason of the mere fact that he occupied the caboose as a sleeping room, it appearing that cabooses were customarily so used to the knowledge of the railroad company.¹⁴¹

§§ 5509-5516. **Railway Switchmen.**—A complaint in an action against a railroad company for the death of a switchman, alleged to have been caused by the negligence of the railroad company in constructing its switchyard tracks in too close proximity to each other, should allege that the switchman was ignorant of this fact.¹⁴²

§§ 5521-5541. **Railway Track-Repairers.**¹⁴³—Though the rule requiring persons on a highway to look and listen at railroad crossings does not apply in all its strictness to railroad employes¹⁴⁴ that work on or about tracks, still it is their duty while not engaged in work demanding their attention to look and listen for approaching trains.¹⁴⁵

§ 5557. **Degree of Care Required of Servant to Avoid Injury from Overhanging Objects.**—It is proper to prove the existence of tell-tales suspended over a track in an action for the death of an employé while riding on the top of a car on his way to his work, as bearing on the knowledge of the employé that the train was about to pass under a bridge, but without proof that such tell-tales were observed by the injured employé, or that by reason thereof he appreciated the fact that the train was approaching the bridge, their existence would not, as a matter of law, bar a recovery for his death.¹⁴⁶

¹⁴⁰ El Paso Northeastern R. Co. v. Ryan, 36 Tex. Civ. App. 190; s. c. 81 S. W. Rep. 563.

¹⁴¹ Houston & C. R. Co. v. McGowan (Tex. Civ. App.), 74 S. W. Rep. 339.

¹⁴² Chicago & C. R. Co. v. Barnes, 164 Ind. 143; s. c. 73 N. E. Rep. 91; rev'g s. c. 68 N. E. Rep. 166.

¹⁴³ Swartz v. Great Northern R. Co., 93 Minn. 339; s. c. 101 N. W. Rep. 504 (a sectionman was standing eighteen feet from track when struck by stone thrown from tender by fireman—not guilty of contributory negligence).

¹⁴⁴ Pittsburgh & C. R. Co. v. Seivers, 162 Ind. 234; s. c. 67 N. E. Rep. 680; International & C. R. Co. v. Villa-

real, 36 Tex. Civ. App. 532; s. c. 82 S. W. Rep. 1063.

¹⁴⁵ Pittsburgh & C. R. Co. v. Seivers, 162 Ind. 234; s. c. 67 N. E. Rep. 680. A person working on the tracks of a railroad company, where many trains are passing, and knowing that no provision has been made by the company, either by rule or otherwise, to insure his safety, must exercise all reasonable care himself to escape injury from passing trains: Green v. New York & C. R. Co., 26 Ohio Cir. Ct. R. 609.

¹⁴⁶ Chicago Terminal Transfer R. Co. v. O'Donnell, 213 Ill. 545; 72 N. E. Rep. 1133; aff'g s. c. 114 Ill. App. 345; McGarrity v. New York

§ 5561. **Structures and Posts at Side of Track.**—It is the general rule that contributory negligence will not be imputed to the servant unless he knew of the dangerous proximity of the object to the track, or by the exercise of reasonable diligence could have acquired this knowledge.¹⁴⁷ But the employé is not obliged to make a close and critical inspection of the premises of the railroad company to discover the existence and position of such objects.¹⁴⁸ Knowledge of the increased hazard resulting from the dangerous proximity of such objects will not be imputed to a trainman simply because he was aware of the existence and the general location of the object. That is a question for the jury.¹⁴⁹ In a case where it appeared that an employé had often ridden on the side of locomotive tenders past a building so close to the track that there was barely room for his body, it was held that he was not to be imputed with contributory negligence in trying to ride past the building on the side of a wider tender, unless he knew it was wider.¹⁵⁰ The mere fact that the brakeman at the time of contact with an object at the side of the track was hanging on the side of the car will not of itself charge him with contributory negligence, this method of riding being usual and customary.¹⁵¹

§§ 5570-5598. **Coupling and Uncoupling Cars.**—Courts do not generally hold it negligence *per se* for a brakeman to go between cars to make a coupling.¹⁵² The brakeman has a right to act on the pre-

&c. R. Co., 25 R. I. 269; s. c. 55 Atl. Rep. 718 (whether a brakeman thrown from a freight car by looped tell-tales was guilty of contributory negligence in riding on the car with his back toward the tell-tales, such position being necessary in order to transmit signals, a question for the jury).

¹⁴⁷ Illinois Terminal R. Co. v. Thompson, 210 Ill. 226; s. c. 71 N. E. Rep. 328; aff'g s. c. 112 Ill. App. 463; Fearn v. New York &c. R. Co., 186 Mass. 529; s. c. 72 N. E. Rep. 68; Bradburn v. Wabash R. Co., 134 Mich. 575; s. c. 96 N. W. Rep. 929; 10 Det. Leg. N. 592 (lumber pile); McCabe v. Montana Cent. R. Co., 30 Mont. 323; s. c. 76 Pac. Rep. 701.

¹⁴⁸ Galveston &c. R. Co. v. Brown, 33 Tex. Civ. App. 589; s. c. 77 S. W. Rep. 832; Galveston &c. R. Co. v. Mortson, 31 Tex. Civ. App. 142; s. c. 71 S. W. Rep. 770.

¹⁴⁹ Texas &c. R. Co. v. Swearingen, 196 U. S. 51; s. c. 25 Sup. Ct. Rep. 164; 49 L. Ed. 382. See also McCabe v. Montana Cent. R. Co., 30 Mont.

323; s. c. 76 Pac. Rep. 701. Merely because a brakeman, who was struck while on the ladder of a box car by a post set four inches too near the track, had passed it once before at the distance of ten feet on the foot-board of the engine, when it was very dark and he was looking for obstructions on the track, does not as a matter of law show that he was guilty of contributory negligence: Gorham v. Sioux City Stock Yards Co., 118 Iowa 749; s. c. 92 N. W. Rep. 698.

¹⁵⁰ Norfolk &c. R. Co. v. Cheatwood, 103 Va. 356; s. c. 49 S. E. Rep. 489.

¹⁵¹ International &c. R. Co. v. Bearden, 31 Tex. Civ. App. 58; s. c. 71 S. W. Rep. 558; Galveston &c. R. Co. v. Mortson, 31 Tex. Civ. App. 142; s. c. 71 S. W. Rep. 770; Day v. Dominion Iron &c. Co., 36 N. S. 113.

¹⁵² Kansas City &c. R. Co. v. Flippo, 138 Ala. 487; s. c. 35 South. Rep. 457; Atchison &c. R. Co. v. Stanley, 71 Kan. 520; s. c. 81 Pac. Rep. 176 (brakeman going between cars not

sumption that the engine will not be moved without a signal from him.¹⁵³ And this was the conclusion where a coupling having failed and the cars having separated, the brakeman went between the cars to adjust the coupler on the cars not attached to the engine, and while facing the end of such cars to accomplish this object the engineer negligently backed the string of cars attached to the engine against him without warning, and inflicted the injuries sued upon.¹⁵⁴ So a brakeman will not be imputed with contributory negligence, as a matter of law, in using his hands instead of a stick in making a coupling, though in violation of a rule, if such rule has been uniformly and notoriously disregarded to the knowledge of the company.¹⁵⁵ A brakeman will not be charged with contributory negligence in attempting a coupling from the inside of a curve where the danger arose solely from the negligent construction of the car, which allowed a movable platform thereon to slip forward, and the brakeman was ignorant of the defect.¹⁵⁶ So it has been held that the mere fact that a brakeman, killed while attempting to couple cars on a curve, was working from the inside of the curve, would not warrant an instruction that he was guilty of contributory negligence, there being evidence that there was as little danger of injury on the inside as on the outside of the curve.¹⁵⁷ A finding that a brakeman was not guilty of contributory negligence was sustained in a case, where a brakeman, coming from between two cars which he had uncoupled, after signalling the engineer to back up and stop, stumbled over a stone lying by the side of the track, and in trying to keep from falling stepped into an open frog, which held him until after a car ran over his leg, and there was no evidence that he had notice that the yard was not clear of obstructions or that the frog was not filled according to the railroad company's custom.¹⁵⁸ It has

charged with knowledge of the insecurity of roadbed). There is authority that a brakeman required to go between cars in making a coupling, which could be made with greater safety by going between the cars on one side than by going in on the other, will not be imputed with contributory negligence in going in on the more dangerous side, if he could not do his work as well by going in on the other side: *Mobile &c. R. Co. v. Bromberg*, 141 Ala. 258; s. c. 37 South. Rep. 395.

¹⁵³ *Galveston &c. R. Co. v. Courtney*, 30 Tex. Civ. App. 544; s. c. 71 S. W. Rep. 307.

¹⁵⁴ *Ft. Worth &c. R. Co. v. Caskey*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 264.

¹⁵⁵ *Texas Cent. R. Co. v. Yarbro*, 32 Tex. Civ. App. 246; s. c. 74 S. W. Rep. 357.

¹⁵⁶ *Hewitt v. East Jordan Lumber Co.*, 136 Mich. 110; s. c. 98 N. W. Rep. 992; 10 Det. Leg. N. 1008; *Roche v. Denver &c. R. Co.*, 19 Colo. App. 204; s. c. 73 Pac. Rep. 880 (held a question for the jury whether brakeman was negligent where killed between cars by a projecting log while making a coupling before daylight, and the evidence did not show whether the projecting log was so loaded or whether it had slid or how long it had projected).

¹⁵⁷ *Northern Pac. R. Co. v. Tynan*, 119 Fed. Rep. 288; s. c. 56 C. C. A. 192.

¹⁵⁸ *Texarkana &c. R. Co. v. Toliver*,

been held a question for the jury whether a brakeman was guilty of contributory negligence in walking along the side of a car and placing his foot over the rail to uncouple it, where there was evidence that a lever by which cars were coupled was too short for a brakeman to reach from a handhold on the side of a car.¹⁵⁹ On the question of contributory negligence in coupling moving cars, evidence is admissible as to a custom of the employes on the particular railroad to go in front of moving cars in coupling them.¹⁶⁰ So a new employé, injured while attempting to uncouple moving cars, may show that in doing this he but followed the method of an instructor assigned to teach him his work.¹⁶¹ Generally speaking, the propriety of a brakeman using his foot to control a refractory drawbar while attempting to make a coupling is a question for the jury.¹⁶² But it is clear that the brakeman cannot recover for an injury claimed to have been caused by a defective coupler where it was not in fact so caused, but was occasioned by the brakeman negligently using his foot to push a bumper in place.¹⁶³ A brakeman will be imputed with contributory negligence and refused a recovery for injuries due to being crushed between drawheads, where he could with entire safety have stood on either side of the drawheads and escaped injury.¹⁶⁴

§ 5603. Mounting Moving Cars.¹⁶⁵

§§ 5614-5633. Riding on Train in Improper Place or Position.—These holdings are encountered in the recent decisions:—That the fact that a brakeman was riding on the engine will not prevent a recovery for injuries received in a collision, unless his absence from his post of duty and presence on the engine contributed to his injury,¹⁶⁶ that a sectionman thrown from the pilot of a logging engine and injured, which injuries were proximately caused by the dangerous position voluntarily taken when a more secure place on the train was available,

—Tex. Civ. App. —; s. c. 84 S. W. Rep. 375.

¹⁵⁹ International &c. R. Co. v. Penn (Tex. Civ. App.), 79 S. W. Rep. 624.

¹⁶⁰ De Clair v. Manistee &c. R. Co., 133 Mich. 578; s. c. 95 N. W. Rep. 726; 10 Det. Leg. N. 328.

¹⁶¹ Pierson v. Chicago &c. R. Co., 127 Iowa 13; s. c. 102 N. W. Rep. 149.

¹⁶² Brinkmeier v. Missouri Pac. R. Co., 69 Kan. 738; s. c. 77 Pac. Rep. 586.

¹⁶³ Elmore v. Seaboard Air Line R. Co., 132 N. C. 865; s. c. 44 S. E. Rep. 620.

¹⁶⁴ Caldwell v. Missouri Pac. R. Co., 181 Mo. 455; s. c. 80 S. W. Rep. 897.

See also Denver &c. R. Co. v. Arighi, 129 Fed. Rep. 347; s. c. 63 C. C. A. 649.

¹⁶⁵ A railroad switchman was imputed with contributory negligence defeating a recovery for injuries occasioned by his being thrown under the cars by a jolt on stepping onto the brake beam at one end of the car when he could have mounted the car at the other end where there was a stirrup and handhold: Montgomery v. Chicago &c. R. Co., 109 Mo. App. 88; s. c. 83 S. W. Rep. 66.

¹⁶⁶ Chicago &c. R. Co. v. Camper, 199 Ill. 569; s. c. 65 N. E. Rep. 448; rev'g s. c. 100 Ill. App. 21.

was guilty of contributory negligence, as a matter of law;¹⁶⁷ that an employé riding on the footboard of an engine will be imputed with contributory negligence where he knew that the practice was expressly prohibited by the company's rules;¹⁶⁸ that an employé riding on the footboard and injured by derailment could not complain of the speed of the engine where it was within his power to check the speed of the engine by signalling the engineer, and he failed to do so;¹⁶⁹ that a laborer carried to and from his work by a railroad company is not guilty of contributory negligence, as a matter of law, in riding on the top of a car where that is necessary because of the crowded condition of the car furnished for the transportation;¹⁷⁰ that a brakeman unnecessarily riding on the steps of a caboose and injured by reason of the steps of the car striking against wood piled alongside the track, was guilty of contributory negligence defeating a recovery for his injuries.¹⁷¹

§§ 5637-5652. **Operation of Hand-Cars.**¹⁷²—It is plainly the duty of section-men, running a hand-car over a track when a train is past

¹⁶⁷ *Burns v. Chronister Lumber Co.*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 163.

¹⁶⁸ *Lemasters v. Southern Pac. Co.*, 131 Cal. 105; s. c. 63 Pac. Rep. 28.

¹⁶⁹ *St. Louis & C. R. Co. v. Arnold*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 173.

¹⁷⁰ *Chicago Terminal Transfer R. Co. v. O'Donnell*, 114 Ill. App. 345; s. c. aff'd, 213 Ill. 545; 72 N. E. Rep. 1133.

¹⁷¹ *Howard v. Southern R. Co.*, 132 N. C. 709; s. c. 44 S. E. Rep. 401; 131 N. C. 829; s. c. 43 S. E. Rep. 1004.

¹⁷² *Middlesborough R. Co. v. Stalard*, 72 S. W. Rep. 17; s. c. 24 Ky. L. Rep. 1666 (sectionman on first of two hand-cars jumped from the rear of the car to escape injury in threatened collision of his car with an animal on the track and was struck by second car approaching at a dangerous rate of speed—sectionman not guilty of contributory negligence); *McLean v. Pere Marquette R. Co.*, 137 Mich. 482; s. c. 100 N. W. Rep. 748; 11 Det. Leg. N. 358 (sectionman injured by derailment of car caused by running over lumber refuse dropped by preceding train not charged with contributory negligence as a matter of law in immediately following this train under the direction of his foreman,

though he saw the car containing this refuse and thought it was dangerous so to load such materials); *Galloway v. San Antonio & C. R. Co.* (Tex. Civ. App.), 78 S. W. Rep. 32 (foreman injured by slipping off front of hand-car, where he was sitting, may show that it was customary for foremen riding on hand-cars to sit as he claimed he was sitting at the time). A section-hand thrown from a hand-car by the sudden locking of the gearing by which it was operated, which caused the car to stop suddenly, was not guilty of contributory negligence in failing to use the brake when he discovered that something was wrong with the gearing, because this would merely have added to the suddenness of the stop: *Lee v. St. Louis & C. R. Co.*, 112 Mo. App. 372; s. c. 87 S. W. Rep. 12. An inspector was riding slowly along the railroad track on a speeder inspecting the wires and pipes of the interlocking appliances where several roads crossed, and looked and listened for trains when he was about seventy-five feet from the center of the crossing, and again when he was about thirty-five feet from the crossing, but did not look before going upon the track, though he had an unobstructed view, and could have stopped the speeder within a distance of one foot. It was held

due, to keep a lookout for the train, and they are guilty of contributory negligence when they fail to do so, and injuries are received as a proximate result of this want of reasonable care.¹⁷³ The authorities generally refuse to impute section-hands with contributory negligence in exposing themselves to danger in attempting to remove hand-cars from the track to prevent accident unless they act recklessly and rashly in doing so.¹⁷⁴ Whether section-men act recklessly in obeying the command of a foreman to remove a car before an approaching train is a question of fact for the jury.¹⁷⁵ A section-hand engaged in this work at the command of his foreman will not be charged with contributory negligence in failing to watch for approaching trains.¹⁷⁶ The mere act of attempting to mount a hand-car in motion without more does not establish negligence *per se*.¹⁷⁷

§ 5655. Contributory Negligence of Railway Employés in Failing to Put Up Signals to Warn Approaching Trains that they are in a Position of Danger.—Generally speaking, an employé of a railroad company cannot recover for an injury while repairing a car on the track due solely to his failure to comply with a rule of the company requiring the display of a designated signal while thus engaged.¹⁷⁸

§ 5663. Transferring Packages from One Car to Another.¹⁷⁹

that he was guilty of negligence precluding a recovery for injuries sustained by being struck by a train which was backing without a brakeman in proper position on the rear car: *Indiana & C. R. Co. v. Trinosky*, 32 Ind. App. 113; s. c. 69 N. E. Rep. 402.

¹⁷³ *Jacobs v. Chesapeake & C. R. Co.*, 72 S. W. Rep. 308; s. c. 24 Ky. L. Rep. 1879; *McHugh v. Northern Pac. R. Co.*, 32 Wash. 30; s. c. 72 Pac. Rep. 450. In one case of this character it was held that the court should have charged the jury to the effect that if they believe that, prior to the time when the collision occurred, the plaintiff had time, by the exercise of ordinary care and the use of his senses, to discover the approach of the train, but failed to look or listen, and hear, and that such failure on his part was negligence, they should return a verdict for the defendant: *International & C. R. Co. v. Tisdale*, 36 Tex. Civ. App. 174; s. c. 81 S. W. Rep. 347.

¹⁷⁴ *International & C. R. Co. v. McVey* (Tex. Civ. App.), 81 S. W. Rep. 991; s. c. 83 S. W. Rep. 34; *Hicks v. Southern Pac. Co.*, 27 Utah 526;

s. c. 76 Pac. Rep. 625. A section foreman, riding on a hand-car and injured by a collision between the hand-car and a train in a cut at a curve, was not negligent, as a matter of law, in attempting to remove the hand-car from the track on discovering the approach of the train: *Texas & C. R. Co. v. Bender*, 32 Tex. Civ. App. 568; s. c. 75 S. W. Rep. 561.

¹⁷⁵ *Illinois Cent. R. Co. v. Atwell*, 198 Ill. 200; s. c. 64 N. E. Rep. 1095; *aff'g* s. c. 100 Ill. App. 513; *San Antonio & C. R. Co. v. Stevens*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 235.

¹⁷⁶ *Kansas City & C. R. Co. v. Thornhill*, 141 Ala. 215; s. c. 37 South. Rep. 412.

¹⁷⁷ *Galveston & C. R. Co. v. Puente*, 30 Tex. Civ. App. 246; s. c. 70 S. W. Rep. 362.

¹⁷⁸ *Coutlee v. Grand Trunk R. Co.*, *Rap. Jud. Que.* 23 C. S. 242.

¹⁷⁹ A freight handler unloading freight, who had to pass through a car of another railroad, in which he had not been before, and which was between the car that he was unloading and the freight depot, and whose

§§ 5667-5672. **Walking Upon or Crossing Tracks.**¹⁸⁰—Plainly a railroad employé will be precluded from recovering damages from his employer for injuries received while walking along the track where he neither stops, looks nor listens for approaching trains.¹⁸¹ On the question of contributory negligence in this situation evidence is admissible to show a custom among trackmen to depend on their foreman to warn them of approaching trains.¹⁸² Yardmen have a right to rely on the custom of the railroad company as to the movement of its trains and engines in the yard.¹⁸³ They also have a right to rely on the presumption that the operatives of trains will observe speed laws and ordinances. Thus, a trackman walking along a track, having looked without seeing a train near enough to overtake him before reaching the point at which he was to leave the track, if trains were run within the speed fixed by ordinance, was held not guilty of contributory negligence in not looking a second time, so as to prevent a recovery, where he was struck within that distance by a train running at a speed greatly in excess of the legal rate.¹⁸⁴ There is a holding that the mere existence of a custom of certain trains to use at a station the main line on all occasions does not excuse the station agent for failing to exercise ordinary care in walking on the side track at the station, knowing that one of such trains is approaching.¹⁸⁵

§§ 5674-5678. **Getting Injured on Bridges and Trestles.**¹⁸⁶—A railroad employé crossing a bridge in the performance of his duties, may

attention was directed to a rising board over which he had to pass, and which partially concealed a hole in the floor of the strange car, was not held guilty of contributory negligence as a matter of law in failing to see the hole and injuring himself by stepping therein: *Foster v. New York & C. R. Co.*, 187 Mass. 21; s. c. 72 N. E. Rep. 331.

¹⁸⁰ *Bennett v. St. Louis & C. R. Co.*, 36 Tex. Civ. App. 459; s. c. 82 S. W. Rep. 333 (car repairer hurrying to take train attempted to cross track in front of engine within six or seven feet of him and in plain view and was run over, was held negligent as a matter of law).

¹⁸¹ *Lewis v. Vicksburg & C. R. Co.*, 114 La. 161; s. c. 38 South. Rep. 92; *O'Neil v. Pittsburg & C. R. Co.*, 130 Fed. Rep. 204; *Black v. Missouri Pac. R. Co.*, 172 Mo. 177; s. c. 72 S. W. Rep. 559.

¹⁸² *Ham v. Lake Shore & C. R. Co.*, 23 Ohio Cir. Ct. R. 496. A switchman directed by a foreman to figure the

tonnage on cars, and told by the foreman that he would keep a lookout and give signals to the engineer of the switch engine, was not guilty of contributory negligence in failing to keep a lookout or give signals, which it was otherwise his duty to do: *Missouri & C. R. Co. v. Kellerman*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 401.

¹⁸³ *Graham v. Minneapolis & C. R. Co.*, 95 Minn. 49; s. c. 103 N. W. Rep. 714.

¹⁸⁴ *Camp v. Chicago Great Western R. Co.*, 124 Iowa 238; s. c. 99 N. W. Rep. 735.

¹⁸⁵ *Morehead v. Yazoo & C. R. Co.*, 84 Miss. 112; s. c. 36 South. Rep. 151.

¹⁸⁶ *Wazenski v. New York & C. R. Co.*, 180 N. Y. 466; s. c. 73 N. E. Rep. 229; rev'g s. c. 86 App. Div. (N. Y.) 629; 83 N. Y. Supp. 1118 (a question for the jury how far a defect in a trestle contributed to the accident in question, and if it did, whether plaintiff saw or could have

rely on the assumption that the usual signals and warnings will be given to indicate the approach of the train to the bridge, and that trains will be run at a reasonable speed, with the engine under the control of the engineer, and that the engineer will keep a reasonable lookout for him.¹⁸⁷

§ 5680. **Contributory Negligence of Car-Inspectors.**¹⁸⁸—In a case where an inspector, before going in front of a car to test a coupler, saw an engine and other cars at such a distance away that if they were moved at the ordinary speed of cars in switching they could not have reached the car he was inspecting until long after he had accomplished his object, it was held that he was not guilty of contributory negligence, as a matter of law, in placing himself in front of the car to make the inspection.¹⁸⁹

§ 5685. **Contributory Negligence in Making "Flying Switch."**¹⁹⁰

§ 5689. **Injuries Received in Attempting to Pass Between Cars.**¹⁹¹

§ 5692. **Use of Crowbars in Starting and Stopping Cars.**—A person engaged in moving cars with a crowbar is imputable with contribu-

seen the defect in time to have avoided the injury).

¹⁸⁷ *San Antonio & C. R. Co. v. Brock*, 35 Tex. Civ. App. 155; s. c. 80 S. W. Rep. 422. A railroad trackman, on concluding his work, started to cross a bridge to a toolhouse with his tools; his fellow employes intending to follow him on a hand-car. When he reached the bridge, which was some three hundred and sixty yards from the hand-car, he looked back and saw that the car was not then in motion, but when he got about half-way across the bridge he was struck and injured by the car, which was running eight miles an hour. It was held that the trackman was not guilty of contributory negligence: *Chicago & C. R. Co. v. Long*, 32 Tex. Civ. App. 40; s. c. 74 S. W. Rep. 59.

¹⁸⁸ *Whitley v. Chicago & C. R. Co.*, 109 Mo. App. 123; s. c. 83 S. W. Rep. 68 (evidence held insufficient to show that a switching crew knew or ought to have known when they shunted a car on the sidetrack that a car inspector was then between the cars thereon).

¹⁸⁹ *Elliott v. Canadian Pac. R. Co.*, 129 Fed. Rep. 163.

¹⁹⁰ A switchman injured directly

by his own carelessness, while operating a ground switch, cannot recover, though the injury was sustained by the making of a running switch, forbidden by the rules of the company when avoidable: *Williams v. Illinois Cent. R. Co.*, 114 La. 13; s. c. 37 South. Rep. 992.

¹⁹¹ In these cases railroad employes were held guilty of contributory negligence in going between cars: *Dillon v. Iowa Cent. R. Co.*, 118 Iowa 645; s. c. 92 N. W. Rep. 855 (engineer going between standing cars to urinate and crushed by sudden movement of cars when bumped against); *McKee v. Chicago & C. R. Co.*, 96 Mo. App. 671; s. c. 70 S. W. Rep. 922 (employe injured while attempting to climb over couplings of cars standing with engine attached ready to start); *Dishon v. Cincinnati & C. R. Co.*, 133 Fed. Rep. 471; s. c. 66 C. C. A. 345; aff'g s. c. 126 Fed. Rep. 194 (section-hand caught and crushed between two cars on side track at a station which were moved together by an engine as he was attempting to pass through between them); *Campbell v. Illinois Cent. R. Co.*, 124 Iowa 302; s. c. 100 N. W. Rep. 30.

tory negligence where he stands astride the rail instead of at the side, and thereby invites injury from following cars.¹⁹²

§ 5704a. **Street Railway Car Repairers.**—A car repairer removed the trolley pole from the wire before going under a car in the morning to make repairs. On his return from his noon lunch he noticed that it was still off the wire. It was held that he was not guilty of contributory negligence as a matter of law, in not looking again to see whether the pole was off the wire when he left the car to get some material to use in the work, so as to prevent a recovery for injuries caused by a motorman starting the car shortly thereafter without notice to him.¹⁹³

§ 5707. **Contributory Negligence in other Street Railway Cases.**—It is the duty of a motorman to keep a lookout for other street cars at crossings, and he will be charged with contributory negligence where he fails to do so and as a result of this negligence he is injured by a collision of his car with another on the crossing.¹⁹⁴ It is likewise his duty to keep a lookout at railroad crossings, notwithstanding the conductor has gone ahead to note conditions and signal, and he will be charged with negligence where the accident could have been avoided had he looked, and this more particularly where there was no rule requiring motormen to rely solely on the conductor's signal.¹⁹⁵ In a case where a motorman was injured by the negligence of his foreman in moving the motorman's car while he was away from the car, it was held a question for the jury whether the motorman was guilty of contributory negligence in not carrying his controller handle with him, which he had removed from the socket, as required by a rule of the company, instead of leaving it lying on the controller.¹⁹⁶

§ 5712. **Pursuing Improper Methods of Work in Mines.**—An experienced miner was imputed with contributory negligence where with knowledge of an overhanging rock he continued to work thereunder for between ten and fourteen hours continuously, all the time augmenting the danger therefrom by undermining its support, and finally causing its fall.¹⁹⁷ A miner was held not guilty of contributory negligence as a matter of law, in attempting, while on his way to work, to cross a lagging which had been put in since he last crossed the space

¹⁹² *Street v. Norfolk & C. R. Co.*, 101 Va. 746; s. c. 45 S. E. Rep. 284.

¹⁹³ *Quinn v. Brooklyn Heights R. Co.*, 91 App. Div. (N. Y.) 489; s. c. 86 N. Y. Supp. 883.

¹⁹⁴ *Bobb v. Union Traction Co.*, 206 Pa. 265; s. c. 55 Atl. Rep. 972.

¹⁹⁵ *McLeod v. Chicago & C. R. Co.*,

125 Iowa 270; s. c. 101 N. W. Rep. 77.

¹⁹⁶ *Bien v. St. Louis Transit Co.*, 108 Mo. App. 399; s. c. 83 S. W. Rep. 986.

¹⁹⁷ *Heald v. Wallace*, 109 Tenn. 346; s. c. 71 S. W. Rep. 80.

which it covered, and which was composed of planks of the same kind usually used in mines for the same purpose.¹⁹⁸

§ 5713. **Contributory Negligence where the Mine-Owner has Violated a Statute Intended for the Protection of the Miner.**—In Illinois¹⁹⁹ and Missouri²⁰⁰ contributory negligence is not a defense to an action for personal injuries based on a willful violation by the mine owner of duties imposed upon him by statute.

§ 5716. **Getting Injured by Explosions.**—The law requires the exercise of care proportionate to the danger by both the master and the servant in the use of dynamite for blasting.¹ The danger of explosion likely to accompany the attempt to force a stick of dynamite into a hole too small to admit its entrance is not a matter of such scientific knowledge so as to relieve the servant from the charge of contributory negligence in making the attempt.² It was customary in one mine to push giant powder into holes in the rock by means of pieces of gas pipe with wooden plugs driven in the end, but a miner, finding that the pieces of gas pipe were in use by others, attempted to place a stick of powder by means of a shank of a steel drill belonging to himself, and was injured by an explosion from a spark, resulting from the contact between the steel drill and the flinty rock. He was denied a recovery for his injuries on the ground of contributory negligence.³ On the question of the degree of care exercised by a servant for his own safety in exploding a blast, it may be shown that the powder furnished him was of a higher explosive quality than that ordinarily used, and that he was without knowledge of this fact.⁴

§ 5717. **Contributory Negligence with Respect to Dangerous Gases.**⁵

¹⁹⁸ *Garity v. Bullion-Beck &c. Co.*, 27 Utah 534; s. c. 76 Pac. Rep. 556.

¹⁹⁹ *Riverton Coal Co. v. Shepherd*, 111 Ill. App. 294; s. c. aff'd, 207 Ill. 395; 69 N. E. Rep. 921; *Fulton v. Wilmington Star Min. Co.*, 133 Fed. Rep. 193; s. c. 66 C. C. A. 247; 68 L. R. A. 168.

²⁰⁰ *Chicago-Coulterville Coal Co. v. Fidelity &c. Co.*, 130 Fed. Rep. 957.

¹ *Erickson v. Monson Consol. Slate Co.*, 100 Me. 107; s. c. 60 Atl. Rep. 708; *Smith v. Hecla Min. Co.*, 38 Wash. 454; s. c. 80 Pac. Rep. 779.

² *Kopf v. Monroe Stone Co.*, 133 Mich. 286; s. c. 95 N. W. Rep. 72; 10 Det. Leg. N. 185.

³ *Whaley v. Coleman*, 113 Mo. App. 594; s. c. 88 S. W. Rep. 119.

⁴ *Chambers v. Chester*, 172 Mo. 461; s. c. 72 S. W. Rep. 904.

⁵ A miner negligent in fulfilling his duties in making a "break-through" in order to afford proper ventilation, was refused a recovery for injuries due to an explosion of gas to which this negligence contributed: *Western Coal &c. Co. v. Jones*, 75 Ark. 76; s. c. 87 S. W. Rep. 440. A requested instruction that if defendant kept the amount of air required in circulation in the mine, and plaintiff knew of the gas, but made no report thereof to the one whose duty it was to make an examination therefor, plaintiff was guilty of contributory negligence, was properly refused, as it made it

§ 5718. **Getting Hurt by Falling Roofs.**⁶

§ 5721. **Various Other Matters with Respect to which Contributory Negligence has been Ascribed to Miners and Mine Workers.**—A miner cannot relieve himself from the consequences of his own negligence on the ground that his fellow workmen have committed similar acts of negligence.⁷ A miner, unacquainted with the paths leading to his place of work in a mine, and for whom a guide had been provided, was imputed with contributory negligence preventing a recovery, where he attempted to reach the place of work alone and was injured by falling into a pit alongside the path.⁸

§ 5722. **Various other Acts Held Not to Constitute Contributory Negligence in Miners and Mine Workers.**—Where the mine owner has provided employes to give notice of danger in mine operations, a miner at work therein has a right to rely upon the performance of this duty, and is not obliged to maintain a lookout.⁹ In one case the act of a motorman in charge of a train of coal cars in a mine in occupying a front seat of the car with his back in the direction which the train was going instead of occupying a rear seat from which he could have more easily seen obstructions on the track, was held insufficient of itself to charge the motorman with contributory negligence, as a matter of law, defeating a recovery for his injuries by collision with another car negligently left on the track, where it appeared that it was necessary for a helper to accompany the motorman, and the rear seat, which was only twenty inches wide, was occupied by the helper and it was customary for one of the men to sit in front.¹⁰

§ 5730. **Contributory Negligence in and About Vessels—Negligence Imputed.**—The forward portion of the forward hatch on a vessel was down and prevented the longshoremen loading the vessel from moving the bales lowered into the hold as far forward as necessary. To

the duty of the servant to inform defendant of the gas, whether defendant knew or ought to have known of that fact: *Mt. Nebo Anthracite Coal Co. v. Williamson*, 73 Ark. 530; s. c. 84 S. W. Rep. 779.

⁶ A person employed in the removal of stumps supporting a mine roof is charged with the duty to keep the roof propped, and if his negligent failure to do so, after being warned of the danger, results in injuries to himself, he cannot recover from the mine owner for injuries the result of his own negligence: *East Jellico Coal Co. v. Golden*, 79 S. W. Rep. 291; s. c. 25

Ky. L. Rep. 2056. See also: *Chicago & C. Coal Co. v. Moran*, 210 Ill. 9; s. c. 71 N. E. Rep. 38; aff'g s. c. 110 Ill. App. 664 (question for jury whether miner negligent).

⁷ *Gribben v. Yellow Aster Min. & C. Co.*, 142 Cal. 248; s. c. 75 Pac. Rep. 839.

⁸ *Smith v. Thomas Iron Co.*, 69 N. J. L. 11; s. c. 54 Atl. Rep. 562.

⁹ *Coffeyville Vitrified Brick & C. Co. v. Shanks*, 69 Kan. 306; s. c. 76 Pac. Rep. 856; *Allen v. Bell*, 32 Mont. 69; s. c. 79 Pac. Rep. 582.

¹⁰ *Central Coal & C. Co. v. Pearce*, 80 S. W. Rep. 449; s. c. 25 Ky. L. Rep. 2269.

obviate the difficulty when a bale was lowered the tackle was carried around a stanchion and again fastened to the bale, when by starting the winch the bale was drawn forward into the position desired. The method of doing the work was a common method of procedure. It was held that a longshoreman, familiar with the work, who was injured while moving a bale forward, could not complain because the hatch covering was not removed.¹¹

§ 5735. **Contributory Negligence of Employés of Telegraph, Telephone and Other Electrical Companies.**¹²—It has been held that an

¹¹ *Tydeman v. Prince Line*, 102 App. Div. (N. Y.) 279; s. c. 92 N. Y. Supp. 446.

¹² *New Omaha &c. Elec. Light Co. v. Rombold*, 67 Neb. 393; s. c. 93 N. W. Rep. 966 (question for the jury whether due care on a line-man's part required that he should see and avoid contact with exposed splices). Whether a lineman in the employ of a telegraph and telephone company, when at work on a pole of his employer, is negligent in not examining a pin inserted in the pole before trusting his weight upon it, is a question of fact for the jury, and this is none the less so by reason of a rule requiring linemen to test poles and pins if they thought there was danger and if they found any loose pins to pull them out and report to the foreman, if it does not appear that the pin in question was loose or that the lineman thought there was danger: *Chisholm v. New England Tel. &c. Co.*, 185 Mass. 82; s. c. 69 N. E. Rep. 1042. An experienced lineman, engaged with others in stringing a trolley wire at the end of the horizontal arm or bracket of a supporting pole, making use of a ladder leaning against the wire in such a way as to bring the greatest strain upon the bracket, instead of placing the ladder against the wire as nearly upright as safely can be done in order to relieve the strain on the wire and bracket as much as possible, and then mounting to the top of the ladder above the wire and leaning over to pull out an iron spindle which has been inserted in the end of the bracket to make more purchase in pulling up the wire and extracting the spindle by pulling it away from him, thus subjecting the bracket to a strain it was not con-

structed to withstand, whereupon the bracket breaks and throws the lineman to the ground,—is not in the exercise of due care and cannot recover from his employer for injuries thus sustained: *Mulligan v. McCaffrey*, 182 Mass. 420; s. c. 65 N. E. Rep. 831. Plaintiff and a co-employé were employed by defendant in line construction, and while raising a pole they were stationed near a snatch block to pull a rope which led from the pole toward the block. The power was supplied by horses, and plaintiff, who stood with his hands on the rope when the order was given for the horses to move, continued to hold the rope, when the men in front of him also pulled against plaintiff, and plaintiff's hand was drawn into the block. It was held that plaintiff was negligent, either in not seeing the block, or in not appreciating the danger, or, if he did not appreciate it, in continuing to clasp the rope after the giving of the order to move the horses: *Gavin v. Fall River &c. Tel. Co.*, 185 Mass. 78; s. c. 69 N. E. Rep. 1055. Deceased, an experienced lineman in defendant's employ, was directed to assist in constructing a line, and in so doing it became necessary to transfer wires from a defective pole to a new pole. The old pole was stayed by a guy wire, and deceased was warned not to cut the guy until all the work on the pole was completed. Decedent climbed the pole, and before removing any of the other wires cut the guy wire, which caused the pole to fall, throwing deceased to the ground, and from injuries sustained he subsequently died. It was held that the lineman's death was caused by his own negligence: *Leach v. Central*

electric lineman injured by the fall of a pole on which he was at work owing to its having deteriorated from dry rot, was not charged with notice of this defect by reason of his knowledge that the lines were being removed from wooden to iron poles.¹³ It would seem the duty of linemen at work on a dead wire to send some notification of that fact to persons likely to turn the current on the wire.¹⁴

§ 5739. **Circumstances under which Negligence has Not been Ascribed to Servants who were Hurt in Connection with Passenger and Freight Elevators.**—The law does not require that an elevator operator should examine into its condition with a view to discovering possible defects therein before using it.¹⁵ In one case a common laborer, without knowledge of elevator machinery, but who had on previous occasions started a refractory elevator by shaking it, was held not chargeable with contributory negligence, as a matter of law, in using this method to start the elevator at the time of receiving his injuries by the falling of the elevator, where it did not appear that he knew the cause of the stoppage of the elevator or the danger that the elevator would fall if released, or that such cause of danger was obvious to one of his understanding.¹⁶ In another case where an operator fell down the shaft by reason of the removal of the elevator by a guest permitted to use it by the proprietor of the hotel, without the knowledge of the employé, it was held that the operator was not, as a matter of law, guilty of contributory negligence.¹⁷

§ 5741. **Injuries in Connection with Excavations, Falling Banks, Etc.**¹⁸

§ 5742. **Contributory Negligence in Falling into Holes, Pits, etc.**¹⁹

New York Tel. & Teleg. Co., 81 App. Div. (N. Y.) 637; s. c. 80 N. Y. Supp. 1037.

¹³ Walsh v. New York & C. R. Co., 80 App. Div. (N. Y.) 316; s. c. 80 N. Y. Supp. 767; s. c. aff'd, 178 N. Y. 588; 70 N. E. Rep. 1111.

¹⁴ Williams v. North Wisconsin Lumber Co., 124 Wis. 328; s. c. 102 N. W. Rep. 589.

¹⁵ Continental Tobacco Co. v. Knoop, 71 S. W. Rep. 3; s. c. 24 Ky. L. Rep. 1268.

¹⁶ American Distributing Co. v. Thorne, 122 Fed. Rep. 431; s. c. 58 C. C. A. 413.

¹⁷ Lyons v. Dee, 88 Minn. 490; s. c. 93 N. W. Rep. 899.

¹⁸ Norris v. Cudahy Packing Co., 124 Iowa 748; s. c. 100 N. W. Rep. 853 (whether laborer failed to exer-

cise reasonable care for his safety while walking along path across which a ditch had been dug a question for the jury); Eichholz v. Niagara Falls & C. Power Co., 68 App. Div. (N. Y.) 441; s. c. 73 N. Y. Supp. 842; s. c. aff'd, 174 N. Y. 519; 66 N. E. Rep. 1107 (question for jury whether mason guilty of contributory negligence in obeying a peremptory order of his master's superintendent that he go to work in a trench the banks of which were unsafe).

¹⁹ Defendant maintained a pit in a path used by its employés in their work, which could be passed over in safety when covered, but the covering had been removed by defendant, without the knowledge of plaintiff, an employé, who fell into the pit

§ 5746. **Circumstances under which Contributory Negligence was Not Imputed in the Construction and Use of Ladders, Scaffolds, Derricks, etc.**—It has been held that the replacing of a rotten round in a forty-foot ladder is not an “ordinary repair” which a workman is expected to make, in the absence of proof that the defective condition was known to him.²⁰ A carpenter of thirty years’ experience was injured by the breaking of an old board in a scaffold. He testified that he never went on a scaffold without inspecting it; that he knew that some of the boards in the scaffold in question were old and were not safe for scaffold purposes, but he did not know that the scaffold was unsafe. It was held that even though the master could not, by the exercise of ordinary care, have known more in regard to the dangerous condition of the scaffold than the servant knew, it was still for the jury to determine whether the servant was negligent in using the scaffold.²¹

while passing along the path, after dark, and was injured. It was held that the question of contributory negligence of plaintiff was one of fact for the determination of the jury: *Ætna Powder Co. v. Earlandson*, 33 Ind. App. 251; s. c. 71 N. E. Rep. 185.

²⁰ *Twombly v. Consolidated Electric Light Co.*, 98 Me. 353; s. c. 57 Atl. Rep. 85.

²¹ *Hester v. Jacob Dold Packing Co.*, 95 Mo. App. 16; s. c. 75 S. W. Rep. 695.

TITLE NINETEEN.

LIABILITY OF SERVANT FOR NEGLIGENCE.

[§§ 5771-5778.]

§ 5771. **Liability to Third Persons.**—It is but an application of the principle of the main section to say that the trainmen operating a train on which a passenger is injured are not personally liable in damages for these injuries unless they result from the misfeasance or positive wrongs of such servants.¹

§ 5776. **Joint Liability of Master and Servant.**²—An allegation in a complaint for personal injuries received in a collision that the railroad company failed to make proper rules for running its trains, or to put up proper signals, and required the train to be run at a speed of fifty miles an hour, has been held not to state any acts of negligence in which the engineer of the train co-operated so as to give a joint right of action against him and the company. Nor was negligence imputed to the engineer by reason of his obedience of the order to run at such a speed.³ Another allegation in this complaint that the engineer in charge of the train “carelessly, recklessly and negligently” disregarded and ran by signals given to warn and advise him of the presence on the track of the engine with which he collided, on which the plaintiff was stationed, and carelessly, negligently and recklessly ran by said signals at a dangerous rate of speed and against such engine, causing the plaintiff’s injury, also failed to state a cause of action against the engineer and the railroad company as joint tort-feasors. Under this allegation the plaintiff would be entitled to recover punitive damages against the engineer but only compensatory damages against his employer.⁴

§ 5777. **Liability of Servant to Fellow Servant.**⁵

¹ Bryce v. Southern R. Co., 125 Fed. Rep. 958; aff’g s. c. 122 Fed. Rep. 709.

² That there can be no joinder where the causes of action are separate and distinct and based on different grounds, see: Shaffer v.

Union Brick Co., 128 Fed. Rep. 97; McNemar v. Cohn, 115 Ill. App. 31.

³ Gustafson v. Chicago &c. R. Co., 128 Fed. Rep. 85.

⁴ Gustafson v. Chicago &c. R. Co., 128 Fed. Rep. 85.

⁵ That servant is liable to fellow

§ 5778. **Liability of Servant to Master.**—The master's cause of action against his servant on account of injuries to a third person through the servant's negligence does not arise until the master is compelled to pay the party injured.⁶

servant for injuries the result of Co., 71 S. C. 53; s. c. 50 S. E. Rep.
his negligence, see: O'Brien v. Tray- 716.
nor, 69 N. J. L. 239; s. c. 55 Atl. Rep. ⁶Gaffner v. Johnson, 39 Wash.
307; Brabham v. American Tel. &c. 437; s. c. 81 Pac. Rep. 859.

TITLE TWENTY.

NEGLIGENCE OF MUNICIPAL CORPORATIONS.

[§§ 5785-6361.]

§§ 5785-5791. **Not Liable for Discretionary, but Liable for Ministerial Acts—Illustrations.**¹—On the ground that the act was governmental or discretionary within the principle elaborated in the main section, cities have been held not liable for damages resulting from its failure to supply a sufficient quantity of water for the extinguishment of fires,² nor for failure to furnish proper appliances for its fire department;³ nor for injuries to a prisoner due to the unsanitary condition of the city prison;⁴ nor for an injury to a pupil from a defect in a public school building;⁵ nor for injury to health due to negligence in the handling of contagious diseases;⁶ nor for defects in⁷ or the failure to enact⁸ or enforce⁹ ordinances; nor for injuries to property in laying out drains and sewers,—a judicial function,¹⁰ or changing the grades of streets,¹¹ or determining the part of a street for improvement;¹² nor for the delay or neglect of the mayor and council in the performance of duties purely ministerial.¹³ It is the generally accepted rule that the lighting of the streets of a city is a governmental function, for the failure to perform which the city is not liable to an

¹ That a city is not liable either for the non-exercise of or the manner in which it exercises in good faith discretionary powers of public or legislative character, see: *Keeley v. Portland*, 100 Me. 260; s. c. 61 Atl. Rep. 180.

² *United States v. Sault Ste. Marie*, 137 Fed. Rep. 258; *Aschoff v. Evansville*, 34 Ind. App. 25; s. c. 72 N. E. Rep. 279.

³ *Lynch v. North Yakima*, 37 Wash. 657; s. c. 80 Pac. Rep. 79.

⁴ *Shaw v. Charleston*, 57 W. Va. 433; s. c. 50 S. E. Rep. 527.

⁵ *Clark v. Nicholasville*, 87 S. W. Rep. 300; s. c. 27 Ky. L. Rep. 974.

⁶ *Lynch v. North Yakima*, 37 Wash. 657; s. c. 80 Pac. Rep. 79.

⁷ *McGuinness v. Allison Realty Co.*,

46 Misc. Rep. (N. Y.) 8; s. c. 93 N. Y. Supp. 267.

⁸ *Rogers v. Binghamton*, 101 App. Div. (N. Y.) 352; s. c. 92 N. Y. Supp. 179; *Bryant v. Orangeburg*, 70 S. C. 137; s. c. 49 S. E. Rep. 229.

⁹ *Veraguth v. Denver*, 19 Colo. App. 473; s. c. 76 Pac. Rep. 539.

¹⁰ *Keeley v. Portland*, 100 Me. 260; s. c. 61 Atl. Rep. 180; *Kidson v. Bangor*, 99 Me. 139; s. c. 58 Atl. Rep. 900. See also *Rome v. Worcester*, 188 Mass. 307; s. c. 74 N. E. Rep. 370.

¹¹ *Miller v. Kalamazoo*, 140 Mich. 494; s. c. 103 N. W. Rep. 845; 12 Det. Leg. N. 231.

¹² *Ely v. St. Louis*, 181 Mo. 724; s. c. 81 S. W. Rep. 168.

¹³ *Gordon v. Omaha*, — Neb. —; s. c. 99 N. W. Rep. 242.

injured pedestrian;¹⁴ but if it does undertake to light the streets it will be liable for injuries the result of the negligent performance of this duty.¹⁵ On the ground that the act was purely ministerial cities have been held liable for injuries to persons or property resulting from negligence in the construction or reconstruction of streets,¹⁶ the failure to keep in repair water pipes in the street used by its fire department;¹⁷ the negligent operation of a ferry conducted by the municipality in part for profit;¹⁸ the negligent operation of an elevator in a city building used in carrying the public to courts located on the upper floors of a city hall;¹⁹ the neglect of the city to furnish firemen at a fire station a reasonably safe place in which to work.²⁰

§ 5792. Performance of Public Work by Means of its own Agents.²¹

§ 5794. Not Liable for Defective Plan, but Liable for Defective Execution of Public Work.²²—In a case where a city charter expressly authorized the street commissioner to fill a street at a certain point to the established grade it was held that the city was liable for the acts of this officer in so grading the street as to cast a large amount of filling on the property of an abutter, though neither the charter nor the resolution requiring the commissioner to grade the street authorized the work to be performed in that manner.²³

§ 5795. This Distinction Criticized, Qualified and Repudiated.—It is the language of an official syllabus that where there are obstacles to overcome in the construction of any public work, and reasonable minds might differ as to whether the plan adopted therefor by the municipality was the best and safest one, the decision of the municipality on

¹⁴ Vincennes v. Spees, 35 Ind. App. 389; s. c. 74 N. E. Rep. 277; rev'g s. c. 72 N. E. Rep. 531.

¹⁵ Keim v. Ft. Dodge, 126 Iowa 27; s. c. 101 N. W. Rep. 443.

¹⁶ Ely v. St. Louis, 181 Mo. 724; s. c. 81 S. W. Rep. 168.

¹⁷ Aschoff v. Evansville, 34 Ind. App. 25; s. c. 72 N. E. Rep. 279.

¹⁸ Townsend v. Boston, 187 Mass. 283; s. c. 72 N. E. Rep. 991.

¹⁹ Fox v. Philadelphia, 208 Pa. 127; s. c. 57 Atl. Rep. 356; 65 L. R. A. 214.

²⁰ Bowden v. Kansas City, 69 Kan. 587; s. c. 77 Pac. Rep. 573; 66 L. R. A. 181.

²¹ A city, in the construction or reconstruction of water reservoirs, which work is carried on under the supervision and direction of its officers, is not regarded as performing a public governmental duty so

as to exempt it from liability for the negligence of these officers or agents and those acting under them: Hourigan v. Norwich, 77 Conn. 358; s. c. 59 Atl. Rep. 487; Southeast v. New York, 96 App. Div. (N. Y.) 598; s. c. 89 N. Y. Supp. 630. A board of street and park commissioners created by statute is an agent of the city for the negligence of which and its officers the city is responsible: Lockwood v. Dover, 73 N. H. 209; s. c. 61 Atl. Rep. 32.

²² That the city is liable for the negligent execution of public work, see: Keeley v. Portland, 100 Me. 260; s. c. 61 Atl. Rep. 180; Koontz v. District of Columbia, 24 App. (D. C.) 59; Lockwood v. Dover, 73 N. H. 209; s. c. 61 Atl. Rep. 32.

²³ Bunker v. Hudson, 122 Wis. 43; s. c. 99 N. W. Rep. 448.

the question cannot be reviewed by the courts. But a municipality is liable for an injury caused by an unsafe public structure, although the defect exists in the plan adopted for its construction, if there be no reasonable necessity for having the defect.²⁴ In a New York case it is held that since the laws of that State providing for the construction of the New York subway required the city to approve the plans and specifications prepared by the board of rapid transit railway commissioners, the city was bound to exercise reasonable care to adopt plans and specifications which could be performed without injury to adjoining property, and that this duty could not be delegated.²⁵ In one case the court said: "While it is true the plan of improvement of the streets of the city—and indeed, whether they shall be improved at all—is a matter confined to the discretion of the municipal council, yet, if they do improve them, it must be done upon some plan not palpably dangerous to life and limb of travellers. The council cannot authorize or suffer traps or pitfalls or such obviously dangerous obstructions to exist in the public streets, whether structural or otherwise, as indicate a disregard of the safety of pedestrians, without making the city liable for injuries sustained therefrom."²⁶

§ 5796. Application of the Doctrine of Respondeat Superior to Municipal Corporations.²⁷

§ 5798. Not Liable for Ultra Vires Acts of its Officers.—Generally speaking, a municipal officer can exercise only the power conferred upon him by law, or by ordinance passed in pursuance of law, and his acts in the absence of power so conferred are not binding on the municipality.²⁸ The act of a city in laying out a sewer in its corporate capacity without authority of law has been held an *ultra vires* act and the city not liable for a nuisance created thereby.²⁹

§ 5803. When Not Liable for Negligence of Independent Contractors.—Broadly speaking, a city will be liable for the negligent performance of a contract by one who, for an agreed compensation, un-

²⁴ McDonald v. Duluth, 93 Minn. 206; s. c. 100 N. W. Rep. 1102.

²⁵ Haefelin v. McDonald, 96 App. Div. (N. Y.) 213; s. c. 89 N. Y. Supp. 395.

²⁶ O'Rear, J., in House v. Covington, 82 S. W. Rep. 374; s. c. 26 Ky. L. Rep. 660.

²⁷ Thus in a case where a city hired a driver together with his team from a firm of contractors and such driver was required by the city to report to its foreman before be-

ginning labor, it was held that the driver, while reporting, was engaged in the work of the city, so as to render it liable for damages caused by his team running away while he was engaged in reporting to the foreman: Gorney v. New York, 102 App. Div. (N. Y.) 259; s. c. 92 N. Y. Supp. 451.

²⁸ Chicago v. Hannon, 115 Ill. App. 183.

²⁹ Atwood v. Biddeford, 99 Me. 78; s. c. 58 Atl. Rep. 417.

dertakes its performance, and the city retains no control or supervision over the method or manner of work,³⁰ unless the matter involved is one of absolute duty owed by the city to an individual, or the work is intrinsically dangerous, or when properly done, creates a nuisance.³¹ In a case where a city's contract for the construction of a tunnel provided that all labor performed should be subject to the inspection of the commissioner of public works, it was held that the city was liable for the negligence of an independent contractor in doing the work.³²

§ 5807. Not Liable for Property Destroyed by Mobs, unless made so by Statute.—The Kansas statute, authorizing the recovery of damages against cities on account of mobs, whether such damages shall be loss of property or injury to life or limb, applies to all bodily injuries, and is not limited to such as result in death or the loss of a limb.³³ It is no defense to an action brought under these statutes that the city was unable to prevent the injury.³⁴

§ 5821. Officers of Highways and Public Works.³⁵

§ 5824. Board of Public Works.³⁶

§ 5825. Commissioners of Public Parks.³⁷

³⁰ *Koontz v. District of Columbia*, 24 App. (D. C.) 59; *Bennett v. Mt. Vernon*, 124 Iowa 537; s. c. 100 N. W. Rep. 349; *La Groue v. New Orleans*, 114 La. 253; s. c. 38 South. Rep. 160; *Wright v. Muskegon*, 140 Mich. 215; s. c. 103 N. W. Rep. 558; 12 Det. Leg. N. 122; *Haefelin v. McDonald*, 96 App. Div. (N. Y.) 213; s. c. 89 N. Y. Supp. 395; *Jewell v. Mt. Vernon*, 91 App. Div. (N. Y.) 578; s. c. 87 N. Y. Supp. 120; *Kelly v. New York*, 106 App. Div. (N. Y.) 576; s. c. 94 N. Y. Supp. 872.

³¹ *Bennett v. Mt. Vernon*, 124 Iowa 537; s. c. 100 N. W. Rep. 349; *Chicago v. Murdoch*, 212 Ill. 9; s. c. 72 N. E. Rep. 46; aff'g s. c. 113 Ill. App. 656 (blasting for tunnel).

³² *Chicago v. Murdoch*, 212 Ill. 9; s. c. 72 N. E. Rep. 46; aff'g s. c. 113 Ill. App. 656.

³³ *Iola v. Birnbaum*, 71 Kan. 600; s. c. 81 Pac. Rep. 198.

³⁴ *Iola v. Birnbaum*, 71 Kan. 600; s. c. 81 Pac. Rep. 198.

³⁵ A city does not owe employes of street and park commissioners a master's duty to use ordinary care in furnishing instrumentalities for the performance of the work, and

hence is not liable for the death of a servant, caused by the viciousness of a horse furnished him for use in removing ashes, etc.: *Connor v. Manchester*, 73 N. H. 233; s. c. 60 Atl. Rep. 436. A California case holds that an action for damages for injury caused by a defective highway will lie against a town marshal acting *ex officio* as street commissioner, whose duty it is to keep the highway in repair, and the board of town trustees, where the duty of maintaining the safety of highways is correlative with the right accorded them by charter, of opening, lighting and keeping in good repair the highways of the municipality: *Doeg v. Cook*, 126 Cal. 213; s. c. 58 Pac. Rep. 707.

³⁶ The bureau of buildings of the borough of Manhattan is not an administrative department of the city, so as to make the city of New York liable for the default of the superintendent: *McGuinness v. Allison Realty Co.*, 46 Misc. (N. Y.) 8; s. c. 93 N. Y. Supp. 267.

³⁷ A city is liable for the negligent act of a servant of the board of park commissioners in stretching

§ 5826. **Boards of Health, Health Officers, etc.**—It is the general view that a city in the operation and maintenance of hospitals under the control of a board of health acts in its governmental capacity, and hence is not liable for the torts of its officers in charge of such a hospital toward inmates.³⁸

§ 5833. **Fire Departments.**³⁹

§ 5836. **Police Officers.**⁴⁰

§ 5839. **Construction or Repair of Public School Houses.**—A statute creating liability against an owner or possessor of premises whereon a wrongful excavation is made, thereby injuring the foundation and walls of an adjoining owner, is held inapplicable to boards of education holding title to a lot excavated for school purposes, and such board is not liable in its corporate capacity for damages, where in excavating for a school building it negligently carries the excavation below the statutory depth of nine feet, thereby undermining and injuring the foundation and walls of an adjoining owner.⁴¹

§ 5851. **Liability for Nuisances—Licensing Fireworks and Illuminations.**—It is the wholesome doctrine of a decision of the New York Court of Appeals that fireworks exhibited on an extensive scale in a crowded thoroughfare in the midst of a large city where a vast multitude of people is assembled, if not a nuisance as a matter of law may properly be found such as a matter of fact. A city is charged with the duty to exercise due care to keep its streets in a safe condition.⁴²

§ 5852. **Nuisance Created in the Handling of Contagious Diseases.**—It has been held that the contracting of smallpox by a guest from an inmate of a house whose infection with the disease, it was conceded, was due to the unlawful location of a pesthouse in the neighborhood, was the proximate result of such unlawful location, so as to render the city liable in damages to the guest.⁴³

a rope across a boulevard whereby a bicycle rider, in attempting to avoid it, collided with a team and was injured: *Kleopfert v. Minneapolis*, 93 Minn. 118; s. c. 100 N. W. Rep. 669.

³⁸ *Lexington v. Batson*, 118 Ky. 489; s. c. 81 S. W. Rep. 264; 26 Ky. L. Rep. 363.

³⁹ It is the holding of one case that a city it is not liable for a personal injury occasioned by the negligence of an employé of its fire department engaged in hauling coal for use by the department: *Manske v. Milwaukee*,

123 Wis. 172; s. c. 101 N. W. Rep. 377.

⁴⁰ *Miller v. Hastings*, 25 Pa. Super. Ct. 569 (Pennsylvania boroughs not liable for torts of police officers).

⁴¹ *Board of Education of Cincinnati v. Volk*, 72 Ohio St. 469; s. c. 74 N. E. Rep. 646.

⁴² *Landau v. New York*, 180 N. Y. 48; s. c. 72 N. E. Rep. 631; rev'g s. c. 93 App. Div. (N. Y.) 613; 87 N. Y. Supp. 1139.

⁴³ *Henderson v. O'Halaran*, 114 Ky. 186; s. c. 70 S. W. Rep. 662; 24 Ky. L. Rep. 995; 59 L. R. A. 718.

§ 5854. **Dangerous Nuisances Attractive to Children.**—Generally speaking, a city is not required to anticipate and guard against dangers to children which may result from the improper use of objects safe in themselves and for the use for which they were designed.⁴⁴ Thus where the undisputed evidence in an action for injuries to a child shows that a sewer into which he fell and was drowned was properly constructed and was necessary to prevent the streets and private property from being damaged by overflow from heavy rains, and there was no evidence of any negligence on the part of the city or its employés, it was held that there could be no recovery against the city for the death of the child.⁴⁵ So it has been held that a city reservoir situated in, or adjacent to and in the same block with a public park, is a place of danger to persons, and particularly children, who may frequent the park, which it is the duty of the city to surround by sufficient safeguards to protect such persons and children from injury; but the duty is fulfilled by the exercise of reasonable care in the construction of barriers around the reservoir to prevent danger.⁴⁶ The general duty of a city to use ordinary care to maintain its streets in a safe condition requires a city to use like care to see that curb stones placed on a street to be curbed are not placed in a position dangerous to children congregating in the street. In one case it was held that it was no defense to an action against the city for injuries to a child by the fall of a stone improperly placed in an unsafe position that it was so placed by an independent contractor.⁴⁷

§ 5856. **Power Summarily to Abate Nuisances.**—Equity has jurisdiction, at the suit of a city, to compel the removal of obstructions of and encroachments on its sidewalks which exclude the public therefrom, though city ordinances prohibiting these encroachments impose penalties for their disobedience.⁴⁸

§ 5859. **Liability to Private Action for Failure to Abate.**—It has been held that though the unauthorized obstruction of a city street by railway tracks and permanent structures thereon may, as a matter of law, amount to a public nuisance, only persons who will sustain in-

⁴⁴ *Gilmartin v. Philadelphia*, 201 Pa. 518; s. c. 51 Atl. Rep. 312 (child injured by breaking down of a gate to a driveway on which child had climbed).

⁴⁵ *Rome v. Cheney*, 114 Ga. 194; s. c. 39 S. E. Rep. 933; 55 L. R. A. 221.

⁴⁶ *Carey v. Kansas City*, 187 Mo.

715; s. c. 86 S. W. Rep. 438 (child eleven years old had been repeatedly chased away from the reservoir by its watchman).

⁴⁷ *Frankfort v. Allen*, 82 S. W. Rep. 292; s. c. 26 Ky. L. Rep. 581.

⁴⁸ *New York v. Knickerbocker Trust Co.*, 104 App. Div. (N. Y.) 223; s. c. 93 N. Y. Supp. 937.

jury not shared in by the public can maintain equitable proceedings to enjoin the nuisance.⁴⁹

§ 5863. Creating or Permitting Nuisances in Highways.—It may be said generally, that the obstruction of a public street or sidewalk without authority of law constitutes a public nuisance, regardless of the question of the comparative benefit to the public from the obstruction of the street, and the town in which the street is situated may abate or remove the same by action or other lawful procedure.⁵⁰

§ 5872. Liability for Defective Sewers Predicated on the Ground of Negligence.⁵¹

§ 5873. What will Constitute Negligence Rendering the Municipality Liable.—The law makes no distinction between a municipality making excavations for sewer purposes and individuals making excavations for building purposes, in its application of the rule that one making an excavation on his own land deeper than the foundation of a building on adjoining land and so near to the building as to endanger it, must notify the adjoining owner of the proposed excavation and afford him a reasonable opportunity to protect his property, and that the failure to do so amounts to actionable negligence, unless the adjoining owner had actual knowledge of the proposed excavation.⁵²

§ 5875. Liable to Connecting Owners for Negligent Non-Repair.⁵³

§ 5876. Whether Liable for Damages Resulting from Constructing Sewers on a Defective Plan.—It is the general rule that, in the absence of want of good faith on the part of municipal authorities, the law will not hold the city responsible for the exercise of their judgment and discretion in planning a sewer, though it results in the adop-

⁴⁹ *Coker v. Atlanta &c. R. Co.*, 123 Ga. 483; s. c. 51 S. E. Rep. 481.

⁵⁰ *New York v. Knickerbocker Trust Co.*, 104 App. Div. (N. Y.) 223; s. c. 93 N. Y. Supp. 937; *West Seattle v. West Seattle Land &c. Co.*, 38 Wash. 359; s. c. 80 Pac. Rep. 549.

⁵¹ That municipalities are liable for negligence in the construction or maintenance of sewers, see: *Westcott v. Boston*, 186 Mass. 540; s. c. 72 N. E. Rep. 89; *Lockwood v. Dover*, 73 N. H. 209; s. c. 61 Atl. Rep. 32; *O'Donnell v. Syracuse*, 102 App. Div. (N. Y.) 80; s. c. 92 N. Y. Supp. 555. A rule that a municipality will not be liable in tort for the construction of a sewer to drain water from a highway for the pur-

pose of keeping the same in a safe condition cannot be invoked in a case where the conduit was constructed largely for the purpose of draining a large body of private land: *Westcott v. Boston*, 186 Mass. 540; s. c. 72 N. E. Rep. 89.

⁵² *Gerst v. St. Louis*, 185 Mo. 191; s. c. 84 S. W. Rep. 34 (adjoining owner not charged with this knowledge by fact of publication in newspaper of ordinance creating sewer district and providing for their construction).

⁵³ *Betterly v. Scranton*, 208 Pa. 370; s. c. 57 Atl. Rep. 768 (city, though often notified of bad condition of sewer, failed to take steps to remedy nuisance).

tion of a defective plan.⁵⁴ But the city will be liable for an error of judgment of its officers in carrying out a formulated plan for the discharge of sewage,⁵⁵ and it will be liable for injuries to property caused by overloading an inadequate sewer system.⁵⁶

§ 5877. Not Bound to Provide against Extraordinary Rainfalls.—A municipality which adopts a natural water course as an open sewer is bound to keep the channel of the stream open and to prevent the accumulation of filth, and is liable to respond in damages for any injury which may be done to riparian owners in consequence thereof.⁵⁷ The city will not be exonerated from liability for injury to property from an overflow at the time of a freshet by the fact that the act of God in causing the freshet also contributed materially to the damages. An act of God will relieve a municipality for responsibility only where no human aid or intervention contributed to the loss.⁵⁸ Whether the likelihood of the occurrence of freshets of dangerous volume should have been anticipated in the construction of a sewerage system is a question for the jury.⁵⁹

§ 5877a. Abandonment of Sewers already Constructed.—It may be said generally that where a city has constructed a system of sewers for carrying off surface water, it may not abandon these sewers, when the effect of the abandonment is to leave lot owners in a worse condition than they would have been if the city had not constructed the sewers.⁶⁰

§ 5880. Duty to Construct Suitable Outlet for Sewer.—A city, warned by recurring freshets of the fact that a creek into which it discharges all its sewage is inadequate for that purpose, and instead of making other provisions for the discharge of its sewage increases the burden upon the creek by the extension of its sewer system, is

⁵⁴ District of Columbia v. Cropley, 23 App. (D. C.) 232; Keeley v. Portland, 100 Me. 260; s. c. 61 Atl. Rep. 180. A municipality is not liable for damages resulting from an error of judgment with respect to the location or direction of the sewer, or its sufficiency for the purpose designed; but its liability is confined to injuries due to interference with the natural flow of the water, faulty construction, and failure to maintain the sewer in proper condition and free from obstructions that materially affect its use: Siegfried v. South Bethlehem, 27 Pa. Super. Ct. 456.

⁵⁵ O'Donnell v. Syracuse, 102 App. Div. (N. Y.) 80; s. c. 92 N. Y. Supp. 555.

⁵⁶ Ahrens v. Rochester, 97 App. Div. (N. Y.) 480; s. c. 90 N. Y. Supp. 744.

⁵⁷ Glasgow v. Altoona, 27 Pa. Super. Ct. 55.

⁵⁸ O'Donnell v. Syracuse, 102 App. Div. (N. Y.) 80; s. c. 92 N. Y. Supp. 555.

⁵⁹ Westcott v. Boston, 186 Mass. 540; s. c. 72 N. E. Rep. 89.

⁶⁰ Atchison v. Chalis, 9 Kan. 603; McAdams v. McCook, — Neb. —; s. c. 99 N. W. Rep. 656.

wanting in due care and is liable to a property owner for injuries resulting from an overflow.⁶¹

§ 5881. Failing to Construct Drains to Carry Off Surface-Water.—A city is liable in damages to an abutting owner on a street for injuries due to the flooding of his premises by surface water diverted into a street on the construction of a public improvement where sufficient outlets were not provided.⁶² But a city is not liable for the death of a boy bathing in surface water accumulated on a vacant lot, where there is no proof of immediate connection between the negligence of the city in safeguarding the lot and the drowning.⁶³

§ 5883. Duty to Use Care to Prevent Obstructions of Sewers, Drains and Culverts.—Generally speaking, a city is liable in damages for injuries due to a failure to keep its sewers in order, provided there is no want of due care on the part of the injured property owner.⁶⁴

§ 5887. Emptying Sewers into Natural Streams, Polluting their Waters.—The following holdings are encountered in recent decisions dealing with this subject:—That a lower riparian owner injured by the pollution of a water course is not required to prove special damages in order to recover at least nominal damages;⁶⁵ that a defense of a prescriptive right to use a stream for sewer purposes is not sustained, where the city has for more than twenty years used such stream for the disposal of a certain amount of sewage, but it appears that such use had greatly increased in the last few years, since for any increased user, causing material injury, the right of prescription cannot be set up as a defense;⁶⁶ that a corporation owning property injured by pollution is not estopped from maintaining its action against a city because of the knowledge of its president, at the time of the construction of the sewers that pollution would follow and he made no protest;⁶⁷ that a recovery cannot be had against a city for the death of a person from typhoid fever contracted from drinking impure water from a well claimed to have been polluted by percolation of sewage from a near-by stream—a conclusion based on the remoteness and uncertainty of the alleged cause;⁶⁸ that a lower riparian pro-

⁶¹ O'Donnell v. Syracuse, 102 App. Div. (N. Y.) 80; s. c. 92 N. Y. Supp. 555.

⁶² Valparaiso v. Spaeth, — Ind. —; s. c. 74 N. E. Rep. 518; Houston v. Hutcheson (Tex. Civ. App.), 81 S. W. Rep. 86.

⁶³ Reeder v. Omaha, — Neb. —; s. c. 103 N. W. Rep. 672.

⁶⁴ Burnside v. Everett, 186 Mass. 4; s. c. 71 N. E. Rep. 82.

⁶⁵ Smith v. Sedalia, 182 Mo. 1; s. c. 81 S. W. Rep. 165.

⁶⁶ Standard Bag & Co. v. Cleveland, 25 Ohio Cir. Ct. R. 380.

⁶⁷ Standard Bag & Co. v. Cleveland, 25 Ohio Cir. Ct. R. 380.

⁶⁸ Wharton v. Bradford City, 209 Pa. 319; s. c. 58 Atl. Rep. 621.

prietor injured by the pollution of a creek is entitled to recover compensation for the depreciation of the market value of his land, caused thereby, for the destruction of its comfortable use and occupation, and for the actual loss of rents, provided these elements are susceptible of proof;⁶⁹ that the South Carolina statute providing for the same remedy on the condemnation of land for waterworks, sewerage and lights as is provided for the condemnation of land for railroad companies gives an exclusive remedy, and hence a private person whose property outside of a city is damaged by sewage emptied into a stream cannot sue the city for tort, nor to abate the nuisance.⁷⁰

§ 5892. Contributory Negligence of the Property Owner.⁷¹

§ 5894. Questions of Evidence in Actions for Injuries from Defective Sewers.⁷²

§ 5895. Measure and Elements of Damages for Injuries from the Overflow of Sewers.—It is held that the measure of damages to one whose property has been injured by the overflow of a sewer is the depreciation in its rental value.⁷³ In a case where the claim for damages resulting from the pollution of a stream was not merely for permanent injury to land but included injury to trade and deprivation of the use of the water, it was held that the plaintiff could recover the entire amount of actual damages up to the trial of the cause, irrespective of the value of the land; but the city could show that the injury was not permanent, since it was possible and practicable to abolish the injurious conditions.⁷⁴ It is the holding of a Wisconsin case that the expense incurred in restoring property to its former condition is an item properly allowed as damages for an overflow of a sewer, though

⁶⁹ *Smith v. Sedalia*, 182 Mo. 1; s. c. 81 S. W. Rep. 165.

⁷⁰ *Matheny v. Aiken*, 68 S. C. 163; s. c. 47 S. E. Rep. 56.

⁷¹ It is held that a finding that plaintiff's negligence caused a loss of wood piled near the stream, when he should have anticipated, from knowledge of prior floods, that the material would be carried away and damaged, is not a finding that he was guilty of contributory negligence precluding a recovery for the expense incurred in restoring the yard: *Davelaar v. Milwaukee*, 123 Wis. 413; s. c. 101 N. W. Rep. 361.

⁷² *Burnside v. Everett*, 186 Mass. 4; s. c. 71 N. E. Rep. 82 (evidence of an overflow of a sewer two years before too remote to charge city with notice that similar accident

might happen again). In order to recover against a city for violation of a statute requiring proper maintenance and repair of public sewers, plaintiff must show that the drain was a public one, established by the city, that plaintiff was entitled to drainage through it, that defendant had failed to maintain the sewer or keep it in repair, that the defect was not in the original system, and that plaintiff suffered injury from this neglect of the city: *Kidson v. Bangor*, 99 Me. 139; s. c. 58 Atl. Rep. 900.

⁷³ *Ahrens v. Rochester*, 97 App. Div. (N. Y.) 480; s. c. 90 N. Y. Supp. 744.

⁷⁴ *Glasgow v. Altoona*, 27 Pa. Super. Ct. 55.

no itemized account of such expense was furnished the city.⁷⁵ In this case brought for injuries to a brickyard it was also held that the plaintiff could recover the cost of drying and housing a specified number of yards of dry clay, which was saturated with water, rendering the cost in drying and housing a total loss.⁷⁶ It further appearing in this case that the owner of the yard belonged to an association which controlled the output of the yard, it was held that there could be no recovery for loss of business.⁷⁷ Where the city is unquestionably liable in damages to a property owner for the overflow of a sewer into his premises on each occasion of a heavy rainfall the damages will be regarded as continuous, and the recovery should include all the damages sustained up to the time of the commencement of the action.⁷⁸

§ 5907. Collecting Surface Water in Large Quantities and Discharging it on Private Lands.⁷⁹

§ 5912. Negligently Casting Earth on Private Land.—A city, whose council ordered a street in front of property graded to an established grade by the street commissioner and he performed his work so as to bring the surface of the street to grade for its full width, and so filled the street opposite the plaintiff's property that a large amount of filling was thrown thereon, was held liable for the trespass so occasioned.⁸⁰ An admission of the city that the work was done "as required by law," estopped the city to deny that the commissioner's authority did not empower him to grade the surface of the street to its full width.⁸¹

§ 5915. Liable for Highway Injuries in Most of the States.⁸²—It is essential to municipal liability in all cases that the negligence of the city should have been the proximate cause of the injury, although liability is made to depend upon an enactment.⁸³

⁷⁵ *Davelaar v. Milwaukee*, 123 Wis. 413; s. c. 101 N. W. Rep. 361.

⁷⁶ *Davelaar v. Milwaukee*, 123 Wis. 413; s. c. 101 N. W. Rep. 361.

⁷⁷ *Davelaar v. Milwaukee*, 123 Wis. 413; s. c. 101 N. W. Rep. 361.

⁷⁸ *Ahrens v. Rochester*, 97 App. Div. (N. Y.) 480; s. c. 90 N. Y. Supp. 744.

⁷⁹ It has been held that a *prima facie* case of negligence, in casting surface water on adjoining property in larger quantities than had flowed there before, was made where the evidence showed that prior to the construction of a catch-basin by the city in a street near the plaintiff's property and the raising of the street grade at that place, no water

had ever made its way from the street to the plaintiff's premises, but immediately thereafter overflow from the catch-basin repeatedly invaded the plaintiff's cellar: *Miles v. Brooklyn*, 98 App. Div. (N. Y.) 195; s. c. 90 N. Y. Supp. 702.

⁸⁰ *Bunker v. Hudson*, 122 Wis. 43; s. c. 99 N. W. Rep. 448.

⁸¹ *Bunker v. Hudson*, 122 Wis. 43; s. c. 99 N. W. Rep. 448.

⁸² That the municipality is liable, see: *Brown v. Towanda*, 24 Pa. Super. Ct. 378; *Hillyer v. Winsted*, 77 Conn. 304; s. c. 59 Atl. Rep. 40.

⁸³ *Fehrman v. Pine River*, 118 Wis. 150; s. c. 95 N. W. Rep. 105; *Thompson v. West Bay City*, 137 Mich. 94; s. c. 100 N. W. Rep. 280; 11 Det. Leg.

§ 5919. **Jurisdictions in which Not Liable.**⁸⁴—In Nebraska a township organized under the township organization act of that State is not regarded as a municipal corporation in the sense that it is liable to persons injured by reason of defects in a public highway within its limits.⁸⁵ In Oregon a county is not liable, unless made so by statute, for injury from a defect in a highway, though the law requires it to keep the highway in repair, and gives it power to provide means with which to do so.⁸⁶ In Kentucky the same conclusion was reached in a case where it was sought to charge a county with liability for an injury resulting from the failure to repair a turnpike road leased by it from the owners, and maintained free of toll, out of general funds raised by taxation.⁸⁷

§ 5924. **Liability or Non-Liability under Various Other Statutes.**—The New Hampshire statute, making towns in that State liable for damages to travellers because of dangerous embankments and defective railings rendering the highway unsuitable for travel, is held to apply to persons riding on bicycles, at least to the extent of making the town liable for injuries to them resulting from defects which make the highway unsuitable for ordinary travel afoot or in other vehicles.⁸⁸

§ 5926. **Defense of Want of Funds to Repair.**⁸⁹

§ 5930. **Negligence in the Repair of Roads which Form Divisional Lines between Different Municipalities.**—In a case where injuries were received on a highway which had been the divisional line between different towns, but which at the time of the accident owing to change in boundaries was no longer a divisional line, but there had been no reapportionment of the road, it was held that both towns were jointly liable on the ground that the change of boundaries could only become effective by a reapportionment as provided by statute.⁹⁰

§ 5933. **Highways by Formal Laying Out.**—A street located on private grounds—in the particular case on the campus of a university

N. 233 (city liable only for its own negligence or the negligence of some one for whose conduct it is legally responsible).

⁸⁴ That a city was not liable under the common law, see: *McEvoy v. Sault Ste. Marie*, 136 Mich. 172; s. c. 98 N. W. Rep. 1006; 10 Det. Leg. N. 1036.

⁸⁵ *Wilson v. Ulysses Tp.*, — Neb. —; s. c. 101 N. W. Rep. 986.

⁸⁶ *Schroeder v. Multnomah Co.*, 45 Or. 92; s. c. 76 Pac. Rep. 772.

⁸⁷ *Sinkhorn v. Lexington & c. Road*

Co., 112 Ky. 205; s. c. 65 S. W. Rep. 356; 23 Ky. L. Rep. 1479.

⁸⁸ *Hendry v. North Hampton*, 72 N. H. 351; s. c. 64 L. R. A. 70; 56 Atl. Rep. 922.

⁸⁹ That want of funds with which to make repairs is not a defense to an action for injuries caused by defective highway, see: *McKinney v. Brown* (Tex. Civ. App.), 81 S. W. Rep. 88.

⁹⁰ *Schoepke v. Wolfgram*, 119 Wis. 258; s. c. 96 N. W. Rep. 556.

—and controlled by the owner of such premises, public use of which is not inconsistent with the private ownership, is not a public street.⁹¹

§ 5936. Highways by Dedication, Acceptance, and Establishment.

It may be said generally, that the duty of a town to keep its highways safe for travel is imposed with respect to existing highways without reference to the manner in which they originally acquired the highway character.⁹² And where a city has accepted a dedication of land for a street, and has assumed control over it and opened it to the public, the city is liable for damages from its defective condition, though it has not been improved by the construction of sidewalks, etc.⁹³ In New York a city is not required to accept a street dedicated by map so as to prevent it from opening the street on its own initiative over the line of the proposed street as shown by the alleged dedication.⁹⁴

§ 5937. What Constitutes an Acceptance.⁹⁵

§ 5938. Highways by Public User and Prescription.—Generally speaking, the character of a street as a public highway when collaterally raised in an action for its negligent maintenance is sufficiently shown by proof of its uniform, adverse and continued use by the public for the time in which a title would ripen by adverse possession under the statute of the particular jurisdiction.⁹⁶ There is authority

⁹¹ *Eolster v. Ithaca St. R. Co.*, 79 App. Div. (N. Y.) 239; s. c. 79 N. Y. Supp. 597; s. c. aff'd, 178 N. Y. 554; 70 N. E. Rep. 1096.

⁹² *Paulsen v. Wilton*, 78 Conn. 53; s. c. 61 Atl. Rep. 61.

⁹³ *Newport News v. Scott*, 103 Va. 794; s. c. 50 S. E. Rep. 266.

⁹⁴ *New Jersey &c. R. Co. v. Jersey City*, 68 N. J. L. 108; s. c. 52 Atl. Rep. 352; s. c. aff'd, 70 N. J. L. 326; 53 Atl. Rep. 1117.

⁹⁵ A city street commissioner is without power to appropriate and take charge of land for highway purposes for the city: *Cannady v. Durham*, 137 N. C. 72; s. c. 49 S. E. Rep. 50. See also *Chicago v. Han-non*, 115 Ill. App. 183. Under a statute, providing that the laying out of a street shall be void as against the owner of any land taken, unless possession is taken to construct the same within two years after the right to take possession accrues, it is only necessary that an entry to construct the street be made within the prescribed time, and it is not necessary that it be completed within that time. The most that an

abutting property owner can claim is that it shall be built within a reasonable time or abandoned: *McCarthy v. Boston*, 188 Mass. 338; s. c. 74 N. E. Rep. 659.

⁹⁶ *Mitchell v. Denver*, 33 Colo. 37; s. c. 78 Pac. Rep. 686 (fact that city graded a strip of land as a street and put up street signs at intersections of adjoining streets is insufficient to establish ownership of the strip by adverse possession short of the statutory period): *Kennedy v. Williamsport*, 11 Pa. Super. Ct. 91; *Washington v. Steiner*, 25 Pa. Super. Ct. 392; *Coward v. Llewellyn*, 209 Pa. 582; s. c. 58 Atl. Rep. 1066. The fact that a land-owner affected by an invalid ordinance opening a street did not maintain any fences or other structures to divide his land from the street was held insufficient to show an intention on his part to dedicate land for street purposes: *Watkins v. Welch Grape Juice Co.*, 96 App. Div. (N. Y.) 114; s. c. 89 N. Y. Supp. 47. In one case it appeared that a street was laid out one hundred fourteen feet wide, and when it reached the city

that where there has been a dedication to public use, and the street opened by the owner is actually used by the public as a highway, the right in the public may become complete and absolute within a much shorter period than that fixed by the statute.⁹⁷ A party not under an obligation to act cannot be said to ratify the action of a municipality in establishing certain street boundaries by keeping silent until his lands are intruded on, no matter how long silent.⁹⁸ In one case it was held that evidence that a way was used by the public as a street for many years, that it had been graded and ditched and sidewalks constructed by the city under the immediate supervision and direction of the street commissioner, and that the city had by ordinances granted a railroad a license to lay switch tracks and construct a culvert in the way, was sufficient to justify a finding that the way was a public street, though there was no evidence of any ordinance under which the street commissioner did his work.⁹⁹

§ 5939. Extent of the Use, how far Material.—The mere fact that a few wagons passed over a highway is insufficient of itself to show that it was open for public travel so as to make the municipality liable for injuries due to defects therein.¹⁰⁰ The public right to an easement in a street is not lost by mere non-user for the period set by the statute of limitations.¹⁰¹

§ 5940. User by the Public and Recognition and Adoption by the City.¹⁰²—After the construction of a railway track a street was laid out by the city across the right of way. The company did not dedicate the land for street purposes and it was not condemned, but the city opened and graded the street, laid water and sewer pipes thereunder, built sidewalks, etc., and made it as much a part of the street as any other portion thereof. The cost of the improvements was paid by the company. The public used it for a highway for eighteen years. It was

limits a road of the same width was used as a continuation of the street to gain access to a bridge over a river. A road was established by the county from the bridge to the city limits sixty feet wide, but was never improved by the county authorities. and public travel was not confined to the boundaries of the county road. It was held that the rights of the public were not restricted to the sixty-foot strip by adverse user, when other portions of the strip one hundred fourteen feet wide, out of which the road was established, were for a long period used as a highway to the same extent as the road laid out by

the county: *Raymond v. Wichita*, 70 Kan. 523; s. c. 79 Pac. Rep. 323.

⁹⁷ *Washington v. Steiner*, 25 Pa. Super. Ct. 392; *Coward v. Llewellyn*, 209 Pa. 582; s. c. 58 Atl. Rep. 1066.

⁹⁸ *Sheridan v. Empire City*, 45 Or. 296; s. c. 77 Pac. Rep. 393.

⁹⁹ *Conner v. Nevada*, 188 Mo. 148; s. c. 86 S. W. Rep. 256.

¹⁰⁰ *Compton v. Revere*, 179 Mass. 413; s. c. 60 N. E. Rep. 931.

¹⁰¹ *People v. Rock Island*, 215 Ill. 488; s. c. 74 N. E. Rep. 437.

¹⁰² *Cannady v. Durham*, 137 N. C. 72; s. c. 49 S. E. Rep. 50 (whether a city had established a sidewalk at a point where an accident occurred a question of fact).

held that the street across the company's right of way constituted a public highway.¹⁰³

§ 5940a. **Winter Roads.**—It is the holding of a Canadian case that a winter road, which is open to everybody and is used by a large number of persons, with nothing to indicate that it is a private road, is a public highway, for an injury in which, resulting from the failure of the municipality to keep in repair, the municipality will be liable.¹⁰⁴

§ 5945. **No Obligation to Repair after Highway Discontinued.**—But it is the duty of the city or town to give notice of the discontinuance of a street in order to terminate its statutory liability for injuries caused by defective ways.¹⁰⁵

§ 5948. **Not Liable for Defects in Passageways to and from or alongside Highways.**—Different holdings on the question of liability under this head are noted in recent cases:—In Missouri it is held that a city that had never improved that part of the street which would ordinarily be used for sidewalk purposes is not liable for injuries to a pedestrian caused by a defect in a path which had been worn along such part of the street.¹⁰⁶ A Kansas case holds, where there had been a general use by foot travellers of a part of a public street lying outside of the improved roadway for years, that the city would be deemed to have assumed responsibility for its being made safe, though no artificial sidewalk had been constructed.¹⁰⁷

§ 5953. **General Statement of Doctrine as to Degree of Care in Construction and Maintenance of Highways.**—It may be said that cities are under the continuing duty of exercising reasonable care and diligence to keep their streets in safe condition for use by persons who exercise ordinary care for their own safety.¹⁰⁸ Under the general neg-

¹⁰³ St. Louis &c. R. Co. v. Lindell R. Co., 190 Mo. 246; s. c. 88 S. W. Rep. 634.

¹⁰⁴ Duchene v. Corporation de Beauport, Rap. Jud. Que. 23 C. S. 80.

¹⁰⁵ Jones v. Boston, 188 Mass. 53; s. c. 74 N. E. Rep. 295.

¹⁰⁶ Ely v. St. Louis, 181 Mo. 724; s. c. 81 S. W. Rep. 168.

¹⁰⁷ Atchison v. Mayhood, 69 Kan. 672; s. c. 77 Pac. Rep. 549.

¹⁰⁸ Columbus v. Anglin, 120 Ga. 785; s. c. 48 S. E. Rep. 318; Muncie v. Hey, 164 Ind. 570; s. c. 74 N. E. Rep. 250; Vincennes v. Spees, 35 Ind. App. 389; s. c. 74 N. E. Rep. 277; rev'g s. c. 72 N. E. Rep. 531; Clay City v. Abner, 82 S. W. Rep.

276; s. c. 26 Ky. L. Rep. 602; Louisville v. Keher, 117 Ky. 841; s. c. 79 S. W. Rep. 270; 25 Ky. L. Rep. 2003; Haxton v. Kansas City, 190 Mo. 53; s. c. 88 S. W. Rep. 714. In actions arising from injuries happening on a defective highway, while the state of the weather may affect the question whether officials have exercised reasonable diligence in discovering defects and remedying them and to that extent is the proper subject of an instruction to the jury, it is error to charge the jury that they can consider it upon the abstract question of the reasonable safety of the highway at a given time; Fehrman v. Pine River, 118 Wis. 150; s. c. 95 N. W. Rep. 105. Balkiness is not a

ligence rule exacting a degree of care commensurate with the danger, there are holdings that it is the duty of a municipality to exercise greater care in respect to keeping in repair much travelled streets and sidewalks than streets and sidewalks but little used.¹⁰⁹ One court, in passing upon the matter of care in the maintenance of highways, has declared the question to be not whether the town used ordinary care in the construction and repair of the street, but whether as a result the way as constructed and maintained was in fact reasonably safe for travellers.¹¹⁰ If the defect in the street is the direct and proximate cause of the accident, the mere fact that other concurring conditions—not involving negligence or culpability—even if they come into a causal relation to the accident, will not relieve the city from liability.¹¹¹ A municipality, having exercised this degree of care in the maintenance of a highway proper, will not be liable for injuries caused by defects in a side path constructed along the side of the road by other persons.¹¹² The rule as to reasonable care is without application, of course, where a statute makes the municipality absolutely liable for defects under specified conditions.¹¹³

§ 5957. **Not Liable for Pure Accidents.**—Generally speaking, a municipality will not be liable for an accident occurring on a highway where the accompanying circumstances are not such that they could be reasonably foreseen and guarded against.¹¹⁴

§ 5958. **Not Bound to Provide for Extraordinary Uses of the Highway.**—The municipality in the maintenance of a highway is only required to provide for such things as ordinarily exist or such as may be reasonably expected to occur.¹¹⁵ A city has been held not liable for personal injuries caused by permitting horse racing in a street

common trait in a horse, so that counties are bound to keep country roads in such condition that no accident may result therefrom; the county being only bound to provide a reasonably safe place of travel by the ordinary horse: *Cage v. Franklin Tp.*, 11 Pa. Super. Ct. 533. In cases where the street has been dug into or obstructions have been placed therein it is the duty of the city, so far as the street is permitted to remain open for travel, to take proper precautions to guard against accidents, and to render it safe: *Hyde v. Boston*, 186 Mass. 115; s. c. 71 N. E. Rep. 118. Whether a city has exercised this degree of care in a particular case is a question of fact for the jury: *Hyde v. Boston*, 186 Mass. 115; s. c.

71 N. E. Rep. 118; *Foley v. Ray*, 27 R. I. 127; s. c. 61 Atl. Rep. 50.

¹⁰⁹ *Miller v. Canton*, 112 Mo. App. 322; s. c. 87 S. W. Rep. 96; *Foley v. Ray*, 27 R. I. 127; s. c. 61 Atl. Rep. 50.

¹¹⁰ *Moriarty v. Lewiston*, 98 Me. 482; s. c. 57 Atl. Rep. 790.

¹¹¹ *Block v. Worcester*, 186 Mass. 526; s. c. 72 N. E. Rep. 77.

¹¹² *Siegler v. Mellinger*, 203 Pa. 256; s. c. 52 Atl. Rep. 175.

¹¹³ *Cunningham v. Clay Tp.*, 69 Kan. 373; s. c. 76 Pac. Rep. 907.

¹¹⁴ *Beardslee v. Columbia Tp.*, 5 Lack. Leg. N. 290; *Ibbeken v. New York*, 94 N. Y. Supp. 568.

¹¹⁵ *Russell v. Westmoreland Co.*, 26 Pa. Super. Ct. 425 (horse ordinarily tractable suddenly frightened and backed over unguarded precipice).

which it maintained in proper condition and safe for travel.¹¹⁶ In a case where the injuries were sustained by reason of a horse taking fright at a bicycle at a point on a public road where there was an unguarded embankment, it was held error for the court to assume that the frightening of a horse at an approaching bicycle is such an extraordinary occurrence that the township could not reasonably be expected to have provided against it.¹¹⁷ Where the laws recognize the right of traction engines on the highway it is the duty of a town to construct and maintain its highways in a reasonably safe condition for travel by such engines.¹¹⁸

§ 5959. **Particulars in which this Duty is Owning.**—It is held that a boy is a traveller while playing in a proper manner along the street, within a statute authorizing a recovery by any one sustaining bodily injury in a street because of neglect to keep it in reasonable repair and in condition reasonably safe and fit for travel.¹¹⁹ Since automobiles are vehicles in common use for transportation of persons and merchandise over highways, and their use is regulated by statute, a recovery can be had for an injury to an operator of such a vehicle caused by a defect in the street.¹²⁰

§ 5960. **Degree of Care to be Exercised with Regard to Sudden Floods, Washouts, etc.**¹²¹

§ 5961. **Care Required with Respect to Alleys.**¹²²

§ 5963. **Tests by which to Gauge Liability: Indictability—Evidence such as would Charge Highway Commissioner.**¹²³

§ 5966. **Not Liable without Notice or the Means of Knowing.**—It is another statement of the doctrine of this section to say that be-

¹¹⁶ McCarthy v. Munising, 136 Mich. 622; s. c. 99 N. W. Rep. 865; 11 Det. Leg. N. 132.

¹¹⁷ Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624.

¹¹⁸ Johnson v. Highland, 124 Wis. 597; s. c. 102 N. W. Rep. 1085.

¹¹⁹ Beaudin v. Bay City, 136 Mich. 333; s. c. 99 N. W. Rep. 285; 11 Det. Leg. N. 29.

¹²⁰ Baker v. Fall River, 187 Mass. 53; s. c. 72 N. E. Rep. 336.

¹²¹ The general duty of a municipality to keep its streets in a reasonably safe condition does not require provision against conditions brought about by extraordinary and unforeseen events: Schrunk v. St. Joseph, 120 Wis. 223; s. c. 97 N. W. Rep. 946 (floods); Beattie v. Detroit, 137 Mich. 319; s. c. 100 N. W.

Rep. 574; 11 Det. Leg. N. 310 (block pavement washed out by extraordinary storm).

¹²² Milliken v. Denny, 135 N. C. 19; s. c. 47 S. E. Rep. 132 (an "alley" not necessarily a street and public cannot always claim a right to its use).

¹²³ It is held that a nuisance, under a statute making the erection and continuance of any structure upon and over a highway punishable by indictment and fine, and declaring the structure so erected a nuisance, must be a nuisance in fact to be the basis of a private action for damages, and whether a stepping stone is such a nuisance is a question of fact for the jury: Nutter v. Pearl, 71 N. H. 247; s. c. 51 Atl. Rep. 897.

fore a city can be held liable for personal injuries resulting from a defective street or sidewalk it must have had such notice of the defect as to have afforded a reasonable opportunity to repair the defect prior to the injury.¹²⁴ Under the statute requiring notice of a highway defect to be given to the county, city, town, or person by law obliged to keep said way in repair, contractors obstructing a street with a nuisance are not persons obliged by law to keep the way in repair, and hence are not entitled to notice.¹²⁵

§ 5967. An Explanation of this Principle: Negligent Ignorance Equivalent to Actual Knowledge.—Where actual notice of the alleged defect cannot be shown it is essential to a recovery against a municipality that it be shown that the defect in question had existed for such a length of time that the municipality, in the exercise of reasonable care, should have known of its existence, and have remedied the defect prior to the accident.¹²⁶

§ 5968. Failure to Repair within a Reasonable Time after Notice.¹²⁷

§ 5970. Notice or Negligent Ignorance a Question of Fact.¹²⁸

¹²⁴ *Ball v. Neosho*, 109 Mo. App. 683; s. c. 83 S. W. Rep. 777; *Osterhout v. Bethlehem*, 55 App. Div. (N. Y.) 198; s. c. 66 N. Y. Supp. 845. Under the Kansas statute trustees must have had notice not only of the existence and location of the defect, but also the fact that it might be dangerous to travel: *Cunningham v. Clay Tp.*, 69 Kan. 373; s. c. 76 Pac. Rep. 907.

¹²⁵ *Jones v. Boston*, 188 Mass. 53; s. c. 74 N. E. Rep. 295.

¹²⁶ *Birch v. Charleston Light & Co.*, 113 Ill. App. 229; *Chenoa v. Kramer*, 109 Ill. App. 85; *McLeansboro v. Trammel*, 109 Ill. App. 524; *Nokomis v. Farley*, 113 Ill. App. 161; *Michigan City v. Phillips*, 163 Ind. 449; s. c. 71 N. E. Rep. 205; aff'g s. c. 69 N. E. Rep. 700; *Miller v. Canton*, 112 Mo. App. 322; s. c. 87 S. W. Rep. 96; *Bender v. Minden*, 124 Iowa 685; s. c. 100 N. W. Rep. 352; *Garnett v. Hamilton*, 69 Kan. 866; s. c. 77 Pac. Rep. 583; *Creighton v. Board of Hudson Co.*, 70 N. J. L. 350; s. c. 57 Atl. Rep. 870; *Cahill v. Rochester*, 96 App. Div. (N. Y.) 557; s. c. 89 N. Y. Supp. 67; *Ibbeken v. New York*, 94 N. Y. Supp. 568 (defect had not existed for such a length of time as to impute city

with notice); *Hallum v. Omro*, 127 Wis. 337; s. c. 99 N. W. Rep. 1051; *Radichel v. Kendall*, 121 Wis. 560; s. c. 99 N. W. Rep. 348.

¹²⁷ That there can be no recovery without proof that the city had actual or constructive notice a sufficient length of time before the accident happened to afford it a reasonable opportunity to repair, which it failed to do, see: *Gerber v. Kansas City*, 105 Mo. App. 191; s. c. 79 S. W. Rep. 717; *Dallas v. Muneton*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 481.

¹²⁸ See generally: *O'Dwyer v. Northern Market Co.*, 24 App. (D. C.) 81; *McLeansboro v. Trammel*, 109 Ill. App. 524; *Huntington v. Lusch*, 33 Ind. App. 476; s. c. 70 N. E. Rep. 402 (whether a stump remained in a city street so long that the authorities should have taken notice of its presence, and whether it was an object calculated to frighten horses, questions for the jury); *Norton v. Kramer*, 180 Mo. 536; s. c. 79 S. W. Rep. 699; *Johnson v. Park City*, 27 Utah 420; s. c. 76 Pac. Rep. 216 (defective sidewalk). Where there was evidence that the streets in the vicinity of an obstruction were largely used, and that the obstruction had re-

§ 5971. **Notice of a Particular Defect Not Necessary, but Notice of General Bad Condition in the Vicinity Sufficient.**¹²⁹

§ 5972. **Care Required in Discovering Latent Defects.**—Generally speaking, a municipal corporation will not be liable for injuries due to latent defects in its streets and sidewalks which could not have been discovered by ordinary care and diligence.¹³⁰ In a case where a city was sued for injuries due to the fright of a horse at a pile of wood beside the highway, and it appeared that the horse was frightened, not by the appearance of the wood, but by the sudden slipping down of a stick from the pile, it was held that the town was not liable, since the commissioner of highways was not bound to anticipate such an event.¹³¹

§ 5973. **Notice of Latent Defects.**—A city will not be imputed with knowledge of a defect in a sidewalk of such a nature as to have escaped the notice of a person injured thereby, who had used it continually for many months.¹³²

§ 5974. **Lapse of Time from which Notice Inferred.**¹³³—It may be said generally that there is no definite rule as to what length of time would be required to justify the inference of notice to a city of defects in a sidewalk. Each case depends on the facts and circumstances at-

mained for a long time, though more or less guarded by a telephone pole and a post up to within a few weeks of plaintiff's injury by reason thereof, whether the city had notice of the obstruction was for the jury: *Sweet v. Poughkeepsie*, 97 App. Div. (N. Y.) 82; s. c. 89 N. Y. Supp. 618.

¹²⁹ See generally: *Evans v. Iowa City*, 125 Iowa 202; s. c. 100 N. W. Rep. 1112; *Elgin v. Nofs*, 212 Ill. 20; s. c. 72 N. E. Rep. 43; modif'g s. c. 113 Ill. App. 618. In an action against a city for injuries to a pedestrian who stepped into a hole in a sidewalk, evidence that other planks in close proximity to the defective one had been found decayed and broken a considerable time before the accident was properly admitted to show that the general condition of the walk was such as to lead to the discovery of the defect in question: *Pumorlo v. Merrill*, 125 Wis. 102; s. c. 103 N. W. Rep. 464. ¹³⁰ *Columbus v. Anglin*, 120 Ga. 785; s. c. 48 S. E. Rep. 318.

¹³¹ *Hoffart v. West Turin*, 90 App. Div. (N. Y.) 348; s. c. 85 N. Y. Supp. 471; s. c. aff'd, 180 N. Y. 516; 72 N. E. Rep. 1143.

¹³² *Byrne v. Philadelphia*, 211 Pa. 598; s. c. 61 Atl. Rep. 80.

¹³³ *Chicago v. Davies*, 110 Ill. App. 427 (several months); *Muncie v. Hey*, 164 Ind. 570; s. c. 74 N. E. Rep. 250 (ice causing injury on sidewalk for several days); *Louisville v. Keher*, 117 Ky. 841; s. c. 79 S. W. Rep. 270; 25 Ky. L. Rep. 2003 (several weeks); *Lorenz v. New Orleans*, 114 La. 802; s. c. 38 South. Rep. 566 (several weeks); *Cutcher v. Detroit*, 139 Mich. 186; s. c. 102 N. W. Rep. 629; 11 Det. Leg. N. 791 (two and a half years); *Hunter v. Durand*, 137 Mich. 53; s. c. 100 N. W. Rep. 191; 11 Det. Leg. N. 188 (two or three months); *Deland v. Cameron*, 112 Mo. App. 704; s. c. 87 S. W. Rep. 597 (several months); *Hitt v. Kansas City*, 110 Mo. App. 713; s. c. 85 S. W. Rep. 669 (nearly two years); *Knight v. Kansas City*, 113 Mo. App. 561; s. c. 87 S. W. Rep. 1192 (six months); *Hoffart v. West Turin*, 90 App. Div. (N. Y.) 348; s. c. 85 N. Y. Supp. 471; s. c. aff'd, 180 N. Y. 516; 72 N. E. Rep. 1143 (weeks); *Jones v. Sioux Falls*, 18 S. D. 477; s. c. 101 N. W. Rep. 43 (three months); *Hal-*

tending it,¹³⁴ and among the circumstances which may be considered in determining the question are the population of the city, and the amount of business or travel at or near the place of such obstruction.¹³⁵

§ 5976. **Circumstances where the Time was Too Short to Impute such Notice.**¹³⁶

§ 5979. **Notice to Officer whose Duty it is to Repair: Road Overseers, Highway Commissioners, etc.**—A notice of street or sidewalk defects to the officers of the town who are charged with the duty of keeping the streets in repair is notice to the town.¹³⁷ Actual notice to sidewalk commissioners in Missouri,¹³⁸ and superintendents of streets in Michigan, is regarded as equivalent to notice to the city.¹³⁹ In Kansas actual knowledge on the part of a township trustee of a patent defect in a public highway in his township is held to satisfy a statute providing that a person sustaining injury by reason of a defective highway may recover where it is shown that the chairman of the county board had notice of such a defect for at least five days prior to the injury under investigation.¹⁴⁰

§ 5983. **Notice to Policemen.**¹⁴¹

§ 5986. **Prior and Subsequent Repairs as a Means of Proving Notice.**¹⁴²

lum v. Omro, 122 Wis. 337; s. c. 99 N. W. Rep. 1051 (three years).

¹³⁴ Miller v. Canton, 112 Mo. App. 322; s. c. 87 S. W. Rep. 96.

¹³⁵ Ottawa v. Hayne, 114 Ill. App. 21; s. c. aff'd, 214 Ill. 45; s. c. 73 N. E. Rep. 385.

¹³⁶ McFeeters v. New York, 102 App. Div. (N. Y.) 32; s. c. 92 N. Y. Supp. 79 (light at excavation was burning up to within one hundred fifty-three minutes of the time of the accident). Where the evidence as to the length of time the defect existed was conflicting, and one of defendant's witnesses testified that the defect had not existed prior to the day of the accident, it was error to direct the jury to find that the unsafe condition of the highway existed for such a length of time that the defendant should have known of and repaired it: Kennedy v. Lincoln, 122 Wis. 301; s. c. 99 N. W. Rep. 1038.

¹³⁷ Miller v. Canton, 112 Mo. App. 322; s. c. 87 S. W. Rep. 96.

¹³⁸ Small v. Kansas City, 185 Mo. 291; s. c. 84 S. W. Rep. 901; Small v. Kansas City, 110 Mo. App. 721; s. c. 85 S. W. Rep. 627.

¹³⁹ McEvoy v. Sault Ste. Marie, 136 Mich. 172; s. c. 98 N. W. Rep. 1006; 10 Det. Leg. N. 1036.

¹⁴⁰ Madison Tp., Greenwood Co., v. Scott, 9 Kan. App. 871; s. c. 61 Pac. Rep. 967.

¹⁴¹ Cleveland v. Payne, 72 Ohio St. 347; s. c. 74 N. E. Rep. 177 (a department rule, requiring policemen to remove defects or report them, insufficient to charge city in absence of statute to that effect).

¹⁴² It has been held that evidence showing the defective refilling of a sewer ditch from which a hole in the street resulted, and that the city had filled other holes along the ditch and near the one in question, was sufficient to support an inference of actual knowledge on the part of the city of the existence of the defect: Dallas v. Muncton, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 431.

§ 5989. **Statutes Requiring Express Notice of Defect, or that it shall have Existed for Twenty-Four Hours or Other Specified Time.**—The Kansas statutory provision requiring five days' notice to township trustees of defects in public highways in order to charge the township with damages occasioned by such defects is held to mean actual knowledge, and not notice inferable from the notoriety or long continuance of the defects.¹⁴³ But it is not required that the notice should be in writing, nor that any particular formality should attend the giving of it.¹⁴⁴

§ 5993. **Notice Not Required of Obstructions Made or Authorized by the City Itself.**¹⁴⁵

§ 5994. **Notice of Defective Construction Not Required.**—The rule is generally recognized that where a public improvement constructed by a city is unsafe by reason of its negligent construction, and its defects are not latent, it is not necessary to show that the municipality had notice of such unsafe condition in order to recover for injuries sustained thereby.¹⁴⁶

¹⁴³ *Parr v. Board of Com'rs of Shawnee Co.*, 70 Kan. 111; s. c. 78 Pac. Rep. 449; *Hari v. Ohio Tp., Saline Co.*, 62 Kan. 315; s. c. 62 Pac. Rep. 1010. The fact that the chairman of the county commissioners overheard a conversation between others as to the bridge in question and other bridges being in a defective condition is not sufficient to show that he had notice of the particular defect causing the injury, so as to make the county liable: *Scruggs v. Board of Com'rs of Leavenworth County*, 71 Kan. 848; s. c. 80 Pac. Rep. 595.

¹⁴⁴ *Erie Tp. v. Beamer*, 71 Kan. 182; s. c. 79 Pac. Rep. 1070.

¹⁴⁵ *Pratt v. Cohasset*, 177 Mass. 482; s. c. 59 N. E. Rep. 79 (gravel placed in road under orders and with knowledge of superintendent of streets); *Kleopfert v. Minneapolis*, 93 Minn. 118; s. c. 100 N. W. Rep. 669 (rope stretched across a highway by servant of board of park commissioners); *Hutchinson v. Clarke*, 26 R. I. 307; s. c. 58 Atl. Rep. 948 (failure of city to refill a sewer trench dug in the street). Thus a city whose mayor and city council gave permission to close a street in order to effect a change of

grade between the street and a railroad, was deemed, as a matter of law, to have known that the street would be rendered dangerous for travel without formal notice: *Torphy v. Fall River*, 128 Mass. 210; s. c. 74 N. E. Rep. 465. And so where a city permitted an adjoining property owner to maintain a coal hole in a sidewalk, and the hole and the cover were of improper and unsafe construction, so that the cover was liable to be displaced, it was held that the city was not entitled, as against a person injured by a displacement of such cover, to actual notice of the defect as a condition to the liability of the city for such injuries: *Drake v. Kansas City*, 190 Mo. 370; s. c. 88 S. W. Rep. 689.

¹⁴⁶ See generally: *Achey v. Marion*, 126 Iowa 47; s. c. 101 N. W. Rep. 435 (improper construction of street); *Evans v. Iowa City*, 125 Iowa 202; s. c. 100 N. W. Rep. 1112 (defect in construction of sidewalk); *McDonald v. Duluth*, 93 Minn. 206; s. c. 100 N. W. Rep. 1102; *Hager v. Wharton Tp.*, 200 Pa. 281; s. c. 49 Atl. Rep. 757 (defect in construction of bridge); *Howard v. Snohomish County*, 38 Wash. 149; s. c. 80 Pac. Rep. 293.

§ 6000. **Instructions with Reference to Notice.**—On the question of notice an instruction has been sustained which told the jury that: "It is not necessary that the plaintiff shall prove that the city had actual notice of the defective condition of the walk in question. It is sufficient if the circumstances show that by the exercise of reasonable diligence and attention to the condition of the walk it would have discovered such defects; and, if such walk remained in a defective condition for a long time prior to the injury, then knowledge of such condition may be inferred from these facts."¹⁴⁷

§ 6005. **General Statement of Duty to Keep Highway Clear of Defects.**—A statute making it the duty of the municipality to keep streets in repair so as to be safe and convenient for travellers does not require that the streets should be kept in a condition of absolute safety, as that is unattainable. All that is required is a condition of reasonable safety in view of the circumstances of each particular case.¹⁴⁸ If a street undergoing repairs is accepted from the contractor the city will be liable for injuries occasioned by bad repair, although the contractor has not been paid in full.¹⁴⁹ There is authority that a town is liable for an injury to an animal from a hole in the street, where the animal had escaped from its owner's stable without his negligence, if the town would have been liable had the animal been driven.¹⁵⁰

§ 6008. **What Width of the Road or Street must be Kept in Repair.**¹⁵¹—A traveller along a street has a right to assume that the municipality has performed its duty to keep at least the travelled portion of a street in a reasonably safe condition, and where it has used its discretion to keep in repair less than the full width of the street the remainder should be indicated in a way to attract the attention of travellers.¹⁵² The authorities do not generally require counties and towns to keep country roads in a suitable condition for travel for their entire width or to build sidewalks along the same.¹⁵³ It is enough if the travelled portion of the highway is kept in a suitable condition for travel, including, of course, a width sufficient for teams to pass.¹⁵⁴

¹⁴⁷ Marshall, J., in *Small v. Kansas City*, 185 Mo. 291; s. c. 84 S. W. Rep. 901.

¹⁴⁸ *Moriarty v. Lewiston*, 98 Me. 482; s. c. 57 Atl. Rep. 790.

¹⁴⁹ *Rimby v. Philadelphia*, 208 Pa. 119; s. c. 57 Atl. Rep. 347.

¹⁵⁰ *Nocks v. Whiting*, 126 Iowa 405; s. c. 102 N. W. Rep. 109.

¹⁵¹ That a city is required to keep its streets in repair for their entire

width, see: *Thuis v. Vincennes*, 73 N. E. Rep. 141; s. c. aff'd, 35 Ind. App. 350; 73 N. E. Rep. 1098.

¹⁵² *Birch v. Charleston Light & Co.*, 113 Ill. App. 229.

¹⁵³ *Hammacher v. New Berlin*, 124 Wis. 249; s. c. 102 N. W. Rep. 489.

¹⁵⁴ *Newell v. Stony Point*, 59 App. Div. (N. Y.) 237; s. c. 69 N. Y. Supp. 583.

§ 6009. **Not Ordinarily Bound to Make Repairs Outside of Travelled Path.**¹⁵⁵

§ 6012. **Exception in Case of Dangerous Defects Outside of, but Near the Highway and in the General Direction of Travel.**—In cases where excavations are so near to the travelled path, although outside thereof, that combined with the ordinary accidents of travel they are liable to cause injury to users of the highway, the municipality will be liable for injuries caused thereby to travellers free from negligence.¹⁵⁶ A city was held liable for injury to a traveller caused by his wagon coming in contact with a stump standing six inches outside the highway line where there was no mark to indicate the line of the street, and it was shown that the public had turned in on the private premises inside this stump and had made a beaten path across the same.¹⁵⁷

§ 6014. **Repair of Streets in Outskirts of Municipality.**¹⁵⁸

§ 6015. **Temporary Obstructions of the Streets for Building Purposes Permitted.**¹⁵⁹

§ 6018. **No Defense that Obstruction was Work of Independent Wrong-Doer.**—It may be said generally, that it is as much the duty of a municipality to remove or guard against an obstruction to a public highway placed there by a third person as if it was so placed by the city itself.¹⁶⁰

§ 6020. **Liable for Obstructions Caused by Contractors of Public Work.**—A city undertaking the construction of a sidewalk is liable

¹⁵⁵ *King v. Ft. Ann*, 180 N. Y. 496; s. c. 73 N. E. Rep. 481; rev'g s. c. 90 App. Div. (N. Y.) 617; 85 N. Y. Supp. 1135 (traveller injured by driving into a ditch outside the travelled portion of a highway running through a small village—village not liable). *Boulders* eighteen feet from the travelled way, forming a guard on the edge of an embankment to keep vehicles from running over the embankment, do not constitute an actionable highway defect: *Waterhouse v. Calef*, 21 R. I. 470; s. c. 44 Atl. Rep. 591.

¹⁵⁶ *Birch v. Charleston Light & C. Co.*, 113 Ill. App. 229; *Rea v. Sioux City*, 127 Iowa 615; s. c. 103 N. W. Rep. 949.

¹⁵⁷ *Sweet v. Poughkeepsie*, 97 App. Div. (N. Y.) 82; s. c. 89 N. Y. Supp. 618.

¹⁵⁸ Under a statute requiring the county commissioners to obtain the

consent of the city council to the improvement of a road within the city, a city is liable for damages resulting from the negligent construction of the portion of the road within the city limits: *Valparaiso v. Spaeth*, — Ind. —; s. c. 74 N. E. Rep. 518.

¹⁵⁹ That property owners, to a reasonable extent, have the right to deposit in the street building materials required for the improvement of their property, see: *Friedman v. Snare & Triest Co.*, 71 N. J. L. 605; s. c. 61 Atl. Rep. 401; *Malikan v. Carlin*, 105 App. Div. (N. Y.) 640; s. c. 93 N. Y. Supp. 378.

¹⁶⁰ *Vincennes v. Spees*, 35 Ind. App. 389; s. c. 74 N. E. Rep. 277; rev'g s. c. 72 N. E. Rep. 531. See also, *McEvoy v. Sault Ste. Marie*, 136 Mich. 172; s. c. 98 N. W. Rep. 1006; 10 Det. Leg. N. 1036.

for injuries the result of negligence in performing the work, although the primary duty of constructing the sidewalk belonged to the property owners.¹⁶¹

§ 6021. **Obstructions Created by Railroad Companies.**—A city is bound to keep safe and in repair a portion of the street occupied by the tracks of a street railroad. It is not, however, held to this same duty in respect to railroad tracks occupying the street.¹⁶² In one case a city was charged with negligence *per se* where it permitted a street railroad side track, which had been disconnected from the main track and had fallen into disuse, to remain in an unpaved street in such a way as to constitute a dangerous hidden obstruction in wet weather.¹⁶³

§ 6022. **What Objects have been Deemed Actionable Obstructions.**—The following objects have been held actionable obstructions where they resulted in damage to a traveller:—large stones;¹⁶⁴ stone piles;¹⁶⁵ lumber piles;¹⁶⁶ a ridge of dirt sixteen inches in height and from four to five feet wide;¹⁶⁷ the thills of a buggy, left in the street in conformity to a custom tolerated by the municipality.¹⁶⁸

§ 6024. **What Objects Not Deemed Actionable Obstructions or Defects.**—These obstructions have not been deemed actionable obstructions or defects:—A hole or rut ten inches deep in an ordinary country road;¹⁶⁹ a pile of ashes five or six inches in height on a sleety street;¹⁷⁰ a board standing a little above the surface of the sidewalk;¹⁷¹ a ridge of earth from four to five feet wide and from eight to nine inches above the surface of the street caused by filling up an excavation made in the highway for the purpose of laying a pipe.¹⁷²

§ 6028. **What Obstruction Deemed the Proximate, what the Remote, Cause of the Injury.**¹⁷³—It may be said generally, that where

¹⁶¹ Lancaster v. Walter, 80 S. W. Rep. 189; s. c. 25 Ky. L. Rep. 2189.

¹⁶² Hyde v. Boston, 186 Mass. 115; s. c. 71 N. E. Rep. 118.

¹⁶³ Cutcher v. Detroit, 139 Mich. 186; s. c. 102 N. W. Rep. 629; 11 Det. Leg. N. 791.

¹⁶⁴ Louisville v. Keher, 117 Ky. 841; s. c. 79 S. W. Rep. 270; 25 Ky. L. Rep. 2003; Hebbe v. Maple Creek, 121 Wis. 668; s. c. 99 N. W. Rep. 442.

¹⁶⁵ York v. Athens, 99 Me. 82; s. c. 58 Atl. Rep. 418.

¹⁶⁶ Smith v. Davis, 22 App. (D. C.) 298.

¹⁶⁷ Streeter v. Marshalltown, 123 Iowa 449; s. c. 99 N. W. Rep. 114.

¹⁶⁸ Radichel v. Kendall, 121 Wis. 560; s. c. 99 N. W. Rep. 348.

¹⁶⁹ Osterhout v. Bethlehem, 55 App. Div. (N. Y.) 198; s. c. 66 N. Y. Supp. 845.

¹⁷⁰ Kelchner v. Nanticoke, 209 Pa. 412; s. c. 58 Atl. Rep. 851.

¹⁷¹ Lynch v. Boston, 186 Mass. 148; s. c. 71 N. E. Rep. 301.

¹⁷² Messenger v. Bridgetown, 33 N. S. 291.

¹⁷³ In a case where a traveller was killed by being precipitated into a hole in close proximity to the travelled track of a highway, which was concealed by high water, it was held a question for the jury whether the proximate cause of the injury was the defect in the highway or the sudden and unprecedented rise of the water: Jenewein v. Irving, 122

two causes combine to produce an injury to a traveller on a highway, both of which are in their nature proximate,—the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible,—the municipality is liable, provided the injury would not have been sustained but for such defect.¹⁷⁴ The act of a city in lowering the grade of a street and leaving a sidewalk at the original grade, considerably above the street, was held the proximate cause of an injury to a traveller who slipped while passing over the incline leading from the street to the sidewalk.¹⁷⁵

§ 6031. **Electric Wires.**—It may be said generally, that a city owes to its citizens the duty to protect them against electricity conducted through wires running along the streets, and against the falling of the wires and poles and the obstruction of the public highway therewith.¹⁷⁶ A recovery against a city was upheld in a case where a traveller was killed by coming in contact with a heavily charged and exposed electric wire used by the police department of the city, and lying so close to the highway as to endanger a traveller deviating a few feet from the beaten path.¹⁷⁷

§ 6036. **Duty in Respect of Dangerous Excavations.**¹⁷⁸—The act of a city in allowing the continued existence of holes¹⁷⁹ and trenches¹⁸⁰ of such depth as to endanger the safety of travellers on the highway constitutes actionable negligence.

§ 6040. **Duty of the City to Oversee the Work of Private Excavators in the Highway.**—It has been held in a New York subway case,

Wis. 228; s. c. 99 N. W. Rep. 346, 903. In a case where it appeared that a traveller at the time of the accident stood in a safe place in a road when a guard rail on the side of the road fell over, from a cause not directly explained and without the traveller's having touched it, and he in his confusion walked over the side of the road at this place, and was injured, it was held that the fall of the guard rail was not the proximate cause of the accident: *Ohl v. Bethlehem Tp.*, 199 Pa. 588; s. c. 49 Atl. Rep. 288.

¹⁷⁴ *Lincoln Tp. v. Koenig*, 10 Kan. App. 504; s. c. 63 Pac. Rep. 90. See also *Templin v. Boone*, 127 Iowa 91; s. c. 102 N. W. Rep. 789. Where a horse shied to one side, and then, at a gallop, ran forward sixty to ninety feet, the driver all the time pulling back on the lines, so that the horse was drawing the vehicle by the bit, and resisting the efforts

to stop him, till a defect in the highway was reached, and an accident occurred, the horse cannot be held to have been only "momentarily" uncontrolled, within the law as to liability of a municipality for defects in highways. *Ehleiter v. Milwaukee*, 121 Wis. 85; s. c. 98 N. W. Rep. 934.

¹⁷⁵ *Muncie v. Spence*, 33 Ind. App. 599; s. c. 71 N. E. Rep. 907.

¹⁷⁶ *Ft. Smith v. Hunt*, 72 Ark. 556; s. c. 82 S. W. Rep. 163.

¹⁷⁷ *Emery v. Philadelphia*, 208 Pa. 492; s. c. 57 Atl. Rep. 977.

¹⁷⁸ Reasonable or ordinary care is required in the matter of street excavations: *Tompert v. Hastings Pavement Co.*, 35 App. Div. (N. Y.) 578; s. c. 55 N. Y. Supp. 177.

¹⁷⁹ *Miller v. New York*, 104 App. Div. (N. Y.) 33; s. c. 93 N. Y. Supp. 227.

¹⁸⁰ *Torphy v. Fall River*, 188 Mass. 310; s. c. 74 N. E. Rep. 465.

—the work being conducted under legislative authority by a corporation over which the city had no control—that the city was not negligent as a matter of law, because it did not keep a force of men at work repairing the street as it was disturbed from day to day by the contractors, in making the necessary excavations for the work.¹⁸¹

§ 6048. When the Excavation is Deemed the Proximate Cause of the Injury.—Where it is clear that the proximate cause of an accident on a highway was the fright of a horse from a cause for which the city was not liable, an action cannot be maintained against the municipality because the horse in his fright threw the injured person into an unguarded excavation in the highway.¹⁸²

§ 6049. Pleading, Evidence, and Instructions in such Actions.—An instruction telling the jury to find for the plaintiff if the excavation into which he fell was such as to be unsafe or dangerous to passers-by in the night-time, and the defendant city left the same open and unguarded by any barriers, light, or signal to warn the travellers of its presence, and the plaintiff fell into the excavation without negligence on his part, was held not open to the objection that it failed to require the unguarded condition of the excavation to have been the proximate cause of the accident.¹⁸³

§ 6052. Duty to Erect Barriers and Establish Signals in Case of Dangerous Defects in the Highway.¹⁸⁴—It is the duty of a municipality to use reasonable care and diligence to protect the public from obstructions or defects of which it has knowledge, by the erection of suitable barriers and the maintenance of lights at night.¹⁸⁵ The effect of notice given the public by barrier or sign that a street has been closed, is to suspend the responsibility of the city for injuries to travellers due to the condition of that portion of the street;¹⁸⁶ and a person living

¹⁸¹ *Morris v. Interurban St. R. Co.*, 100 App. Div. (N. Y.) 295; s. c. 91 N. Y. Supp. 479.

¹⁸² *Nichols v. Pittsfield Tp.*, 209 Pa. 240; s. c. 58 Atl. Rep. 283.

¹⁸³ *Indianapolis St. R. Co. v. James*, 35 Ind. App. 543; s. c. 74 N. E. Rep. 536.

¹⁸⁴ That a city is under no common-law obligation to display danger signals, see: *Collier v. Ft. Smith*, 73 Ark. 447; s. c. 84 S. W. Rep. 480; 68 L. R. A. 237. Whether the failure to guard or light a dangerous place is negligence is a question for the jury where there is no ordinance requiring such safeguards: *Gerber v. Kansas City*, 105

Mo. App. 191; s. c. 79 S. W. Rep. 717. So where a complaint did not plead a city ordinance requiring barriers and lights at the place of an accident, but pleaded negligence in that regard generally, it was held that proof that the city did not erect barriers and place lights while evidence of negligence, did not show negligence *per se*: *Jackson v. Kansas City*, 106 Mo. App. 52; s. c. 79 S. W. Rep. 1174.

¹⁸⁵ *Jones v. Boston*, 188 Mass. 53; s. c. 74 N. E. Rep. 295; *Newport News v. Scott*, 103 Va. 794; s. c. 50 S. E. Rep. 266.

¹⁸⁶ *Torphy v. Fall River*, 188 Mass. 310; s. c. 74 N. E. Rep. 465.

in this portion of the street has no larger right than any other traveller.¹⁸⁷ In the matter of lights, it is not sufficient that a near-by electric light was burning, but it is the duty of the city to display danger signals or put up barriers at the point of danger.¹⁸⁸ It has been held that the failure to guard a defect for an hour and a half, in a small town, was not sufficient evidence of negligence to warrant submission of the question of negligence to the jury in an action for injuries occasioned by the defect.¹⁸⁹

§ 6053. This Duty Not Discharged by Engaging a Contractor to Perform it.¹⁹⁰

§ 6055. Duty to Erect Guards or Railings at Dangerous Places Outside of but Near Highway Limits.—It is the duty of the city to take proper precaution and warn travellers of dangerous defects or obstructions in close proximity to streets and highways, and it is guilty of negligence if it fails to do so.¹⁹¹

§ 6057a. Barricades for Temporary Sidewalks.—A city was held not imputable with negligence in failing to provide railings upon each side of a temporary walk erected by railway contractors, engaged in repairing a viaduct on a permit from the city, for the use of private persons and their customers, where access to the walk was guarded by barricades and red lights were displayed. It was also intimated that the case would not be different even if it were conceded that access to such sidewalk was not guarded by barricades if the person injured by falling therefrom entered the walk from the premises of the person for whose use it had been so provided.¹⁹²

§ 6060. Duty to Erect Barriers where the Road Traverses Dangerous Embankments.—Material facts in determining whether a railing is necessary are the character and amount of the travel over the highway, the character of the road itself, its width, extent of the slope of the bank and the length of the portion claimed to require a rail, whether the danger is obvious, and the probable extent of any injury.¹⁹³

¹⁸⁷ *Torphy v. Fall River*, 188 Mass. 310; s. c. 74 N. E. Rep. 465.

¹⁸⁸ *La Salle v. Evans*, 111 Ill. App. 69. In one case a county was held liable for injuries resulting from a traveller's collision with a heavily laden wagon used in repairing the highway, which stood in the highway for several weeks, unlighted, at night: *Duncan v. Greenville Co.*, 71 S. C. 170; s. c. 50 S. E. Rep. 776.

¹⁸⁹ *Bender v. Minden*, 124 Iowa 685; s. c. 100 N. W. Rep. 352.

¹⁹⁰ A city is liable for negligent in-

juries to a person travelling over a sidewalk in course of construction, where the permit for the work stated that it should be done "under the supervision of the city engineer:" *McClammy v. Spokane*, 36 Wash. 339; s. c. 78 Pac. Rep. 912.

¹⁹¹ *Vincennes v. Spees*, 35 Ind. App. 389; s. c. 74 N. E. Rep. 277; rev'g s. c. 72 N. E. Rep. 531.

¹⁹² *Chicago v. McKenna*, 114 Ill. App. 270.

¹⁹³ *Seeton v. Dunbarton*, 72 N. H. 269; s. c. 56 Atl. Rep. 197.

Whether a city is negligent in failing to erect railings along a sidewalk some distance above the ground, is a question for the jury.¹⁸⁴

§ 6061. **Failure to Erect Barriers to Prevent Frightened Horses from Going Over Embankments, etc.**—Speaking generally, the lack of barriers on the side of approaches to a bridge will not make the city liable unless their absence proximately caused the injuries complained of. In an action for injuries caused by a horse going off a bank forming a bridge approach which was sufficiently wide to allow two teams to pass without injury, and the proximate cause of the injury was the fright of the horse and his becoming so unmanageable that the driver could not keep him within the limits of the road, the city was held not liable.¹⁸⁵

§ 6064. **Duty to Erect Barriers where Roads are Cut in Hill-sides.**¹⁸⁶

§ 6070. **When Want of Barrier is or is not the Proximate Cause of the Accident.**¹⁸⁷

§ 6071. **Removal of Barriers by Independent Wrong-Doers.**¹⁸⁸

§ 6081. **Objects In or Near the Highway which Frighten Horses—Steam Road-Rollers.**—A statute requiring persons using traction or

¹⁸⁴ *Hannon v. Gladstone*, 136 Mich. 621; s. c. 99 N. W. Rep. 790; 11 Det. Leg. N. 128.

¹⁸⁶ *Bell v. Wayne*, 123 Mich. 386; s. c. 82 N. W. Rep. 215; 48 L. R. A. 644.

¹⁸⁸ That municipalities are liable for failure to erect barriers where roads are cut in hillsides, see: *Davis v. Snyder Tp.*, 196 Pa. St. 273; s. c. 46 Atl. Rep. 301; *Wilson v. O'Hara Tp.*, 14 Pa. Super. Ct. 258; *Lincoln Tp. v. Koenig*, 10 Kan. App. 504; s. c. 63 Pac. Rep. 90 (question for jury). See *ante*, § 6060.

¹⁸⁷ The absence of a guard rail was held not the proximate cause of injuries to a person pushed over an embankment from an unguarded sidewalk by another person: *Rhine v. Philadelphia*, 24 Pa. Super. Ct. 564.

¹⁸⁵ A city having placed a red light near an excavation was not liable, in the absence of actual notice, for the removal of the light by a third person, at some unknown time within two hours and a half of the time when a traveller fell into the excavation by reason of the absence of the signal: *McFeeters v. New*

York, 102 App. Div. (N. Y.) 32; s. c. 92 N. Y. Supp. 79. In an action where the warnings were insufficient to attract the attention of travellers and a temporary barrier at the defect had been removed, and a traveller suffered injuries by reason thereof, it was held that, as the warnings were such as easily to escape the attention of travellers, and the barrier had been often removed before the time in question, that the question whether the safeguards were sufficient was properly one for the jury: *Wetmore Tp. v. Chamberlain*, 64 Kan. 327; s. c. 67 Pac. Rep. 845. In an action for injuries caused by falling in an alleged unguarded trench in a street, where the evidence did not show that any barriers were provided at all, it was held that an offered instruction that if the barriers and lights were provided and they were removed before the plaintiff fell into the ditch, without defendant's fault, the plaintiff could not recover, was properly refused: *Jackson v. Kansas City*, 106 Mo. App. 52; s. c. 79 S. W. Rep. 1174.

road engines on public streets in incorporated towns or cities to send a person in advance not less than fifty yards to warn approaching teams is without application to steam road-rollers used in making and repairing city streets.¹⁹⁹

§ 6098. Fall of Projecting Signs and Awnings.—There is authority that a city is not liable for injuries resulting from the maintenance of billboards by property owners on spaces between the sidewalk and buildings on the adjacent lots.²⁰⁰ But a city is liable for injuries to travellers on the sidewalk caused by the fall of a defectively hung sign projecting over the sidewalk, where the servants of the city had either actual or constructive notice of the danger.¹

§ 6101. Fall of Snow and Ice from Adjacent Roofs.—In a case where a city hall was occupied in part by the city water department and city collector,—these departments not paying any rent,—and a person's property was injured through the negligence of servants of the city in throwing snow from the roof of the hall, the fact of an occupancy of this character was held not to render the city liable. The only cases in which a city will be "held liable on account of the occupation of a city hall are where it lets a substantial portion of it for hire."²

§ 6105. Bridge Includes Abutments and Approaches.—In one case, however, a municipality was held not liable where the injury was occasioned by a defect in a plank bridge which was not a part of the travelled path but outside it, and constructed solely to facilitate access to and from the travelled path to a private way which opened into the highway.³

§ 6112. Counties Not Always Suable for Neglecting this Duty.—Where the authority of county commissioners is limited strictly to the construction and maintenance of bridges, with their approaches, at points laid out by viewers and approved by the court or other tribunal, and the county is not required to open another highway while it is erecting a new approach on the site of the old one, the county will not be liable for injuries occasioned by defects in a temporary way opened by the commissioners around a bridge they are engaged in re-building.⁴

¹⁹⁹ *New Albany v. Stirr*, 34 Ind. App. 615; s. c. 72 N. E. Rep. 275.

²⁰⁰ *Temby v. Ishpeming*, 140 Mich. 146; s. c. 103 N. W. Rep. 588; 12 Det. Leg. N. 114; 69 L. R. A. 618.

¹ *Leary v. Yonkers*, 95 App. Div. (N. Y.) 126; s. c. 88 N. Y. Supp. 829.

² *Kelly v. Boston*, 186 Mass. 165; s. c. 71 N. E. Rep. 299.

³ *Felch v. West Brookfield*, 184 Mass. 309; s. c. 68 N. E. Rep. 227.

⁴ *Brewer v. Sullivan Co.*, 199 Pa. 594; s. c. 49 Atl. Rep. 259.

§ 6114. **Incorporated Cities, Villages, etc., When Bound to Repair.**⁵

§ 6115. **Duty of Municipality to Repair Bridges Erected by Others.**—A municipality was held to have assumed control over a bridge so as to be liable for its maintenance where the evidence showed that its control had been asserted many times, that it had repaired the bridge, that the flooring of the bridge was laid by a bridge carpenter in the employ of the city who, acting as such, inspected the woodwork of the structure shortly before the accident, and that a long time prior thereto the street supervisor of the city had covered the floor of the bridge with dirt.⁶

§ 6122a. **Joint Liability of City and Street Railway Using Bridge.**—A city allowing the use of a defective bridge by a street railroad company, and the street railroad company using the same, are jointly liable for injury occasioned by a collapse of the bridge while in use by the street railroad company.⁷

§ 6124. **Measure of Duty Ordinary or Reasonable Care.**⁸—Under the New Jersey statute giving a right of action to one injured through the wrongful neglect to repair a bridge, a traveller injured while the authorities are actually engaged in making the repairs required thereon, cannot recover, as the wrongful neglect to repair under the statute must be continuing when the damage results.⁹

§ 6128. **Bound to a Careful and Continuing Inspection.**—It may be said generally that it is the duty of a municipality to exercise such supervision over bridges and make such inspection of the same under its control as ordinary care and diligence demand, and in the performance of this duty the city must use reasonable care, measured by the known importance and difficulty of the work to be performed, in selecting, after due inquiry into their qualification and fitness, experts

⁵ In Arkansas a city is not liable for personal injuries caused by a defective bridge negligently maintained by it; *Gray v. Batesville*, 74 Ark. 519; s. c. 86 E. W. Rep. 295.

⁶ *Mackay v. Salt Lake City*, 29 Utah 247; s. c. 81 Pac. Rep. 81.

⁷ *Indianapolis v. Cauley*, 164 Ind. 304; s. c. 73 N. E. Rep. 691.

⁸ See generally: *Robe v. Snohomish Co.*, 35 Wash. 475; s. c. 77 Pac. Rep. 810. The fact that a county supervisor and the foreman of a county bridge crew inspected a

bridge after it was repaired and thought it reasonably safe for ordinary travel was held not a defense in a case against the county for damages from the collapse of the bridge after it had been repaired by the direction of the supervisors after notice of its unsafety: *Schlenzig v. Monona Co.*, 126 Iowa 625; s. c. 102 N. W. Rep. 514.

⁹ *Mattlage v. Boards of Hudson and Bergen Counties*, — N. J. L. —; s. c. 60 Atl. Rep. 195.

skilled and competent to make the inspection and to determine whether repairs are necessary, and if so, what kind of repairs should be made.¹⁰

§ 6129. Not Liable for Latent Defects.¹¹

§ 6134. Whether Liable for Breaking Down of Bridge under Extraordinary Loads.¹²

§ 6137. Bound to Keep Them Guarded by Suitable Railings.¹³

§ 6142. Defect or Insufficiency must have been Proximate Cause of Injury.—A town has been held not liable for injuries caused by a horse taking fright at a hole in the bridge and backing the vehicle in which the plaintiff was riding off the bridge, where the hole at which the horse became frightened was not such as necessarily interfered with the passage of vehicles.¹⁴

§ 6145. Rules of Pleading Peculiar to Bridge Accident Cases.¹⁵

§ 6154. Civil Liability for Failure to Repair Sidewalk.¹⁶

¹⁰ Indianapolis v. Cauley, 164 Ind. 304; s. c. 73 N. E. Rep. 691.

¹¹ See generally: Johnson Co. v. Carmen, — Neb. —; s. c. 99 N. W. Rep. 502.

¹² Coolidge v. New York, 99 App. Div. (N. Y.) 175; s. c. 90 N. Y. Supp. 1078 (city not guilty of negligence in allowing overcrowding of defective bridge where it detailed policemen to handle the crowds and these policemen were on the bridge in the performance of this duty when it went down); Comstock v. Georgetown Tp., 137 Mich. 541; s. c. 100 N. W. Rep. 788, 11 Det. Leg. N. 379 (user of bridge warned by highway commissioner that bridge was of doubtful strength and, notwithstanding, drove a traction engine over the bridge and it broke through,—county not liable).

¹³ It has been held that a bicyclist thrown into a stream by reason of the absence of the guard rail on the approach to a bridge was not precluded from a recovery against the town for his injuries by the fact that he was riding a bicycle at the time: Spring v. Williamstown, 186 Mass. 479; s. c. 71 N. E. Rep. 949.

¹⁴ Wallace v. New Albion, 107 App. Div. (N. Y.) 172; s. c. 94 N. Y. Supp. 793.

¹⁵ A complaint in a suit against a county for injuries caused by the giving way of a bridge, containing only a general statement that the

bridge was out of repair and unsafe, should be made more specific on motion: Johnson Co. v. Carmen, — Neb. —; s. c. 99 N. W. Rep. 502. A complaint in an action for injuries by a collapse of a bridge while plaintiff was riding over same in a car, which alleged the city's negligence in failing to repair the bridge and the plaintiff's want of knowledge of the defect, and that while the car was crossing the bridge gave way and fell by reason of its insecure and unsafe condition, and the car occupied by the plaintiff and others was thrown into the river, and plaintiff thereby was injured, was held to sufficiently allege that plaintiff's injuries were proximately caused by the fall of the bridge, which in its turn resulted from the negligent failure of the city to repair: Indianapolis v. Cauley, 164 Ind. 304; s. c. 73 N. E. Rep. 691. An allegation that a city negligently allowed a bridge to get out of repair and become dangerous for travel, and while knowing that fact negligently suffered the same to remain out of repair and to be used by the public for travel, has been held sufficient to charge negligence to withstand a demurrer: Indianapolis v. Cauley, 164 Ind. 304; s. c. 73 N. E. Rep. 691.

¹⁶ The city will be liable for injuries caused by sidewalk defects, though the sidewalk was not regu-

§ 6155. **Measure of Duty is Ordinary or Reasonable Care.**¹⁷—The sidewalk is to be maintained in a reasonably safe condition for the ordinary uses to which a sidewalk is subjected. A city will not be liable for injuries to a pedestrian caused by the cane with which he was supporting himself going through a crack between decayed boards, where the sidewalk was in a reasonably safe condition for travellers not compelled to use canes.¹⁸

§ 6156. **Whether Liable for Latent Defects.**—It may be said generally that it is the duty of a city to repair all defects in a sidewalk which it can discover by the exercise of reasonable diligence.¹⁹ It will not be relieved from liability for injuries through defects by merely showing that they were not of a character to attract the attention of passers-by.²⁰

§ 6157. **A Primary Duty, which Cannot be Devolved on Others.**—The duty cannot be devolved on sidewalk committees,²¹ contractors,²² or property owners,²³ so as to relieve the city from liability for injuries occasioned by defects.

§ 6159. **Primary Liability of Abutting Owners.**—A Michigan city charter authorized the city to require owners of adjacent property to build sidewalks, the expenses to be paid by the owner, but permitted the council to pay such part of the cost as they should deem proper,

larly laid out by it: *Hillyer v. Winsted*, 77 Conn. 304; s. c. 59 Atl. Rep. 40.

¹⁷ That it is the duty of a city to exercise reasonable diligence to keep its sidewalks in a reasonably safe condition for travel, see: *McLeansboro v. Trammel*, 109 Ill. App. 524; *Nokomis v. Farley*, 113 Ill. App. 161; *St. Louis v. Kansas City*, 110 Mo. App. 653; s. c. 85 S. W. Rep. 630; *Parrish v. Huntington*, 57 W. Va. 286; s. c. 50 S. E. Rep. 416. An instruction that evidence of the condition of the sidewalk in question at other times than that at which the injury occurred was admitted as showing the need of greater diligence in removing the obstruction was inaccurate, the diligence required being the same without regard to how often the need for the removal of the obstruction arose: *Hofacre v. Monticello*, 128 Iowa 239; s. c. 103 N. W. Rep. 488. Ordinary care has been held not improperly defined by an instruction that it means such prudence and care as an

ordinarily careful person would use under the same or like circumstances: *Pumorlo v. Merrill*, 125 Wis. 102; s. c. 103 N. W. Rep. 464. Reasonable diligence of city officers means such diligence as like officers, with like responsibilities, usually and ordinarily employ in the discharge of their duties: *Pumorlo v. Merrill*, 125 Wis. 102; s. c. 103 N. W. Rep. 464.

¹⁸ *Harden v. Jackson*, 137 Mich. 271; s. c. 100 N. W. Rep. 389; 11 Det. Leg. N. 269.

¹⁹ *Drake v. Kansas City*, 190 Mo. 370; s. c. 88 S. W. Rep. 689; *Miller v. Canton*, 112 Mo. App. 322; s. c. 87 S. W. Rep. 96.

²⁰ *Miller v. Canton*, 112 Mo. App. 322; s. c. 87 S. W. Rep. 96.

²¹ *Miller v. Canton*, 112 Mo. App. 322; s. c. 87 S. W. Rep. 96.

²² *Harvey v. Chester*, 211 Pa. 563; s. c. 61 Atl. Rep. 118.

²³ *Krebs v. Heitmann*, 104 App. Div. (N. Y.) 173; s. c. 93 N. Y. Supp. 542; *Hillyer v. Winsted*, 77 Conn. 304; s. c. 59 Atl. Rep. 40.

all the work to be done under the direction of the council. It authorized the city to construct the sidewalk in the event only of the owner's failure. It was held, under these provisions, that the city was not liable for the negligence of a contractor who built a sidewalk pursuant to a contract with a property owner, under the authority and direction of the city council, though the council agreed to pay one-third of the expense.²⁴

§ 6161. Whether City Liable with Joint Wrong-Doer.—There is authority that a paving contractor creating an obstruction in a street under a permit from the city is jointly liable with the city for an injury to a traveller on the street from the failure properly to guard the obstruction.²⁵

§ 6162. Duty Arises when Sidewalks Thrown Open for Public Use.—Generally a city constructing a sidewalk will be liable for injuries resulting from its failure to keep the walk in repair, although it was not required to construct the walk in the first instance.²⁶ On the question of the adoption of a sidewalk by a city, evidence is admissible to show its long use as a sidewalk,²⁷ and its recognition by the city authorities by posting warning notices or otherwise.²⁸

§ 6165. Whether Obligated to Keep Sidewalks Safe for Those who are Not Travellers, or for Extraordinary Uses.—The owner or tenant of an adjoining property is regarded as a traveller in the use he makes of the sidewalk alongside his premises.²⁹

§ 6166. Whether Bound to Keep Safe for Both Pedestrians and Vehicles, Including Bicycles.—In Rhode Island, where the bicycle is not regarded as a carriage, within the meaning of a statute making it the duty of towns to keep highways in repair for the use of such vehicles, a bicyclist is not entitled to recover for injuries sustained by reason of a defect in the street where the defect would not have caused injury to an ordinary traveller using another type of vehicle.³⁰

§ 6167. Whether Bound to Keep Every Portion in Repair.³¹—The fact that a small portion of the surface of a public sidewalk extends

²⁴ Thompson v. West Bay City, 137 Mich. 94; s. c. 100 N. W. Rep. 280; 11 Det. Leg. N. 233.

²⁵ Godfrey v. New York, 104 App. Div. (N. Y.) 357; s. c. 93 N. Y. Supp. 899.

²⁶ Birngruber v. Eastchester, 54 App. Div. (N. Y.) 80; s. c. 66 N. Y. Supp. 278. See also Harrison v. Ayrshire, 123 Iowa 528; s. c. 99 N. W. Rep. 132.

²⁷ Hillyer v. Winsted, 77 Conn. 304; s. c. 59 Atl. Rep. 40.

²⁸ Hillyer v. Winsted, 77 Conn. 304; s. c. 59 Atl. Rep. 40.

²⁹ Schindler v. Schroth, 146 Cal. 433; s. c. 80 Pac. Rep. 624; Strack v. Milwaukee, 121 Wis. 91; s. c. 98 N. W. Rep. 947.

³⁰ Fox v. Clarke, 25 R. I. 515; s. c. 57 Atl. Rep. 305; 65 L. R. A. 234.

³¹ That it is the duty of a city to

over upon private property does not affect the city's duty to maintain that portion of the walk; its responsibility covers the construction in its entirety.³² There is authority that a city is not liable for injuries caused by defects in sidewalks built without the consent or authority of the city on portions of the street not opened for sidewalk purposes.³³

§ 6169. Duty Extends to Defects Caused by the City Itself.³⁴

§ 6170. And to Obstructions and Defects Created by Wrong-Doers, or by Permission.—Under this rule the fact that a water company created a defect in a highway without authority will not relieve the town from liability for injuries caused by such defect if it could have been repaired within a reasonable time after notice.³⁵ In a case where a city had constructed a sidewalk and thereafter permitted a part of it to be torn up by others, leaving a dangerous depression for several weeks, it was held no defense to an action for injuries sustained by reason of the defect that the city was not bound to construct a walk at the point in question.³⁶

§ 6177. Questions of Proximate or Remote Cause in Actions for Sidewalk Injuries.³⁷—Where a pedestrian was injured by a fall due to a defective sidewalk, and the fall caused him to suffer from dizziness, the fact of the fall and the dizziness caused thereby will not be regarded as the proximate cause of an injury subsequently sustained by the pedestrian from a fall at another place, due to the negligence of the city in failing to clear the sidewalk of ice and snow.³⁸

§ 6183. No Liability for Injuries Caused by Smooth Deposits of Ice and Snow.³⁹

§ 6184. Qualifications and Denials of this Exemption from Liability.⁴⁰

maintain sidewalks in a reasonably safe condition for their entire width, see: *Wilmette v. Brachle*, 209 Ill. 621; s. c. 71 N. E. Rep. 41; aff'g s. c. 110 Ill. App. 356; *Coffey v. Carthage*, 186 Mo. 573; s. c. 85 S. W. Rep. 532; *Norton v. Kramer*, 180 Mo. 536; s. c. 79 S. W. Rep. 699.

³² *Deland v. Cameron*, 112 Mo. App. 704; s. c. 87 S. W. Rep. 597.

³³ *Ruppenthal v. St. Louis*, 190 Mo. 213; s. c. 88 S. W. Rep. 612.

³⁴ *Parrish v. Huntington*, 57 W. Va. 286; s. c. 50 S. E. Rep. 416 (water plugs).

³⁵ *Foley v. Ray*, 27 R. I. 127; s. c. 61 Atl. Rep. 50.

³⁶ *Belyea v. Port Huron*, 136 Mich. 504; s. c. 99 N. W. Rep. 740; 11 Det. Leg. N. 95.

³⁷ That the negligence of the city must have been the proximate cause of the injury, see: *Menzies v. Interstate Pav. Co.*, 106 App. Div. (N. Y.) 107; s. c. 94 N. Y. Supp. 492.

³⁸ *Watters v. Waterloo*, 126 Iowa 199; s. c. 101 N. W. Rep. 871.

³⁹ See generally: *Chicago v. McDonald*, 111 Ill. App. 436.

⁴⁰ The accumulation of water and ice on a sidewalk from a water spout leading from the roof of an adjoining house constitutes a nuisance which it is the duty of a city

§ 6185. The Doctrine in Massachusetts.⁴¹

§ 6191. **Liability where Snow is Allowed to Remain on the Street and to Become Packed or Otherwise Rendered Dangerous by Public Travel.**—A city is liable where the ice on a sidewalk which caused an injury was produced by artificial causes, was dangerous to pedestrians, and the city had notice of its presence, or by the exercise of reasonable diligence could have had notice in time to have removed it before the accident.⁴² A city having negligently allowed an accumulation of snow and ice to become and remain in a dangerous and unsafe condition, cannot escape liability for injuries received thereon by showing that the slipperiness was increased by natural causes, such as rain and sleet or sudden changes in the weather.⁴³ In one case it was held that the city was not liable for injuries occasioned by slipping on an accumulation of snow and ice on a sidewalk where it appeared that there was six feet of clear sidewalk on each side of the accumulation and it had been sprinkled with ashes twice during the day.⁴⁴

§ 6193. **Notice to Municipality and Opportunity to Remove the Snow or Ice.**—It is not demanded that a city should remove the snow immediately after it falls; it has a right to rely for a reasonable time on the presumption that the property owners will perform their duty and remove it.⁴⁵ A delay of forty-eight hours was excused in one case where the weather was below the freezing point during the time between the fall of the snow and the happening of the accident.⁴⁶

§ 6195. **Defense that there was an Ordinance Requiring Property Owners to Remove Snow.**—A walk in front of an alleyway is not a sidewalk, but a crosswalk, from which the city and not the property owner is required to remove the snow under ordinances requiring property owners to remove the snow from sidewalks in front of their premises.⁴⁷

to prevent or abate, and for its negligent failure to do so it will be liable to one injured thereby: *Muncie v. Hey*, 164 Ind. 570; s. c. 74 N. E. Rep. 250. See also *Cincinnati v. Grebner*, 25 Ohio Cir. Ct. R. 700.

⁴¹ An instruction was upheld which told the jury that they must find by a preponderance of the evidence that a sidewalk was not reasonably safe and convenient for public travel independently of the ice and snow upon it: *McCabe v. Whitman*, 187 Mass. 484; s. c. 73 N. E. Rep. 535.

⁴² *Hofacre v. Monticello*, 128 Iowa 239; s. c. 103 N. W. Rep. 488.

⁴³ *Templin v. Boone*, 127 Iowa 91; s. c. 102 N. W. Rep. 789.

⁴⁴ *Rogers v. Rome*, 96 App. Div. (N. Y.) 427; s. c. 89 N. Y. Supp. 130.

⁴⁵ *Foley v. New York*, 95 App. Div. (N. Y.) 374; s. c. 88 N. Y. Supp. 690.

⁴⁶ *Moran v. New York*, 98 App. Div. (N. Y.) 301; s. c. 90 N. Y. Supp. 596.

⁴⁷ *Moran v. New York*, 98 App. Div. (N. Y.) 301; s. c. 90 N. Y. Supp. 596.

§ 6204. **Basement Areas and Areaways, Coal-Holes, Cellarways, etc., in Sidewalk.**⁴⁸

§ 6209. **What Defects and Obstructions in Sidewalks have Afforded Evidence of Negligence.**—These defects and obstructions in sidewalks have been held actionable:—Wooden pegs projecting above the surface of the sidewalk;⁴⁹ market refuse left on sidewalk;⁵⁰ a plank set edgewise across a brick sidewalk for the purpose of securing the brick in position, and rising frequently three inches above the level of the sidewalk;⁵¹ a loose plank which flew up and tripped a pedestrian and caused him to fall in a hole in the walk;⁵² a large unguarded stone placed on the edge of the sidewalk.⁵³

§ 6211. **What Defects and Obstructions do Not Afford Evidence of Negligence.**⁵⁴

§ 6213. **Cases where the Question whether the Defect was Actionable has been Submitted to the Jury.**⁵⁵

§ 6224. **What are Crosswalks within these Principles.**—It may be said generally that it is not negligence in a city not to remove boards or other temporary aids to crossing an unpaved street placed there by citizens for convenience in muddy weather.⁵⁶ It has been held that the construction of an approach from a street to a sidewalk at a slope of one foot in seven is not negligence *per se*.⁵⁷

§ 6226. **Pleading in Actions for Injuries from Defective Sidewalks.**—Allegations in an action for injuries to a pedestrian falling over a cellar door set in a sidewalk, that the door was so constructed as to form a dangerous obstruction to travel, and that it was not constructed

⁴⁸ *Earl v. Cedar Rapids*, 126 Iowa 361; s. c. 102 N. W. Rep. 140 (city liable for injuries resulting from a cellarway extending a foot into the sidewalk being left open, without railing or guard).

⁴⁹ *Rea v. Sioux City*, 127 Iowa 615; s. c. 103 N. W. Rep. 949.

⁵⁰ *O'Dwyer v. Northern Market Co.*, 24 App. (D. C.) 81.

⁵¹ *Moriarty v. Lewiston*, 98 Me. 482; s. c. 57 Atl. Rep. 790.

⁵² *McKinney v. Brown* (Tex. Civ. App.), 81 S. W. Rep. 88.

⁵³ *Vincennes v. Spees*, 35 Ind. App. 389; s. c. 74 N. E. Rep. 277; rev'g s. c. 72 N. E. Rep. 531.

⁵⁴ A city was held not liable for injuries to an unattended blind man caused by colliding with a strip nailed lengthwise between two electric light poles for hitching purposes

at a place between the regular street crossings: *Foy v. Winston*, 135 N. C. 439; s. c. 47 S. E. Rep. 466.

⁵⁵ *Upham v. Boston*, 187 Mass. 220; s. c. 72 N. E. Rep. 946 (whether a circular hole from two to two and one-half inches in diameter in which the toe or heel of a traveller might be caught showed negligence by the city a question for the jury); *Perigo v. St. Louis*, 185 Mo. 274; s. c. 84 S. W. Rep. 30 (whether a cellar door projecting into a sidewalk and elevated two and one-half to four inches above the pavement was a dangerous structure a question for the jury).

⁵⁶ *McConway v. Philadelphia*, 209 Pa. 236; s. c. 58 Atl. Rep. 358.

⁵⁷ *Lush v. Parkersburg*, 127 Iowa 701; s. c. 104 N. W. Rep. 336.

in compliance with a city ordinance, does not require an election by the plaintiff whether he will proceed for a violation of the ordinance, or for negligence independent of it, since the ordinance was not the basis of the action.⁵⁸

§ 6227. Questions of Evidence Peculiar to Actions for Sidewalk Injuries.—The presumption that city officers fulfill their duties in respect to keeping sidewalks in repair may be invoked by the city only where there is no evidence on the subject.⁵⁹

§ 6228. Instructions in Actions for Sidewalk Injuries.—An instruction that a city was required to keep its sidewalks “in suitable repair” so that persons travelling over them might do so in safety, using ordinary care, was held erroneous as imposing a higher degree of care on the city than required by a statute which simply provided that the city should keep its sidewalks and streets “in reasonable repair,” and in a “condition reasonably safe and fit for public travel.”⁶⁰ An instruction to find for the plaintiff if the defendant, by the use of ordinary diligence, could have known of the defective condition of the walk on which the injuries were received, for a period reasonably sufficient to have repaired it before the injury, was held not in conflict with another instruction authorizing a finding for the plaintiff unless the jury believed that the sidewalk had been in a defective condition for a sufficient length of time before the accident for the city officials to have discovered it, by the exercise of ordinary diligence, in time to have repaired it before the accident.⁶¹

§ 6229. Other Questions of Procedure Peculiar to Actions for Sidewalk Injuries.⁶²

§ 6233. Questions of Procedure Peculiar to Crosswalk Injuries.⁶³

§ 6236. Traveller Bound to Exercise Ordinary Care.⁶⁴

⁵⁸ *Perrigo v. St. Louis*, 185 Mo. 274; s. c. 84 S. W. Rep. 30.

⁵⁹ *Miller v. Canton*, 112 Mo. App. 322; s. c. 87 S. W. Rep. 96.

⁶⁰ *Caldwell v. Detroit*, 137 Mich. 667; s. c. 100 N. W. Rep. 897; 11 Det. Leg. N. 440.

⁶¹ *Wright v. Kansas City*, 187 Mo. 678; s. c. 86 S. W. Rep. 452.

⁶² It is a question of law as to whether an obstruction was such as to render the sidewalk not in a reasonably safe condition, and thereby make the corporation liable in damages to a person injured by reason thereof where the evidence is conclusive and without conflict that the obstruction actually existed: *Par-*

rish v. Huntington, 57 W. Va. 286; s. c. 50 S. E. Rep. 416.

⁶³ It was held a question for the jury whether a city was negligent in maintaining an approach from a street crossing to a sidewalk, the street end of which approach presented an abrupt elevation of five or six inches, and at which crossing no light was maintained, and at which a traveller crossing the street in the dark, and ignorant of the conditions, was injured by striking his foot against the approach: *Achey v. Marion*, 126 Iowa 47; s. c. 101 N. W. Rep. 435.

⁶⁴ See generally: *Cunningham v. Clay Tp.*, 69 Kan. 373; s. c. 76 Pac.

§ 6238. **How Far Traveller may Rightfully Assume that Highway is Safe.**—It may be said generally that except as to defects of which the traveller has notice, he has a right to presume that streets are in a safe condition;⁶⁵ and that as to defects previously noticed by him that they have been removed after the lapse of sufficient time in which to make repairs.⁶⁶ But the traveller without knowledge of defects must use that degree of care in travelling over the street that a prudent person ordinarily employs under similar circumstances.⁶⁷

§ 6239. **Traveller Not Required to be Vigilant in Discovering Defects and Obstructions.**⁶⁸

§ 6241. **Duty of Traveller to Observe Obvious Defects and Dangers.**⁶⁹

§ 6245. **Attempting Obvious Dangers.**⁷⁰

§ 6246. **Injuries from Concealed and Unknown Defects.**—In one case a driver of a vehicle was imputed with contributory negligence where he received injuries in an attempt to drive a horse and carriage over a section of the highway, many rods in length, on a narrow dirt fill six feet high, covered by water to a depth of three feet, entirely obscuring it and all objects that would suggest its location.⁷¹

§ 6247. **Choice of Ways.**⁷²—Here it may be said that one with knowledge of a defect in a highway over which he may most con-

Rep. 907; *Jewell City v. Van Meter*, — Kan. —; s. c. 79 Pac. Rep. 149; *Rainey v. Lawrence*, 70 Kan. 518; s. c. 79 Pac. Rep. 116; *Hunter v. Durand*, 137 Mich. 53; s. c. 100 N. W. Rep. 191; 11 Det. Leg. N. 188; *Deland v. Cameron*, 112 Mo. App. 704; s. c. 87 S. W. Rep. 597.

⁶⁵ *Ward v. District of Columbia*, 24 App. (D. C.) 524; *Columbus v. Anglin*, 120 Ga. 785; s. c. 48 S. E. Rep. 318; *Wilmette v. Brachle*, 209 Ill. 621; s. c. 71 N. E. Rep. 41; aff'g s. c. 110 Ill. App. 356; *Louisville v. Keher*, 117 Ky. 841; s. c. 79 S. W. Rep. 270; 25 Ky. L. Rep. 2003; *Haxton v. Kansas City*, 190 Mo. 53; s. c. 88 S. W. Rep. 714; *Holloway v. Kansas City*, 184 Mo. 19; s. c. 82 S. W. Rep. 89; *Godfrey v. New York*, 104 App. Div. (N. Y.) 35; s. c. 93 N. Y. Supp. 899; *Curry v. Erie City*, 209 Pa. 283; s. c. 58 Atl. Rep. 476 (bicyclist thrown from wheel while running over a depression in an asphalt pavement of which she had no notice).

⁶⁶ *Deland v. Cameron*, 112 Mo. App. 704; s. c. 87 S. W. Rep. 597.

⁶⁷ *Coffey v. Carthage*, 186 Mo. 573; s. c. 85 S. W. Rep. 532.

⁶⁸ See generally: *Upper Alton v. Green*, 112 Ill. App. 439; *Oesterreich v. Detroit*, 137 Mich. 415; s. c. 100 N. W. Rep. 593; 11 Det. Leg. N. 301; *Duncan v. Grand Rapids*, 121 Wis. 626; s. c. 99 N. W. Rep. 317. Thus a pedestrian who saw that a sidewalk was a temporary one, placed in position for travel, but had no reason to think it insecure, was not guilty of contributory negligence in going upon it: *Garnett v. Hamilton*, 69 Kan. 866; s. c. 77 Pac. Rep. 583.

⁶⁹ That a traveller may not recover for injuries due to his failure to observe an obvious danger, see: *Keys v. Second Baptist Church*, 99 Me. 308; s. c. 59 Atl. Rep. 446.

⁷⁰ *Lockport v. Licht*, 113 Ill. App. 613 (presumption of negligence in case of injury from obvious highway defect).

⁷¹ *Schrunk v. St. Joseph*, 120 Wis. 223; s. c. 97 N. W. Rep. 946.

⁷² *Harvey v. Malden*, 188 Mass. 133; s. c. 74 N. E. Rep. 327 (bicyclist having ample room to pass obstruc-

veniently reach a desired destination is not required to take a less convenient route, at the risk of being charged with contributory negligence in the careful use of the defective way.⁷³ Certainly the doctrine of choice of ways cannot be applied where the traveller is ignorant of the defect.⁷⁴ In one case where a person was killed by contact with a heavily charged fire-alarm wire left dangling over a city street, it was held that the city would not be relieved from liability by the fact that the accident occurred on the side of a road of which sixteen feet was macadamized in the middle, and if the traveller had kept to the macadamized portion of the road in the middle he would not have lost his life.⁷⁵

§ 6248. What Uses of the Highway Will or Will Not Preclude Recovery.—A traveller is not to be charged with contributory negligence, as a matter of law, in attempting to reach a sidewalk from the street at a place other than a street crossing.⁷⁶

§ 6250. Attempting to Pass Over Icy Places.⁷⁷

§ 6254. What Acts of Travellers Not Negligent Per Se.⁷⁸

§ 6258. Questions of Pleading with Respect to Contributory Negligence in these Cases.—An allegation in an answer that the plaintiff was guilty of contributory negligence in that she was not careful, prudent or watchful in her walking over the sidewalk causing her injuries, has been held sufficiently specific.⁷⁹

tion and failing to do so and injured in consequence, imputed with contributory negligence).

⁷³ *Missouri &c. Tel. Co. v. Vandervort*, 71 Kan. 101; s. c. 79 Pac. Rep. 1068; *Dallas v. Muncion*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 431; *Muncie v. Hey*, 164 Ind. 570; s. c. 74 N. E. Rep. 250; *Commissioners of Charles Co. v. Mandanyohl*, 93 Md. 150; s. c. 48 Atl. Rep. 1058. A pedestrian was not required to leave a defective sidewalk and go out into a much used street in order to avoid a defect in the walk which the city had negligently permitted to exist after notice: *Pascagoula v. Kirkwood*, 86 Miss. 630; s. c. 38 South. Rep. 547.

⁷⁴ *Bussel v. Ft. Dodge*, 126 Iowa 308; s. c. 101 N. W. Rep. 1126; *Considine v. Dubuque*, 126 Iowa 283; s. c. 102 N. W. Rep. 192; *Evans v. Iowa City*, 125 Iowa 202; s. c. 100 N. W. Rep. 1112; *Pecor v. Oconto*, 125 Wis. 335; s. c. 104 N. W. Rep. 88.

⁷⁵ *Emery v. Philadelphia*, 208 Pa. 492; s. c. 57 Atl. Rep. 977..

⁷⁶ *Rea v. Sioux City*, 127 Iowa 615; s. c. 103 N. W. Rep. 949.

⁷⁷ That there may be no recovery where the dangerous condition is plainly apparent to the traveller, see: *Sickels v. Philadelphia*, 209 Pa. 113; s. c. 58 Atl. Rep. 128; *Rogers v. Rome*, 96 App. Div. (N. Y.) 427; s. c. 89 N. Y. Supp. 130; *Charlottesville v. Failes*, 103 Va. 53; s. c. 48 S. E. Rep. 511.

⁷⁸ *Pecor v. Oconto*, 125 Wis. 335; s. c. 104 N. W. Rep. 88 (not negligence in law for pedestrian passing along sidewalk composed of three longitudinal planks to step onto either of the outside ones); *Dougherty v. Philadelphia*, 210 Pa. 591; s. c. 60 Atl. Rep. 261 (not conclusive of contributory negligence that a traveller fell into an open inlet in a public street in the dark).

⁷⁹ *Durham v. Bolivar*, 106 Mo. App. 601; s. c. 81 S. W. Rep. 463.

§ 6259. **Rulings upon Instructions in these Cases.**—In general, the jury may be instructed that it was the duty of the traveller to use ordinary care, and to use his eyes and other senses to avoid any defects in the street which were obvious, or which could be discovered by the exercise of ordinary care.⁸⁰ It has been held not improper to charge that a person driving in the city need not entirely forego travelling upon a defective street merely because of the defect, and because the street is not lighted, if he is not thereby guilty of contributory negligence because of a failure to exercise reasonable care in proportion to the danger liable to be encountered.⁸¹ An instruction was held prejudicially erroneous which told the jury that to avoid the imputation of contributory negligence a higher degree of care is required of one using the sidewalk in front of another's premises for business purposes than is required of him when using such sidewalk for ordinary pedestrianism.⁸²

§ 6263. **Contributory Negligence Not Necessarily Imputed from Knowledge of Defective Condition of Highway.**—Here it may be said that the fact that a traveller has knowledge of defects in the street or sidewalk does not make him negligent, as a matter of law, in using such street or sidewalk unless the danger attending its use is so open and obvious as to suggest itself in an appreciative way to the mind of an ordinarily prudent man.⁸³ It is not the knowledge of the defect which renders the traveller negligent in attempting to use the street or sidewalk, but his failure to use ordinary care in avoiding the defect.⁸⁴ In one case it was held not necessarily contributory negligence for a person to run along a sidewalk, upon a rainy night, with his head down close to the building line and receive injuries by contact

⁸⁰ *Jackson v. Kansas City*, 106 Mo. App. 52; s. c. 79 S. W. Rep. 1174.

⁸¹ *Thuis v. Vincennes*, 73 N. E. Rep. 141; s. c. aff'd, 35 Ind. App. 350; 73 N. E. Rep. 1098.

⁸² *Schindler v. Schroth*, 146 Cal. 433; s. c. 80 Pac. Rep. 624.

⁸³ *Aledo v. Honeyman*, 208 Ill. 415; s. c. 70 N. E. Rep. 338; aff'g s. c. 108 Ill. App. 536; *Arnold v. Waterloo*, 128 Iowa 410; s. c. 104 N. W. Rep. 442; *Hollingsworth v. Ft. Dodge*, 125 Iowa 627; s. c. 101 N. W. Rep. 455; *Templin v. Boone*, 127 Iowa 91; s. c. 102 N. W. Rep. 789; *Erie Tp. v. Beamer*, 71 Kan. 182; s. c. 79 Pac. Rep. 1070; *Pratt v. Cohasset*, 177 Mass. 488; s. c. 59 N. E. Rep. 79;

Belyea v. Huron, 136 Mich. 504; s. c. 99 N. W. Rep. 740; 11 Det. Leg. N. 95; *Oesterreich v. Detroit*, 137 Mich. 415; s. c. 100 N. W. Rep. 593; 11 Det. Leg. N. 301; *Perrigo v. St. Louis*, 185 Mo. 274; s. c. 84 S. W. Rep. 30; *Ashby v. Elsberry & Co. Road Co.*, 99 Mo. App. 178; s. c. 73 S. W. Rep. 229; *Deland v. Cameron*, 112 Mo. App. 704; s. c. 87 S. W. Rep. 597; *Pascagoula v. Kirkwood*, 86 Miss. 630; s. c. 38 South. Rep. 547; *Gardner v. Wasco Co.*, 37 Or. 392; s. c. 61 Pac. Rep. 834; 62 Pac. Rep. 753; *McClammy v. Spokane*, 36 Wash. 339; s. c. 78 Pac. Rep. 912.

⁸⁴ *Rea v. Sioux City*, 127 Iowa 615; s. c. 103 N. W. Rep. 949.

with an obstruction, notwithstanding he may have been familiar with the sidewalk and knew its ordinary condition.⁸⁵

§ 6265. Care Required of Traveller Having Knowledge of Defect.—The traveller with knowledge of defects is under the duty to use greater diligence to avoid them than where he is ignorant of their existence. The care demanded is a care proportionate to the known danger to be avoided.⁸⁶ Thus a person with knowledge of the dangerous condition of a street cannot complain of the absence of barricades around the defect which caused his injuries.⁸⁷

§ 6266. Traveller Knowing of the Defect but Forgetting it at the Time of the Accident.⁸⁸

§ 6267. Miscalculation as to Proximity to Dangerous Place.⁸⁹

§ 6268. Traveller Knowing of the Defect, but Supposing that it has been Remedied.—Where barricades indicating the defects have been removed before the completion of the repairs, a traveller without knowledge of this fact has a right to infer that the way is safe for his use.⁹⁰ The question of the traveller's contributory negligence was held one of fact for the jury on evidence that though the traveller knew of the defect, he also knew that repairs had recently been made in the vicinity of the defect.⁹¹

⁸⁵ *Ottawa v. Hayne*, 114 Ill. App. 21; s. c. aff'd, 214 Ill. 45; 73 N. E. Rep. 385.

⁸⁶ *Lyon v. Grand Rapids*, 121 Wis. 609; s. c. 99 N. W. Rep. 311; *Seaver v. Union*, 113 Wis. 322; s. c. 89 N. W. Rep. 163 (driver of loaded sled overturned in narrow cut while turning out to pass approaching team guilty of contributory negligence where he had known of the dangerous conditions in the cut for more than six months). The driver of a vehicle, familiar with all the conditions of the street over which he is driving, and knowing the danger of attempting to drive on such street, is required in the event of injury, to overcome the presumption of contributory negligence arising from his conduct in exposing himself to the known danger: *Lockport v. Licht*, 113 Ill. App. 613.

⁸⁷ *Lockport v. Licht*, 113 Ill. App. 613.

⁸⁸ *Lyon v. Grand Rapids*, 121 Wis. 609; s. c. 99 N. W. Rep. 311 (wife loaded down with bundles was told by her husband to "hurry up" and while her attention was directed to

his remark she stepped into a hole in the sidewalk—not guilty of contributory negligence); *Lancaster v. Walter*, 80 S. W. Rep. 189; s. c. 25 Ky. L. Rep. 2189 (wife hurrying in the night time to call a physician for her husband suddenly taken ill and injured by falling over obstruction—not guilty of contributory negligence); *Veach v. Champaign*, 113 Ill. App. 151 (traveller falling into catch-basin, his attention being particularly attracted to the movement of a street car which he was intending to board—not guilty of contributory negligence).

⁸⁹ That traveller with knowledge miscalculated proximity to dangerous place not guilty of contributory negligence as a matter of law, but question one of fact for jury, see: *Belyea v. Port Huron*, 136 Mich. 504; s. c. 99 N. W. Rep. 740; 11 Det. Leg. N. 95; *Herring v. St. Joseph*, 137 Mich. 480; s. c. 100 N. W. Rep. 747; 11 Det. Leg. N. 399; *Wiens v. Ebel*, 69 Kan. 701; s. c. 77 Pac. Rep. 553.

⁹⁰ *Torphy v. Fall River*, 188 Mass. 310; s. c. 74 N. E. Rep. 465.

⁹¹ *Hunter v. Durand*, 137 Mich. 53;

§ 6277. Injuries from Careless Driving.⁹²

§ 6286. **When Negligence to Attempt to Cross Dangerous or Defective Bridge.**—It is not conclusive on the question of contributory negligence of a traveller going on a weakened bridge and suffering injuries thereby that he knew of its condition, unless its condition was such that a reasonably prudent man, under the circumstances, would have declined the risk.⁹³ The fact that a notice stating that the bridge was unsafe was posted on the bridge was held not conclusive on the question where it appeared that the injured traveller was personally advised by the road supervisors that the bridge was safe.⁹⁴

§ 6288. **Subjecting Bridges to Extraordinary Strain.**—On the principle of contributory negligence a person who knows, or has reason to believe that a bridge is liable to collapse under a heavy load, and notwithstanding voluntarily and knowingly takes the risk of crossing the bridge with such a load, cannot recover against the municipality for injuries to himself or the load, caused by the collapse of the bridge.⁹⁵ The failure to comply with a statute prescribing various precautions to be taken by persons in charge of traction engines in crossing bridges will not prevent a recovery for injuries caused by the collapse of the bridge, due to its negligent construction, unless the violation of the statute contributed directly to the injury.⁹⁶

§ 6290. Knowledge of Defect in Sidewalk.⁹⁷

s. c. 100 N. W. Rep. 191; 11 Det. Leg. N. 188.

⁹² *Baker v. Fall River*, 187 Mass. 53; s. c. 72 N. E. Rep. 336 (on question of plaintiff's care in operating automobile jury could take into consideration his violation of a statute requiring meeting vehicles to drive to the right of the middle of the travelled path); *Wood v. Westport*, 185 Mass. 567; s. c. 70 N. E. Rep. 1018 (evidence held insufficient to show that plaintiff was in the exercise of due care in driving, on a very dark night, over a bank wall between the highway and a mill where he had worked for years); *Conrad v. Upper Augusta Tp.*, 200 Pa. 337; s. c. 49 Atl. Rep. 770 (driver over road along embankment with knowledge of the absence of barriers allowed light in front of wagon to go out—guilty of contributory negligence). A Canadian case holds that one whose horse stumbles over a

projection in a highway, made while filling an excavation, cannot recover, where he knew of the condition of the place, and was at the time driving at a high rate of speed a lame, old horse, which had been known to stumble easily: *Messenger v. Bridgetown*, 33 N. S. 291.

⁹³ *Jones v. Shelby Co.*, 124 Iowa 551; s. c. 100 N. W. Rep. 520.

⁹⁴ *Jones v. Shelby Co.*, 124 Iowa 551; s. c. 100 N. W. Rep. 520.

⁹⁵ *Johnson v. Denning*, 106 App. Div. (N. Y.) 343; s. c. 94 N. Y. Supp. 532.

⁹⁶ *Tackett v. Taylor Co.*, 123 Iowa 149; s. c. 98 N. Y. Rep. 730.

⁹⁷ That knowledge of the defect does not conclusively show negligence on the part of the traveller injured thereby, see: *Lemman v. Spokane*, 38 Wash. 98; s. c. 80 Pac. Rep. 280; *Madill v. Caledon Tp.*, 3 Ont. L. Rep. 66.

§ 6291. **Knowledge of Defect and Safe Way Round.**—Contributory negligence is usually a question of fact for the jury where the traveller was familiar with the sidewalk through long use, and there was another street which he could have used and thus avoided injury.⁹⁸

§ 6292. **Attempting Obvious Danger.**—A pedestrian injured while attempting to pass over an obstructed sidewalk will not be charged with contributory negligence, as a matter of law, unless the obstruction or defect was such that a man of ordinary prudence would not have attempted to pass over it.⁹⁹ A pedestrian was imputed with contributory negligence where the evidence showed that he walked directly for thirty or forty feet towards the hole in the sidewalk three or four feet wide and seven or eight feet long, and stopped within eighteen inches of the hole and stood for fifteen or twenty minutes engaged in conversation with a companion, and then turned and stepped directly into it.¹⁰⁰

§ 6293. **Not Bound to Anticipate Defects.**—A pedestrian is not required to examine minutely the sidewalk over which he passes where there is no apparent reason to suppose that the sidewalk is not in good repair and condition. The existence of the walk is an invitation to pedestrians to use it and they may ordinarily assume that it is reasonably safe.¹⁰¹

§ 6296. **Deviating from Travelled Path.**—Here it may be said that a city has fully performed its duty when it has constructed its streets of reasonable width and smoothness, and a traveller who chooses, without reasonable cause, to drive or walk outside of such way will be held to have assumed the risk of injury from the deviation.¹⁰²

§ 6305. **Degree of Care Required of Nocturnal Traveller.**—A traveller making frequent use of a defective sidewalk, which was the

⁹⁸ Vander Velde v. Leroy, 140 Mich. 359; s. c. 103 N. W. Rep. 812; 12 Det. Leg. N. 183.

⁹⁹ Beatrice v. Forbes, — Neb. —; s. c. 103 N. W. Rep. 1069.

¹⁰⁰ Bender v. Minden, 124 Iowa 685; s. c. 100 N. W. Rep. 352.

¹⁰¹ Chicago v. Harris, 113 Ill. App. 633; McLeansboro v. Trammel, 109 Ill. App. 524; Kaiser v. Hahn Bros., 126 Iowa 561; s. c. 102 N. W. Rep. 504; Hitt v. Kansas City, 110 Mo. App. 713; s. c. 85 S. W. Rep. 669; Gallamore v. Olympia, 34 Wash. 379; s. c. 75 Pac. Rep. 978. A stranger arriving in a town at night, and un-

able to find a vehicle, was held not guilty of contributory negligence in walking along the street to her destination, leading one infant and carrying another, so as to defeat a recovery for injuries caused by a defective sidewalk: Conner v. Nevada, 188 Mo. 148; s. c. 86 S. W. Rep. 256.

¹⁰² Orr v. Oldtown, 99 Me. 190; s. c. 58 Atl. Rep. 914; Hammacher v. New Berlin, 124 Wis. 249; s. c. 102 N. W. Rep. 489 (pedestrian walking at night in path alongside country road failed to follow the path closely and fell into a ditch—imputed with contributory negligence).

only convenient way to his home, and not regarding it as dangerous, is not negligent, as a matter of law, in undertaking to pass over such a sidewalk at night.¹⁰³

§ 6309. **Contributory Negligence of Children upon the Highway.**¹⁰⁴

§ 6310. **Contributory Negligence of Parents or Guardians.**¹⁰⁵

§ 6312. **Travellers who are Blind or Bodily Infirm.**¹⁰⁶—In one case contributory negligence was imputed to a bright boy fifteen years old, partially blind, who, a short time after being warned against going on a bridge alone, went on the bridge, at a time when the draw was opened and walked off into the water.¹⁰⁷

§ 6320. **Examples and Construction of Statutes Requiring Notice.**—The following conclusions, in recent cases, were reached under the rule of strict construction noted in the principal section:—That a statute requiring presentation of “demands” to a city council does not apply to claims for damages for personal injuries;¹⁰⁸ that a statute requiring notice of claims for injuries from defects in streets and public works does not cover the case of injuries due to the negligent failure of the city to provide a servant with a reasonably safe place for work;¹⁰⁹ that a statute requiring notice of injuries by reason of highway defects does not apply to a claim of damages against a city for injuries to an abutter’s property due to a negligent delay in constructing a sewer;¹¹⁰ that such statutes are inapplicable to suits for relief from a nuisance;¹¹¹ that they apply generally only where the injury is ordinary and casual and not where it is a continuing injury.¹¹² The Connecti-

¹⁰³ *Tuttle v. Clear Lake*, — Iowa —; s. c. 102 N. W. Rep. 136.

¹⁰⁴ That a child is held only to the exercise of the care to be expected of one of his age and experience under the circumstances surrounding the particular accident, see: *Covington Saw Mill & Co. v. Drexilius*, — Ky. —; s. c. 87 S. W. Rep. 266; 27 Ky. L. Rep. 903; *Parrish v. Huntington*, 57 W. Va. 286; s. c. 50 S. E. Rep. 416 (boy five years old injured on defective sidewalk); *Lorenz v. New Orleans*, 114 La. 802; s. c. 38 South. Rep. 566 (boy nine years old injured by falling into open fire well—not guilty of contributory negligence).

¹⁰⁵ *Newport News v. Scott*, 103 Va. 794; s. c. 50 S. E. Rep. 266 (widowed mother of child five years old not guilty of contributory negligence as matter of law, where child escaped

from yard and was killed by falling into a hole in the street within fifteen minutes after escaping).

¹⁰⁶ That a blind traveller is held only to the exercise of ordinary care, see: *Hill v. Glenwood*, 124 Iowa 479; s. c. 100 N. W. Rep. 522.

¹⁰⁷ *Desure v. New York & C. R. Co.*, 94 App. Div. (N. Y.) 251; s. c. 87 N. Y. Supp. 988.

¹⁰⁸ *Dawes v. Great Falls*, 31 Mont. 9; s. c. 77 Pac. Rep. 309; *Gallamore v. Olympia*, 34 Wash. 379; s. c. 75 Pac. Rep. 978.

¹⁰⁹ *Kelly v. Faribault*, 95 Minn. 293; s. c. 104 N. W. Rep. 231.

¹¹⁰ *Fugere v. Cook*, 27 R. I. 134; s. c. 60 Atl. Rep. 1067.

¹¹¹ *Gerow v. Liberty*, 106 App. Div. (N. Y.) 357; s. c. 94 N. Y. Supp. 949.

¹¹² *Ahrens v. Rochester*, 97 App.

cut statute providing that all claims against the borough shall be presented to and passed on by the warden and burgesses, and that the warden shall not draw any warrant for any claim unless approved by such board, is held not to make the presentation of a claim for damages for personal injuries a condition precedent to an action on such claim.¹¹³ In Kansas the only effect of a failure to present a verified written claim is to prevent the recovery of costs by the plaintiff.¹¹⁴ In New York notice must be filed as to each claim growing out of the injury, and hence a parent in an action for injuries to his infant son cannot rely on the notice filed on behalf of the son alone.¹¹⁵

§ 6321. Notice of Injury Necessary under Statutes.¹¹⁶

§ 6325. **Form and Sufficiency of the Notice.**—A statute prohibiting notaries public who are attorneys from administering oaths in causes in which they may be professionally engaged does not vitiate a claim against a city for injuries because the notary before whom the claim was verified afterwards acted as attorney for the injured person.¹¹⁷ A claim demanding a certain sum as compensation for injuries is not rendered insufficient because it contains an offer to accept the amount demanded “by way of compromise or settlement in order to avoid litigation.”¹¹⁸ In New York it has been held not improper to file a copy of the claim where it shows due verification.¹¹⁹ In Wisconsin the statute has been held sufficiently complied with, in a case of death by wrongful act, by service of one of the duplicate notices signed with the name of the widow of the injured person by her attorney, though the name of the decedent’s administrator was not signed thereto.¹²⁰

§ 6327. **Waiver of Statutory Requirements as to Notice.**—Defects in the notice are generally regarded as waived where the officials to be served with the notice accept the same without objection as to the particular defect afterwards relied on.¹²¹ There is a holding that the

Div. (N. Y.) 480; s. c. 90 N. Y. Supp. 744.

¹¹³ *Hillyer v. Winsted*, 77 Conn. 304; s. c. 59 Atl. Rep. 40.

¹¹⁴ *Garnett v. Hamilton*, 67 Kan. 866; s. c. 77 Pac. Rep. 583.

¹¹⁵ *Seliger v. New York*, 88 N. Y. Supp. 1003.

¹¹⁶ That the presentation of a claim as commanded by statute, in the absence of sufficient excuse, is a condition precedent to the maintenance of an action, see: *Joy v. York*, 99 Me. 237; s. c. 58 Atl. Rep. 1059; *Biggs v. Geneva*, 100 App. Div. (N. Y.) 25; s. c. 90 N. Y. Supp. 858;

Forseyth v. Oswego, 107 App. Div. (N. Y.) 187; s. c. 95 N. Y. Supp. 33; *Garske v. Ridgeville*, 123 Wis. 503; s. c. 102 N. W. Rep. 22.

¹¹⁷ *Allen v. West Bay City*, 140 Mich. 111; s. c. 103 N. W. Rep. 514; 12 Det. Leg. N. 70.

¹¹⁸ *Bland v. Mobile*, 141 Ala. 142; s. c. 37 South. Rep. 843.

¹¹⁹ *Soper v. Greenwich*, 48 App. Div. (N. Y.) 354; s. c. 62 N. Y. Supp. 1111.

¹²⁰ *Carpenter v. Rolling*, 107 Wis. 559; s. c. 83 N. W. Rep. 953.

¹²¹ *Hunter v. Durand*, 137 Mich. 53; s. c. 100 N. W. Rep. 191; 11 Det.

fact that the injured person appeared before the claims committee of a city council and was examined did not amount to a waiver of defects in the notice where it was not shown when the examination took place, or whether it was at the instance of the injured person or of the city, nor that the particulars of the accident were detailed.¹²² Service on the city attorney, as commanded by statute, is not waived by the presence of the attorney with the council committee while examining the claim.¹²³

§ 6328. Essentials of Time, Place and Nature of Injury.—A statute of this character is generally regarded as sufficiently complied with when the notice gives the city such information as will enable it to investigate the cause of the injuries relied on.¹²⁴ The notice should be so worded that an ordinarily intelligent person could find the place and understand how and when the accident occurred.¹²⁵

§ 6330. Place of the Accident: What Description Sufficient.—The place was held sufficiently described by a recital that the accident occurred "on a certain sidewalk situated on King Hill avenue, on the east side thereof, at a point about the center of Massachusetts avenue, if said Massachusetts avenue continued on over and across said King Hill avenue, the place being in front of the residence of Dick Johnson."¹²⁶

§ 6333. Instances of Insufficient Descriptions of Place of Accident.—A notice was held defective in this particular which stated that the plaintiff, while riding along a certain street near another named street, was thrown from his wagon on the wagon striking a large stone in the highway, the notice not referring to any house or other monument upon the street on which the plaintiff was driving by which the specific location of the stone could be fixed—the stone in

Leg. N. 188; *Spier v. Kalamazoo*, 138 Mich. 652; s. c. 101 N. W. Rep. 846; 11 Det. Leg. N. 697.

¹²² *Forseyth v. Oswego*, 107 App. Div. (N. Y.) 187; s. c. 95 N. Y. Supp. 33.

¹²³ *Wilton v. Detroit*, 138 Mich. 67; s. c. 100 N. W. Rep. 1020; 11 Det. Leg. N. 467.

¹²⁴ *Denver v. Bradbury*, 18 Colo. App. 441; s. c. 75 Pac. Rep. 1077. See also *Connor v. Salt Lake City*, 28 Utah 248; s. c. 78 Pac. Rep. 479 (notice sufficiently definite where it did not mislead city); *Pecor v. Ocon-*

to, 125 Wis. 335; s. c. 104 N. W. Rep. 88.

¹²⁵ *Elson v. Waterford*, 138 Fed. Rep. 1004. For examples of notices that have withstood objections on the ground of insufficiency, see: *Oesterreich v. Detroit*, 137 Mich. 415; s. c. 100 N. W. Rep. 593; 11 Det. Leg. N. 301; *Burnette v. St. Joseph*, 112 Mo. App. 668; s. c. 87 S. W. Rep. 589; *Garske v. Ridgeville*, 123 Wis. 503; s. c. 102 N. W. Rep. 22.

¹²⁶ *Strange v. St. Joseph*, 112 Mo. App. 629; s. c. 87 S. W. Rep. 2.

fact being located eight hundred feet distant from the street near which it was described as located.¹²⁷

§ 6334. Cause of the Accident: Defect, Insufficiency, Want of Repair, etc.—Whether the notice describes a defect under the rules is a question of fact for the jury, but it is for the court only to decide whether the notice describes the nature and location of the alleged defect with sufficient accuracy.¹²⁸ A notice merely reciting that the injury was received by the plaintiff while walking on the sidewalk of a city at the intersection of certain streets, is clearly insufficient and wanting in facts.¹²⁹ There is authority that a notice specifying the condition of a walk at the point where the plaintiff was injured, and undertaking to attribute this condition to the negligence of the city, does not prevent the defendant from afterwards alleging that the original construction of the walk was defective.¹³⁰

§ 6338. Statement of the Nature and Extent of the Injury.—Generally speaking, a notice is sufficient if it describes the nature of the injury with such particularity as will enable the town to ascertain the true condition of the injured person. The plaintiff must specify such injuries as he knows of, and if he can do no more, he must state the apparent physical condition caused by his injuries.¹³¹ A notice that the plaintiff, injured by the overturning of a sleigh in which she was riding, was thrown on her back and head on a rock and her left hip dislocated and her back and head injured, was held to convey a sufficient general description of the injury and its cause.¹³² The injured person will be confined to the injuries described in his notice. Thus a description of the injury as a fracture of both wrists will not allow recovery of damages for an injury to a shoulder.¹³³

§ 6340. Stating Amount of Damages.—The statement of the amount of damages in the notice is not conclusive on the claimant. In an action brought after a refusal to allow his claim he may demand and recover the damages proved, though in excess of the amount claimed in the notice presented to the city.¹³⁴

§ 6344. Notice, within What Time Given.—The New York statutory construction law provides that the number of months after a

¹²⁷ *Forseyth v. Oswego*, 107 App. Div. (N. Y.) 187; s. c. 95 N. Y. Supp. 33. ¹³¹ *Joy v. York*, 99 Me. 237; s. c. 58 Atl. Rep. 1059.

¹²⁸ *York v. Athens*, 99 Me. 82; s. c. 58 Atl. Rep. 418. ¹³² *Dean v. Sharon*, 72 Conn. 667; s. c. 45 Atl. Rep. 963.

¹²⁹ *Lyons v. St. Joseph*, 112 Mo. App. 681; s. c. 87 S. W. Rep. 588. ¹³³ *Joy v. York*, 99 Me. 237; s. c. 58 Atl. Rep. 1059.

¹³⁰ *McCartney v. Washington*, 124 Iowa 382; s. c. 100 N. W. Rep. 80. ¹³⁴ *Mackay v. Salt Lake City*, 29 Utah 247; s. c. 81 Pac. Rep. 81. But see *Bland v. Mobile*, 142 Ala. 142; s. c. 37 South. Rep. 843.

certain day shall be computed by counting such number of months from such day, exclusive of the calender month in which such day occurs, and shall include the day of the month in the last month so counted having the same numerical order as the days of the month in which the computation is made. Under this rule a notice filed on March the eleventh, demanding compensation for an injury received February tenth, is one day too late, under a statute requiring service of the notice within one month.¹³⁵ A statute requiring service of notice "within sixty days next after such injury," allows sixty days after the day of the injury for the service of the notice.¹³⁶

§ 6345. Exception in Favor of Persons so Severely Injured as to be Incapable of Giving Notice.¹³⁷

§ 6349. Notice, By Whom Given.—It is held in Washington that a claim presented by a wife alone for personal injuries, and rejected by the city authorities without question as to its regularity or sufficiency, or as to the person by whom it was signed, is sufficient to enable the claimant's husband and herself to jointly prosecute the action.¹³⁸

§ 6350. Notice, To Whom Given.¹³⁹

§ 6354. Action within What time Brought.—Under the Iowa statute one injured by a defective sidewalk must not only give notice of the injury within thirty days, but must also postpone the commencement of his action for the injury until the expiration of thirty days after notice of claim.¹⁴⁰

§ 6355. Parol Evidence to Explain the Notice.¹⁴¹

¹³⁵ *Biggs v. Geneva*, 100 App. Div. (N. Y.) 25; s. c. 90 N. Y. Supp. 858.

¹³⁶ *McEvoy v. Sault Ste. Marie*, 136 Mich. 172; s. c. 98 N. W. Rep. 1006; 10 Det. Leg. N. 1036.

¹³⁷ It is the rule in New York that the giving of the notice may be postponed until the injured person is physically and mentally able to do so, notwithstanding the statute: *Walden v. Jamestown*, 178 N. Y. 213; s. c. 70 N. E. Rep. 466; aff'g s. c. 79 App. Div. (N. Y.) 433; 80 N. Y. Supp. 65; *Williams v. Port Chester*, 97 App. Div. (N. Y.) 84; s. c. 89 N. Y. Supp. 671.

¹³⁸ *Davis v. Seattle*, 37 Wash. 223; s. c. 79 Pac. Rep. 734.

¹³⁹ In New York a service of notice on the clerk is sufficient: *Dobson v. Oneida*, 106 App. Div. (N. Y.) 337;

s. c. 94 N. Y. Supp. 958; *O'Donnell v. Syracuse*, 102 App. Div. (N. Y.) 80; s. c. 92 N. Y. Supp. 555. In Massachusetts, where service may be made on selectmen, there is a holding that service on the evening of the last day for service, on a domestic employed in the selectman's house, was sufficient where it was shown that the selectman occupied the house and slept there that night: *McCarthy v. Dedham*, 188 Mass. 204; s. c. 74 N. E. Rep. 319.

¹⁴⁰ *Kenyon v. Cedar Rapids*, 124 Iowa 195; s. c. 99 N. W. Rep. 692.

¹⁴¹ The fact that a witness for plaintiff, who testified to having drawn the notice, had made a memorandum in respect to it, which he did not have with him when he testified, did not prevent him from testi-

§ 6356. **Pleading Notice.**—The fact that the description of the cause of the injury in the notice is general does not prevent the plaintiff from alleging the cause more specifically in his complaint or declaration.¹⁴² So a complaint may be amended to set forth with sufficient clearness that the defect relied on in the complaint is the same defect as that set out in the notice.¹⁴³ Under a declaration alleging performance of the statute as to notice a waiver of verification may be shown.¹⁴⁴ Where the giving of the statutory notice is denied by the defendant, the failure of the plaintiff to offer any proof of compliance with the statute prevents a recovery.¹⁴⁵ Where the action is merely to enforce a common-law right of the plaintiff, his failure to allege a compliance with a statute requiring notice is available only by answer or plea in abatement.¹⁴⁶

§ 6361. **Liability of Third Person who Fails to Perform a Duty Imposed by Statute or Ordinance.**—The principle underlying the right of a municipality to be reimbursed for damages paid by it in cases of accident is, that the owner or occupier of the property, as the case may be, is primarily liable to the person injured. Under this rule a non-resident owner of a city lot was held not liable to the city on a verdict recovered against it for personal injuries by a fall on the ice on the sidewalk in front of the premises, where the sidewalk was in good repair, and the owner had no notice of its condition, but the city had actual notice.¹⁴⁷

fyng to such facts in connection with the notice as he remembered: *Garske v. Ridgeville*, 123 Wis. 503; s. c. 102 N. W. Rep. 22. The city clerk is competent to testify that a claim was presented to the city council and disallowed before the commencement of the action: *Jewell City v. Van Meter*, — Kan. —; s. c. 79 Pac. Rep. 149.

¹⁴² *Breen v. Cornwall*, 73 Conn. 309; s. c. 47 Atl. Rep. 322.

¹⁴³ *Elson v. Waterford*, 138 Fed. Rep. 104.

¹⁴⁴ *Hunter v. Durand*, 137 Mich. 53; s. c. 100 N. W. Rep. 191; 11 Det. Leg. N. 188.

¹⁴⁵ *Seliger v. New York*, 88 N. Y. Supp. 1003.

¹⁴⁶ *Bunker v. Hudson*, 122 Wis. 43; s. c. 99 N. W. Rep. 448.

¹⁴⁷ *New Castle v. Kurtz*, 210 Pa. 183; s. c. 59 Atl. Rep. 989.

TITLE TWENTY-ONE.

NEGLIGENCE OF PUBLIC OFFICERS AND AGENTS.

[§§ 6376-6410].

§ 6376. No Liability where Public Officer Acts within his Lawful Powers, Gratuitously and in Good Faith.—It may be said generally that public officers are without power to bind the government by acts beyond their actual authority notwithstanding the act may be within the apparent scope of their authority.¹ Where the act is within the apparent scope of the officer's authority the burden of proving an excess of power is on the party asserting this as a defense.²

§ 6377. Liable where he Acts Oppressively, Maliciously, or Negligently.³

§ 6403. Public Ministerial Officers Liable for Acts of Trespass or Misfeasance, but Not for Nonfeasance.—In the absence of a supported charge of illegality or fraud, courts are without power to interfere with public officers in the discharge of their duties.⁴ Neither is a public officer charged with discretionary duties liable for an erroneous performance of these duties unless guilty of willful wrong, malice or corruption.⁵

§ 6410. Rule as to De Facto Officers.—One claiming rights by virtue of his office must show that he is an officer *de jure*; a showing that he is an officer *de facto* is insufficient.⁶ The act of a *de facto* officer, where it is for his own benefit, is void. An officer cannot take

¹Orange Co. v. Texas &c. R. Co., 35 Tex. Civ. App. 361; s. c. 80 S. W. Rep. 670.

²Martin v. Common School Dist. No. 61, Meeker Co., 93 Minn. 409; s. c. 101 N. W. Rep. 952.

³Where the city is not liable for a tort of one of its officers on the ground that the act was a governmental act,—as for example, lack of care given an inmate of a contagious hospital,—the remedy is by

civil action and indictment of the guilty officers: Lexington v. Batson, 118 Ky. 489; s. c. 81 S. W. Rep. 264; 26 Ky. L. Rep. 363.

⁴People v. Board of Trustees of White Plains, 93 App. Div. (N. Y.) 599; s. c. 88 N. Y. Supp. 506.

⁵Schooler v. Arrington, 106 Mo. App. 607; s. c. 81 S. W. Rep. 468.

⁶Moon v. Champaign, 214 Ill. 40; s. c. 73 N. E. Rep. 408.

advantage of his own want of title,—a matter of which he must be conversant,—but where the act is for the benefit of strangers, or the public, who are presumed to be ignorant of the defective title, the act is good.⁷

⁷ *Jordan v. Washington &c. R. Co.*, 25 Pa. Super. Ct. 564.

TITLE TWENTY-TWO.

CARRIERS OF GOODS AND ANIMALS.

[§§ 6418-6646.]

§ 6418. Distinguished from Private Carriers.¹

§ 6425. **Carrier May Not Discriminate Between Shippers.**—It may be said generally that it is unlawful for a carrier to discriminate in favor of an individual shipper in the matter of furnishing cars for the transportation of freight, and this though the demands upon the carrier by shippers generally exceed its capacity and the anticipated calls for cars.² The rule against discrimination is violated where the carrier refuses to serve all shippers alike in the manner of delivering freight over a switch along which the establishments of various shippers are located.³

§ 6426. **Duty to Furnish Suitable and Sufficient Vehicles for the Service.**—It is the duty of the carrier to furnish suitable and proper cars for shipment⁴ without discrimination between shippers.⁵ Where the carrier has sufficient rolling stock for the purposes of transportation in the usual course of events, taking into consideration the fact that at certain seasons more cars are needed, it has satisfied the rule as to facilities and will not be required to provide for such a rush of freight as may occur in any given locality temporarily or at long intervals of time.⁶ Whether a carrier has unreasonably neglected to pro-

¹ A railroad company in the transportation of a circus and managerie train is a private carrier, and as such may refuse transportation except under a contract limiting its liability to that of a private carrier: *Wilson v. Atlantic Coast Line Co.*, 133 Fed. Rep. 1022; s. c. 66 C. C. A. 486; aff'g s. c. 129 Fed. Rep. 774.

² *Strough v. New York & C. R. Co.*, 92 App. Div. (N. Y.) 584; s. c. 87 N. Y. Supp. 30; s. c. aff'd, 181 N. Y. 533; 73 N. E. Rep. 1133.

³ *Kellogg v. Sowerby*, 93 App. Div. (N. Y.) 124; s. c. 87 N. Y. Supp. 412.

⁴ *St. Louis & C. R. Co. v. Marshall*, 74 Ark. 597; s. c. 86 S. W. Rep. 802.

⁵ *State v. Chicago & C. R. Co.*, — Neb. —; s. c. 99 N. W. Rep. 309.

⁶ During a temporary scarcity of cars a railroad company is entitled to consider, in apportioning them among grain dealers, their relative volume of business; and, though there may be a difference in the number furnished to different grain dealers at the same station, still, if no discrimination is shown, no shipper has a right to complain, though he may not obtain all the cars he deems necessary: *State v. Chicago & C. R. Co.*, — Neb. —; s. c. 99 N. W. Rep. 309.

vide a sufficient number of cars to forward freight is usually a question of fact for the jury.⁷ As against a carrier, a consignee, who claims that his consignment was injured by reason of the unsuitableness of the car provided, is concluded by the consignor's selection of the car under an agreement which authorized him to make the selection.⁸

§ 6427. **Duty to Receive Goods Tendered.**—The law gives a carrier the right to make reasonable regulations governing the manner and place in which it will receive freight for transportation and also to change or modify such regulations provided reasonable notice is given to the public.⁹ Where the carrier has designated a certain point as the place at which it will receive a certain class of freight, and the designation is not unreasonable, the shipper is not entitled to compel the carrier to receive this form of freight from him at another place, where freight of another character is received, merely because the place designated for his class of freight was not as accessible to him as the other place.¹⁰

§ 6428. **Carriage may be Limited to Particular Species of Goods.**¹¹

§ 6429. **Duty with Reference to Reception and Carriage of Perishable Goods.**—Hay is not regarded as perishable merchandise within a rule requiring the carrier to put forth unusual efforts to move perishable goods when delivered to it for transportation.¹²

§ 6438. **Delivery and Acceptance of Goods Essential to Inception of Relation.**¹³—A bill of lading acknowledging the receipt of the goods is evidence of its delivery to the carrier,¹⁴ but it is not absolutely essential if there has been a complete delivery and acceptance of the goods.¹⁵ In a case where a shipper's cotton after being ginned was placed on a

⁷ Strough v. New York &c. R. Co., 92 App. Div. (N. Y.) 584; s. c. 87 N. Y. Supp. 30; s. c. aff'd, 181 N. Y. 533; 73 N. E. Rep. 1133.

⁸ Edward Frohlich Glass Co. v. Pennsylvania Co., 138 Mich. 116; s. c. 101 N. W. Rep. 223; 11 Det. Leg. N. 508.

⁹ Robinson v. Baltimore &c. R. Co., 129 Fed. Rep. 753; s. c. 64 C. C. A. 281.

¹⁰ Robinson v. Baltimore &c. R. Co., 129 Fed. Rep. 753; s. c. 64 C. C. A. 281.

¹¹ Wilson v. Atlantic Coast Line R. Co., 129 Fed. Rep. 774 (may refuse carriage of circus and menagerie unless indemnified against damage or injury).

¹² Strough v. New York &c. R. Co.,

92 App. Div. (N. Y.) 584; s. c. 87 N. Y. Supp. 30; s. c. aff'd, 181 N. Y. 533; 73 N. E. Rep. 1133.

¹³ That the liability of a carrier will not attach until the goods to be shipped are unconditionally delivered by the shipper and accepted by the carrier, see: Louisville &c. R. Co. v. United States, 39 Ct. Cl. (U. S.) 405; Chicago &c. R. Co. v. Powers, — Neb. —; s. c. 103 N. W. Rep. 678.

¹⁴ Fasy v. International Nav. Co., 77 App. Div. (N. Y.) 469; s. c. 79 N. Y. Supp. 1103; s. c. aff'd, 177 N. Y. 591; 70 N. E. Rep. 1098.

¹⁵ Pine Bluff &c. R. Co. v. McKenzie, 75 Ark. 100; s. c. 86 S. W. Rep. 834.

platform which had been built by a railroad for the reception of cotton for shipment, and, according to custom, the manager of the gin requested the carrier's agent at the nearest station to have a car sent for the cotton but the conductor of the train failed to follow his instructions, so that no car was left and the cotton while on the platform was destroyed, it was held that the relation of carrier and shipper was not consummated.¹⁶

§ 6439. **Shipper must Deliver Freight to the Carrier.**—Generally speaking, a carrier cannot be required to receive freight at places other than its own depots or other shipping and receiving points,¹⁷ but it may as a result of custom or by express contract, obligate itself to receive freight at other points.¹⁸

§ 6447. **Presumption as to Condition in Which Goods were Received.**¹⁹

§ 6451. **The Common-Law Doctrine and Its Exceptions.**²⁰—Where the liability of the carrier is not limited by contract, a shipper, in an action against a carrier for loss or injury to the goods, need not show that the injuries were due to the carrier's negligence.²¹

§ 6454. **Burden of Proof whether Loss was Within Common-Law Exceptions.**—An instruction imposing upon the defendant the obligation to prove by a preponderance of the evidence that horses injured during transportation were injured by their own inherent defect or vice, or by the act of God, or a public enemy, has been held improper on the ground that it imposed upon the carrier the burden of proving

¹⁶ *Anderson v. Mobile &c. R. Co.*, — Miss. —; s. c. 38 South. Rep. 661.

¹⁷ *Bedford-Bowling Green Stone Co. v. Oman*, 134 Fed. Rep. 441; s. c. aff'd, 134 Fed. Rep. 6; s. c. 67 C. C. A. 190.

¹⁸ *Georgia Southern &c. R. Co. v. Marchman*, 121 Ga. 235; s. c. 48 S. E. Rep. 961.

¹⁹ An acknowledgment by a carrier of the good condition of merchandise is not to be presumed from the mere delivery of a bill of lading reciting that the goods were "in apparent good condition, except as noted, contents and condition of contents of packages unknown." *Jean, Garrison & Co. v. Flagg*, 45 Misc. (N. Y.) 421; s. c. 90 N. Y. Supp. 289.

²⁰ Under a statute declaring that a common carrier's liabilities shall be those prescribed by the common law, an instruction in an action against a carrier for freight loss is

erroneous which limits the carrier's duty to the exercise of ordinary care for the safe transportation and delivery of the freight to its destination within a reasonable time: *Bibb v. Missouri &c. R. Co.*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 663. That in the absence of a contract limiting its liability a common carrier is liable as an insurer for the loss of goods intrusted to it for transportation, unless the loss was occasioned by an act of God, a public enemy, some inherent defect in the goods or negligence on the part of the shipper, see: *Trace v. Pennsylvania R. Co.*, 26 Pa. Super. Ct. 466; *Gulf &c. R. Co. v. Roberts*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 479 (loss by fire not an exception).

²¹ *Gulf &c. R. Co. v. Roberts*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 479.

that the injuries were occasioned by the act of God, a public enemy, or because of the inherent vice in the animals themselves; while the true rule as announced by the court is that the *prima facie* case made by the plaintiff might have been rebutted by proof that the defendant had provided all suitable means of transportation and had exercised that degree of care which the nature of the property demanded.²²

§ 6458. **Act of God must have been Proximate Cause of Loss.**—Though the carrier is responsible for an injury caused by the concurrence of its negligence with an act of God, yet this injury must be a natural and probable consequence of the negligence and not an unusual and unanticipated consequence.²³ The proposition is affirmed,²⁴ and denied²⁵ that the carrier is not liable for a loss of goods through an act of God which could not reasonably have been foreseen, although but for its negligence in delaying the shipment the property would have escaped the danger and the loss would not have occurred. In an action where the evidence showed that the removal of a car threatened by water during an unprecedented flood to a place of safety would have been difficult, if not impossible, evidence that another carrier moved cars of freight from this vicinity before the inundation was held improperly received, in the absence of evidence showing that the carrier which removed its cars had no better facilities for removing them than the defendant carrier had.²⁶

§ 6460. **Public Enemies.**—Ordinarily the carrier will not be liable for injury to a shipment by delay caused by the interference of strikers with the movements of trains, unless it fails to exercise reasonable diligence to expedite the shipment notwithstanding the interference.²⁷

§ 6464. **Contributory Negligence in General.**—Where the shipper himself undertakes to supply a refrigerator car with ice, the carrier has a right to assume, except as facts may have existed putting it on notice to the contrary, that the shipper has furnished enough ice to keep the car cool until a delivery to the consignee can be had in the ordinary course of transportation.²⁸ There is authority that a carrier

²² Wabash R. Co. v. Johnson, 114 Ill. App. 545.

²³ Empire State Cattle Co. v. Atchison & C. R. Co., 135 Fed. Rep. 135; Grier v. St. Louis Merchants' Bridge Terminal R. Co., 108 Mo. App. 565; s. c. 84 S. W. Rep. 158; Moffatt Commission Co. v. Union Pac. R. Co., 113 Mo. App. 544; s. c. 88 S. W. Rep. 117 (an unprecedented and unforeseen flood).

²⁴ Empire State Cattle Co. v. Atchison & C. R. Co., 135 Fed. Rep. 135; Moffatt Commission Co. v.

Union Pac. R. Co., 113 Mo. App. 544; s. c. 88 S. W. Rep. 117.

²⁵ Bibb Broom Corn Co. v. Atchison & C. R. Co., 94 Minn. 269; s. c. 102 N. W. Rep. 709.

²⁶ Grier v. St. Louis & C. R. Co., 108 Mo. App. 565; s. c. 84 S. W. Rep. 158.

²⁷ Sterling v. St. Louis & C. R. Co., — Tex. Civ. App. —; s. c. 86 S. W. Rep. 655.

²⁸ Chicago & C. R. Co. v. Reyman, — Ind. —; s. c. 73 N. E. Rep. 587.

furnishing a defective car for shipment will be liable for injuries to goods resulting from the defect, although the shipper inspected the car and knew of the defect.²⁹

§ 6471. **Inherent Nature and Propensities of Subject of Carriage.**—The law does not hold a carrier liable for injuries caused by an inherent defect or vice in the subject of the shipment,³⁰ and this more particularly where its existence is unknown both to the carrier and the shipper.³¹

§ 6481. **Constitutional and Statutory Provisions Relating to Contracts Limiting the Carrier's Liability.**³²

§ 6482. **Rules of Construction.**³³

§ 6486. **What Law will Govern in Case of Conflict.**³⁴—Where the contract entered into by an initial carrier amounts merely to an undertaking to deliver the shipment to a connecting carrier, although a through rate is paid, the initial carrier only acts as agent for the connecting carrier, and, as such, makes the contract subject to the laws of the State in which the connecting carrier is situated and where it performs the contract.³⁵ In a case where a contract for carriage made in Ohio limiting the carrier's common-law liability would have been invalid in Kentucky, under a constitutional provision forbidding the execution of such contracts, the court of appeals of Kentucky has held that it was incumbent on the carrier to show, in order to avail itself

²⁹ St. Louis & C. R. Co. v. Marshall, 74 Ark. 597; s. c. 86 S. W. Rep. 802.

³⁰ Texas & C. R. Co. v. Snyder, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 1041.

³¹ Lister v. Lancashire & C. R. Co., [1903] 1 K. B. 878; s. c. 72 L. J. K. B. 385; 88 L. T. 561; 52 Wkly. Rep. 12.

³² Under a Kentucky constitutional provision forbidding carriers to contract away their common-law liability, a contract providing for the release and discharge of a carrier from all liability for the loss of dogs unless caused by the negligence of the carrier's agents or employés, and restricting the carrier's liability to twenty-five dollars for the loss of any of the animals is held invalid: Adams Exp. Co. v. Walker, — Ky. —; s. c. 83 S. W. Rep. 106; 26 Ky. L. Rep. 1025; 67 L. R. A. 412.

³³ That limiting contracts are to be strictly construed against the carrier and liberally in favor of the

shipper, see: Galloway v. Erie R. Co., 107 App. Div. (N. Y.) 210; s. c. 95 N. Y. Supp. 17; Welch v. Northern Pac. R. Co., — N. D. —; s. c. 103 N. W. Rep. 396.

³⁴ That the law of the place of contract governs in the interpretation of limiting stipulations, see: Cleveland & C. R. Co. v. Druen, 118 Ky. 237; s. c. 80 S. W. Rep. 778; 26 Ky. L. Rep. 103; National Bank of Bristol v. Baltimore & C. R. Co., 99 Md. 661; s. c. 59 Atl. Rep. 134; Powers Mercantile Co. v. Wells & C. Co., 93 Minn. 143; s. c. 100 N. W. Rep. 735; Nenno v. St. Louis & C. R. Co., 105 Mo. App. 540; s. c. 80 S. W. Rep. 24; Barnes v. Long Island R. Co., 47 Misc. Rep. (N. Y.) 318; s. c. 93 N. Y. Supp. 616; Cappel v. Weir, 92 N. Y. Supp. 365; Chicago & C. R. Co. v. Mitchell, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 286.

³⁵ Lake Shore & C. R. Co. v. Teeters, — Ind. App. —; s. c. 74 N. E. Rep. 1014.

of the contract, not only that the contract was valid under the laws of Ohio, but that the loss complained of also occurred there.³⁶

§ 6488. **Burden of Proof.**³⁷

§ 6492. **Knowledge and Assent of the Shipper Essential.**³⁸—In a case, where the bill of lading containing a limited liability contract was delivered unsigned to the wife of a shipper who was illiterate, and its contents were not made known to her, it was held that assent was lacking.³⁹ A shipper preparing his own bill of lading is estopped to allege fraud or mistake therein.⁴⁰ Generally a bill of lading with its stipulations is binding on the shipper, if it is accessible to him, and the surrounding facts imply an acceptance of the conditions, although it has not come into his actual possession.⁴¹

§ 6494. **May be Assented to by Agent.**—It is not presumed that expressmen⁴² and persons intrusted with the delivery of goods⁴³ to the carrier have authority to consent to these limiting stipulations. The fact of a presentation of a shipping order to a railroad company by a cartman has been held notice to the company that he was without authority to consent to such conditions.⁴⁴ But an unauthorized assent may become binding where the shipper himself clearly ratifies the act of the person signing the stipulation, and the ratification is made with full knowledge of all the material circumstances.⁴⁵

³⁶ *Adams Exp. Co. v. Walker*, — Ky. —; s. c. 83 S. W. Rep. 106; 26 Ky. L. Rep. 1025; 67 L. R. A. 412.

³⁷ That burden is on carrier to prove that the loss falls within the terms of the limiting contract, see: *Chicago &c. R. Co. v. Dunlap*, — Kan. —; s. c. 80 Pac. Rep. 34; *Kalina & Cizek v. Union Pac. R. Co.*, 69 Kan. 172; s. c. 76 Pac. Rep. 438; *Georgia &c. R. Co. v. Johnson, King & Co.*, 121 Ga. 231; s. c. 48 S. E. Rep. 807. That burden of proof of negligence is on shipper, see: *Cau v. Texas &c. R. Co.*, 194 U. S. 427; s. c. 24 Sup. Ct. Rep. 663; 48 L. Ed. 1053; aff'g s. c. 113 Fed. Rep. 91; 51 C. C. A. 76; *Thyll v. New York &c. R. Co.*, 92 App. Div. (N. Y.) 513; s. c. 87 N. Y. Supp. 345; modif'g s. c. 84 N. Y. Supp. 175; *Nashville &c. R. v. Stone & Haslett*, 112 Tenn. 348; s. c. 79 S. W. Rep. 1031.

³⁸ That a limiting condition in a bill of lading is not binding unless assented to by the shipper, see: *Cleveland &c. R. Co. v. C. & A. Potts & Co.*, 33 Ind. App. 564; s. c. 71 N. E. Rep. 685. That the burden is on the carrier to show assent,

see: *Baltimore &c. R. Co. v. Fox*, 113 Ill. App. 180; *Cleveland &c. R. Co. v. C. & A. Potts & Co.*, 33 Ind. App. 564; s. c. 71 N. E. Rep. 685. Whether assent to condition has been shown by evidence a question for jury, see: *Colvin v. Fargo*, 47 Misc. (N. Y.) 642; s. c. 94 N. Y. Supp. 377.

³⁹ *Patrick v. Missouri &c. R. Co.*, — Ind. T. —; s. c. 88 S. W. Rep. 330.

⁴⁰ *Wm. H. Bessling & Co. v. Houston &c. R. Co.*, 35 Tex. Civ. App. 470; s. c. 80 S. W. Rep. 639.

⁴¹ *Cleveland &c. R. Co. v. C. & A. Potts & Co.*, 33 Ind. App. 564; s. c. 71 N. E. Rep. 685.

⁴² *Russell v. Erie R. Co.*, 70 N. J. L. 808; s. c. 59 Atl. Rep. 150; 67 L. R. A. 433.

⁴³ *Woolsey v. Long Island R. Co.*, 106 App. Div. (N. Y.) 228; s. c. 94 N. Y. Supp. 56.

⁴⁴ *Russell v. Erie R. Co.*, 70 N. J. L. 808; s. c. 59 Atl. Rep. 150; 67 L. R. A. 433.

⁴⁵ *Russell v. Erie R. Co.*, 70 N. J. L. 808; s. c. 59 Atl. Rep. 150; 67 L. R. A. 433.

§ 6495. **Failure of Shipper to Read Contract.**—Generally speaking, a shipper cannot, in the absence of fraud by the carrier, avoid limitations on the carrier's liability by showing that he executed the contract hurriedly, or without due care, or that he was ignorant of its contents.⁴⁶

§ 6496. **Must be Fairly Entered Into, and Freedom of Choice Allowed.**—It is essential to the validity of stipulations of this character that the carrier must offer or be ready on demand to ship the freight with or without such limitation of liability at the option of the shipper.⁴⁷ It is not required that this option should actually be presented to the shipper by the carrier. It is sufficient if the choice could be made if demanded.⁴⁸

§ 6497. **When Limiting Condition should be Executed.**⁴⁹—In a case where cattle were placed on board the cars ready for shipment under an oral contract, it was held that a written contract limiting the carrier's liability, which the shipper was required to sign without time to read it, was void.⁵⁰

§ 6500. **Necessity for Consideration.**⁵¹—Generally the lack of an independent consideration for a limiting contract included in a bill

⁴⁶ *Nashville &c. R. v. Stone & Haslett*, 112 Tenn. 348; s. c. 79 S. W. Rep. 1031.

⁴⁷ *Nashville &c. R. v. Stone & Haslett*, 112 Tenn. 348; s. c. 79 S. W. Rep. 1031. Evidence of other shippers that the carrier had never offered them any contract of shipment excepting one containing a limitation is admissible to show that the carrier did not hold itself ready to make a contract in which it should assume common-law liability: *Nashville &c. R. v. Stone & Haslett*, 112 Tenn. 348; s. c. 79 S. W. Rep. 1031.

⁴⁸ *Cau v. Texas &c. R. Co.*, 24 Sup. Ct. Rep. 663; s. c. 194 U. S. 427; 48 L. Ed. 1053; aff'g s. c. 113 Fed. Rep. 91; 51 C. C. A. 76. And it is the duty of the shipper to make this demand. It will not do for him merely to assume that the rate for carriage with common-law liability would not be considered: *Arthur v. Texas &c. R. Co.*, 139 Fed. Rep. 127.

⁴⁹ The limiting stipulation must be entered into by the shipper before or at the time the goods are delivered for transportation: *Northern Pac. R. Co. v. American Trading Co.*, 195 U. S. 439; s. c. 25 Sup.

Ct. Rep. 84; 49 L. Ed. 269; *Olds v. New York &c. R. Co.*, 107 App. Div. (N. Y.) 26; s. c. 94 N. Y. Supp. 924; *Keyes-Marshall Bros. Livery Co. v. St. Louis &c. R. Co.*, 113 Mo. App. 144; s. c. 87 S. W. Rep. 553.

⁵⁰ *McNeill v. Galveston &c. R. Co.* (Tex. Civ. App.), 86 S. W. Rep. 32. See also *Gulf &c. R. Co. v. Jackson & Edwards*, — Tex. —; s. c. 89 S. W. Rep. 968; rev'g s. c. 86 S. W. Rep. 47.

⁵¹ That a consideration is necessary to support the limiting contract, see: *St. Louis &c. R. Co. v. Coolidge*, 73 Ark. 112; s. c. 83 S. W. Rep. 333; 67 L. R. A. 555; *Evansville &c. R. Co. v. McKinney*, 34 Ind. App. 402; s. c. 73 N. E. Rep. 148 (complaint held to sufficiently negative consideration). Where goods are shipped under a through contract of shipment, a new contract made by the shipper with a connecting carrier, after it has received the goods as a connecting carrier, merely limiting its liability, being without consideration, is void: *Barnes v. Long Island R. Co.*, 47 Misc. Rep. (N. Y.) 318; s. c. 93 N. Y. Supp. 616.

of lading cannot be urged to avoid the stipulation, although the carrier may have had but one rate, if the consideration expressed in the bill of lading is sufficient to support the entire contract made.⁵²

§ 6501. **Reduction in Rate a Sufficient Consideration.**⁵³—But there must be an actual reduction of rate to sustain the contract.⁵⁴ The mere recital in the bill of lading that the shipment was carried at a special rate is not sufficient alone to show this fact.⁵⁵ So there is no actual consideration where, notwithstanding a clause in the bill of lading reciting a reduced rate, the company charges a rate in excess of this rate.⁵⁶ So it has been held that the granting of rates specified in a schedule filed with the Interstate Commerce Commission is not a consideration for a contract limiting the liability of the railroad company, though the company had a schedule of other and higher rates which was not filed with the commission.⁵⁷ So it has been held there was not an actual reduction of rate for cattle merely because the estimate of their weight made by the agent himself, and inserted in the bill of lading, was less than the actual weight of the cattle as contended for by the shipper at the time of the execution of the bill of lading.⁵⁸

§ 6507. **The American Rule as to Stipulations Exempting Carrier from Liability for Negligence.**⁵⁹

§ 6510. **Rule in New York.**—In New York it is held that general words of exemption from liability for damage in the case of shipment

⁵² *Cau v. Texas &c. R. Co.*, 24 Sup. Ct. Rep. 663; s. c. 194 U. S. 427; 48 L. Ed. 1053; aff'g s. c. 113 Fed. Rep. 91; 51 C. C. A. 76. See also *Arthur v. Texas &c. R. Co.*, 139 Fed. Rep. 127.

⁵³ See generally: *Ragsdale, Harper & Weathers v. Southern R. Co.*, 119 Ga. 627; s. c. 46 S. E. Rep. 832; *Smith v. Chicago &c. R. Co.*, 112 Mo. App. 610; s. c. 87 S. W. Rep. 9.

⁵⁴ *Sloop v. Wabash R. Co.* (Mo. App.), 84 S. W. Rep. 111.

⁵⁵ *Keyes-Marshall Bros. Livery Co. v. St. Louis &c. R. Co.*, 113 Mo. App. 144; s. c. 87 S. W. Rep. 553.

⁵⁶ *Hendrix v. Wabash R. Co.*, 107 Mo. App. 127; s. c. 80 S. W. Rep. 970.

⁵⁷ *Summers v. Wabash R. Co.* (Mo. App.), 79 S. W. Rep. 481.

⁵⁸ *Rice v. Wabash R. Co.*, 106 Mo. App. 371; s. c. 80 S. W. Rep. 974.

⁵⁹ That the carrier cannot by contract relieve himself from liability for negligence, see: *Georgia Southern &c. R. Co. v. Johnson, King & Co.*, 121 Ga. 231; s. c. 48 S. E. Rep.

807; *Baltimore &c. R. Co. v. Fox*, 113 Ill. App. 180; *Rice v. Wabash R. Co.*, 106 Mo. App. 371; s. c. 80 S. W. Rep. 974; *Smith v. Chicago &c. R. Co.*, 112 Mo. App. 610; s. c. 87 S. W. Rep. 9; *Yazoo &c. R. Co. v. Grant*, 86 Miss. 565; s. c. 38 South. Rep. 502; *Peerless Mfg. Co. v. New York &c. R.*, 73 N. H. 328; s. c. 61 Atl. Rep. 511; *Russell v. Erie R. Co.*, 70 N. J. L. 808; s. c. 67 L. R. A. 433; 59 Atl. Rep. 150; *Baltimore &c. R. Co. v. Hubbard*, 25 Ohio Cir. Ct. R. 477; *Eckert v. Pennsylvania R. Co.*, 211 Pa. 267; s. c. 60 Atl. Rep. 781; *Nicolette Lumber Co. v. People's Coal Co.*, 26 Pa. Super. Ct. 575; *Trace v. Pennsylvania R. Co.*, 26 Pa. Super. Ct. 466; *Chicago &c. R. Co. v. Mitchell*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 286; *Gulf &c. R. Co. v. Dunman* (Tex. Civ. App.), 81 S. W. Rep. 789; *San Antonio &c. R. Co. v. Dolan*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 302; *Texas &c. R. Co. v. Farrington*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 889; *Nevius v. Chicago &c. R. Co.*, 124 Wis. 313; s. c. 102 N. W. Rep. 489.

of breakable articles, and the words "owner's risk," are insufficient to relieve the carrier from the consequences of his negligence.⁶⁰ It is also held that a shipping receipt limiting the liability of an express company for loss as forwarders only, and within its own lines of communication, and not for any fault of connecting companies, will not relieve the express company from liability for a wrongful delivery of the consignment.⁶¹ So a stipulation exempting the carrier from liability for the negligence of its servants cannot be availed of where the negligent act was not that of a servant, but of another carrier selected by it to complete transportation and delivery.⁶² So it is properly held under the rule of strict construction of these stipulations that a contract exempting the carrier from liability for loss or damage by change in weather, heat, frost, wet or decay, will not cover the case of damages from this source due to the carrier's clear negligence.⁶³

§ 6512. **The Right to Require Notice of Claim.**⁶⁴—The rule in Texas places upon the defendant the burden to show that the notice required by the terms of the contract was not given.⁶⁵ In Kansas the shipper carries this burden.⁶⁶

§ 6515. **Waiver of Conditions Respecting Notice.**—A carrier making no objection to a claim on the ground of insufficient verification, and entering into negotiations with the shipper for a settlement, cannot raise this question on the trial of an action for damages.⁶⁷ It has been held that a carrier, with actual knowledge of injuries to a shipment within the time limited for the service of notice, cannot raise the question of the want of notice long afterwards in the trial of an action for damages, since the entire purpose of a formal notice has been accomplished.⁶⁸

⁶⁰ *Rieser v. Metropolitan Express Co.*, 45 Misc. (N. Y.) 632; s. c. 91 N. Y. Supp. 170.

⁶¹ *Security Trust Co. v. Wells & C. Exp. Co.*, 81 App. Div. (N. Y.) 426; s. c. 80 N. Y. Supp. 830; s. c. aff'd, 178 N. Y. 620; 70 N. E. Rep. 1109.

⁶² *Fasy v. International Nav. Co.*, 77 App. Div. (N. Y.) 469; s. c. 79 N. Y. Supp. 1103; s. c. aff'd, 177 N. Y. 591; 70 N. E. Rep. 1098.

⁶³ *Thyll v. New York & C. R. Co.*, 92 App. Div. (N. Y.) 513; s. c. 87 N. Y. Supp. 345; modif'g s. c. 84 N. Y. Supp. 175.

⁶⁴ That reasonable stipulations of this character are valid, and are a condition precedent to an action for damages, see: *Smith v. Chicago & C. R. Co.*, 112 Mo. App. 610; s. c. 87 S. W. Rep. 9; *Baltimore & C. R. Co.*

v. Hubbard, 72 Ohio St. 302; s. c. 74 N. E. Rep. 214; *Eckert v. Pennsylvania R. Co.*, 211 Pa. 267; s. c. 60 Atl. Rep. 781. Under a statute forbidding the restriction of the carrier's common-law liability, a provision of this character in a contract of shipment is void: *Missouri & C. R. Co. v. Allen*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 168.

⁶⁵ *Texas & C. R. Co. v. Crowley*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 342.

⁶⁶ *Kalina & Cizek v. Union Pac. R. Co.*, 69 Kan. 172; s. c. 76 Pac. Rep. 438.

⁶⁷ *Summers v. Wabash R. Co.* (Mo. App.), 79 S. W. Rep. 481.

⁶⁸ *Eckert v. Pennsylvania R. Co.*, 211 Pa. 267; s. c. 60 Atl. Rep. 781.

§ 6516. **Excuses for Failure to Present Claim within the Stipulated Time.**—The rule is well sustained that where the shipment has been converted by the carrier without fault on the part of the consignor the carrier cannot raise the question that no claim was served within the time limited.⁶⁹

§ 6517. **Principle Inapplicable to Losses from Delay.**⁷⁰—A provision fixing the time for the presentation of claims after the arrival of property at its destination relates solely to damages to the property, and does not include damages resulting from a change in the market during the wrongful delay in the delivery.⁷¹

§ 6518. **Stipulations Fixing Time for Commencement of Suit.**—In Kentucky—a State which forbids contracts limiting the common-law liability of carriers—a stipulation that no suit for damages should be brought after six months from the loss, is held in effect an attempt to vary the statute of limitations, and against public policy and unenforceable.⁷² In Texas the burden is on the carrier to show that stipulation in the contract of shipment limiting the time within which an action may be brought thereon is reasonable.⁷³

§ 6520. **Stipulations as to Amount Recoverable in Case of Loss or Injury—In General.**—It is the general rule that where the parties make a *bona fide* valuation of the freight, or where the contents are unknown to the carrier and the value is placed thereon by the shipper, who thereby gets a lower rate of freight, and the goods are lost or damaged, the shipper is estopped to claim beyond the valuation thus fixed.⁷⁴ Where, however, the carrier arbitrarily fixes the value, or where by the terms of the printed bill of lading there is an arbitrary fixing of value before the goods are inspected, and without regard to their real worth, the stipulation will be treated as a mere attempt to limit the liability, and not a *bona fide* attempt to value the property shipped.⁷⁵ Under a stipulation making the valuation of "a horse or

⁶⁹ Cleveland &c. R. Co. v. C. & A. Potts & Co., 33 Ind. App. 564; s. c. 71 N. E. Rep. 685.

⁷⁰ See generally: Security Trust Co. v. Wells &c. Exp. Co., 81 App. Div. (N. Y.) 426; s. c. 80 N. Y. Supp. 830; s. c. aff'd, 178 N. Y. 620; 70 N. E. Rep. 1109.

⁷¹ Loeb v. Wabash R. Co. (Mo. App.), 85 S. W. Rep. 118; Smith v. Chicago &c. R. Co., 112 Mo. App. 610; s. c. 87 S. W. Rep. 9.

⁷² Adams Exp. Co. v. Walker, — Ky. —; s. c. 83 S. W. Rep. 106; 26 Ky. L. Rep. 1025; 67 L. R. A. 412.

⁷³ Missouri &c. R. Co. v. Godair Commission Co., — Tex. Civ. App. —; s. c. 87 S. W. Rep. 871.

⁷⁴ Macfarlane v. Adams Express Co., 137 Fed. Rep. 982; Georgia &c. R. Co. v. Johnson, King & Co., 121 Ga. 231; s. c. 48 S. E. Rep. 807.

⁷⁵ Georgia &c. R. Co. v. Johnson, King & Co., 121 Ga. 231; s. c. 48 S. E. Rep. 807; Nashville &c. R. v. Stone & Haslett, 112 Tenn. 348; s. c. 79 S. W. Rep. 1031; St. Louis R. Co. v. McIntyre, 36 Tex. Civ. App. 399; s. c. 82 S. W. Rep. 346 (goods arbitrarily valued by carrier at \$5 per

mule one hundred dollars, cattle thirty dollars each . . . other animals at five dollars each," the term "other animals" was held to include hogs.⁷⁶

. § 6521. **Duty of Shipper to State Value of Subject of Shipment.**—The contract for the transportation of horses provided that the shipper should value the stock, and rates should be based on such valuation. It further provided that the charges on the shipment in question should be for horses of a value not exceeding seventy-five dollars each, two hundred twenty-five dollars, and that when the value declared by the shipper should exceed this value an addition should be made according to a schedule made a part of the contract. The contract stated that the shipper declared values "hereafter mentioned to be the true values of said animals, to wit, two thousand one hundred dollars" for each car load lot, and it was stipulated that the shipper released the carrier from all liability save actual damage not to exceed the valuation declared by the shipper. In this case it was held that the seventy-five-dollar valuation was for the purpose of determining the carriage rate, while the twenty-one hundred-dollar valuation on the whole lot was intended to fix the basis of liability in case of loss or injury.⁷⁷

§ 6523. **Damages May be Recovered though Damaged Goods Sold for More than Valuation.**—In a case where the contract for the shipment of horses provided that the carrier should be liable only to the extent of actual damages, which should not exceed the valuation declared by the shipper, and there was partial loss, but the animals thereafter brought the full declared value, it was held that the carrier was not exempt from liability, but the shipper was entitled to recover such a proportion of the actual loss as the declared value of the shipment bore to the actual value.⁷⁸

§ 6524. **Valuation Fixes Limit of Liability, Even Though Loss is Occasioned by Negligence.**⁷⁹—In North Carolina, where the State Corporation Commission is authorized to fix reasonable rates on freight, it is held that the fact of carriage at the rate fixed on a given valuation does not authorize the carrier to limit its liability to

hundred pounds which were really worth three hundred dollars).

⁷⁶ *Nashville & C. R. v. Stone & Haslett*, 112 Tenn. 348; s. c. 79 S. W. Rep. 1031.

⁷⁷ *United States Express Co. v. Joyce*, — Ind. —; s. c. 72 N. E. Rep. 865.

⁷⁸ *United States Express Co. v. Joyce*, — Ind. —; s. c. 72 N. E. Rep. 865.

⁷⁹ That the valuation fixes the limit of the liability, though loss is occasioned by negligence, see: *Baltimore & C. R. Co. v. Hubbard*, 72 Ohio St. 302; s. c. 74 N. E. Rep. 214.

this valuation in case of loss by negligence, but the carrier is liable for the actual value of the goods.⁸⁰

§ 6528. **Stipulations Fixing the Place for Estimating Damages.**⁸¹

§ 6533. **Losses by Fire.**⁸²—It seems the rule that the carrier has the burden of proof to show that an injury from fire was not due to its negligence.⁸³

§ 6536. **Overcrowding Stock-Cars.**⁸⁴—The provision of the Texas statute prohibiting carriers from limiting their liability is construed not to deprive the carrier of the right to make a special contract with the owner of live stock tendered for transportation, requiring him to see that the stock is properly loaded.⁸⁵

§ 6537. **Unloading and Feeding Stock.**—It is clear that a carrier cannot limit its liability for damages arising from delay in transportation caused by its negligence to the extra cost of feeding and watering the stock.⁸⁶

§ 6552. **Who is a Connecting Carrier.**⁸⁷

§ 6554. **Rules Governing the Selection of Connecting Carrier, and Effect of Unauthorized Diversion.**⁸⁸—It is the rule where the bill of

⁸⁰ Everett v. Norfolk & c. R. Co., 138 N. C. 68; s. c. 50 S. E. Rep. 557.

⁸¹ A clause of a bill of lading limiting the amount of the recovery to the value of the goods at the point of shipment is invalid as against a loss arising from the negligence of the carrier. In such a case the owner is entitled to recover, if anything, the value of the goods at the place of delivery: Rhymer v. Delaware & c. R. Co., 27 Pa. Super. Ct. 345.

⁸² That a carrier may by contract exempt himself from liability for fire not attributable to its negligence, see: Van Akin v. Erie R. Co., 92 App. Div. (N. Y.) 23; s. c. 87 N. Y. Supp. 871.

⁸³ Anderson v. Mobile & c. R. Co., — Miss. —; s. c. 38 South. Rep. 661.

⁸⁴ Texas & c. R. Co. v. Dishman & Tribble, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 319. While common carriers under the civil code of Louisiana are not regarded as insurers against loss or damage by fire they are made liable under that provision of the code "unless they can prove that such loss or damage has

been occasioned by accidental and uncontrollable events:" Lehman, Stern & Co v. Morgan & c. R. & c. Co., 115 La. 1; s. c. 38 South. Rep. 873.

⁸⁵ Texas & c. R. Co. v. Edins, 36 Tex. Civ. App. 639; s. c. 83 S. W. Rep. 253.

⁸⁶ Botts v. Wabash R. Co., 106 Mo. App. 397; s. c. 80 S. W. Rep. 976.

⁸⁷ It is held by the supreme court of Texas that railroads which intersect or cross each other either at grade or by an overhead and grade crossing are connecting lines of railroad, within the meaning of a statute of that State requiring railroads to receive freight and passengers from connecting railroads, and defining connecting railroads as railroads which connect by crossing each other's tracks or otherwise, so as to form a continuous or connecting line between two towns in the State: International & c. R. Co. v. Railroad Commission, — Tex. —; s. c. 89 S. W. Rep. 961; aff'g s. c. 86 S. W. Rep. 16.

⁸⁸ That diversion of shipment to carrier not designated in bill of lading is breach of contract, see:

lading is silent as to any particular routing beyond the terminus of the route of the initial carrier, that such carrier may select any usual or reasonably direct route for further transportation.⁸⁹ The intermediate carrier may divert the shipment to a different line from that designated by the initial carrier where such a course is rendered necessary by reason of floods, etc.⁹⁰ But the shipper should be communicated with before a diversion is made if the shipment can be properly cared for meanwhile, though the contract contains a stipulation that every carrier in case of necessity may forward the goods by any railroad between the place of shipment and the place of destination.⁹¹ There is authority that a shipper's written instruction to a station agent as to the selection of a connecting carrier is superseded by a subsequent bill of lading containing no reference to the subject.⁹²

§ 6555. Requisites of Delivery to the Succeeding Carrier.—It is the duty of a carrier unable to deliver goods to the next designated carrier to notify the shipper or consignee, and a failure to give this notice, if possible, renders him liable for any resulting loss.⁹³ The initial and succeeding carriers are charged with the duty to transmit instructions as to delivery of the freight to the next succeeding carrier.⁹⁴

§ 6556. The Connecting Carrier is Required to Receive Goods from Predecessor.—It is the general rule that a connecting carrier is required to receive a shipment when tendered, in the absence of a substantial and valid reason justifying a refusal.⁹⁵ In some States the obligation is imposed by statute.⁹⁶ It is not a valid excuse that the shipment was tendered in cars of other companies on which it would have had to pay the charges while on its own line, though the connecting carrier had an ample supply of its own cars.⁹⁷ Though the con-

Eckles v. Missouri Pac. R. Co., 112 Mo. App. 240; s. c. 87 S. W. Rep. 99.

⁸⁹ Chicago &c. R. Co. v. Woodward, 164 Ind. 360; s. c. 72 N. E. Rep. 558; 73 N. E. Rep. 810; Steidl v. Minneapolis &c. R. Co., 94 Minn. 233; s. c. 102 N. W. Rep. 701; Wm. H. Bessling & Co. v. Houston &c. R. Co., 35 Tex. Civ. App. 470; s. c. 80 S. W. Rep. 639.

⁹⁰ Empire State Cattle Co. v. Atchison &c. R. Co., 135 Fed. Rep. 135.

⁹¹ Fisher v. Boston &c. R. Co., 99 Me. 338; s. c. 59 Atl. Rep. 532.

⁹² Wm. H. Bessling & Co. v. Houston &c. R. Co., 35 Tex. Civ. App. 470; s. c. 80 S. W. Rep. 639.

⁹³ Fisher v. Boston &c. R. Co., 99 Me. 338; s. c. 59 Atl. Rep. 532.

⁹⁴ Cleveland &c. R. Co. v. C. & A. Potts & Co., 33 Ind. App. 564; s. c. 71 N. E. Rep. 685.

⁹⁵ Sterling v. St. Louis &c. R. Co., — Tex. Civ. App. —; s. c. 86 S. W. Rep. 655; Red River &c. R. Co. v. Eastin & Knox, —Tex. Civ. App. —; s. c. 88 S. W. Rep. 530 (cattle kept in muddy pens pending further transportation by connecting carrier).

⁹⁶ Hudson Valley R. Co. v. Boston &c. R., 45 Misc. (N. Y.) 520; s. c. 92 N. Y. Supp. 928; s. c. aff'd, 106 App. Div. (N. Y.) 375; 94 N. Y. Supp. 545.

⁹⁷ Texas &c. R. Co. v. Texas Short Line R. Co., 35 Tex. Civ. App. 387; s. c. 80 S. W. Rep. 567.

necting carrier is required to receive the shipment he is **not** required to furnish immediate transportation over his line on its reception. It is enough that it is forwarded with reasonable diligence.⁹⁸

§ 6558. **Duty where Shipment is Refused by Connecting Carrier.**—Here it is the rule that a carrier unable to deliver a shipment to a succeeding carrier through no fault of his own, is charged with the duty, as a forwarder, to exercise reasonable care to save the goods from loss and unnecessary expense to the owner.⁹⁹

§ 6559. **Liability of Initial Carrier for Loss or Injury—The American Rule.**¹⁰⁰

§ 6560. **Liability of Initial Carrier for Loss or Injury—English Rule.**—The initial carrier is clearly liable for injuries to the shipment caused by his negligence, though occurring on the line of a connecting carrier, as, for example, where the damages are caused by a defective car furnished by the initial carrier.¹⁰¹ Under the English rule a carrier contracting to transport goods to a point beyond the terminus of its own line, may, by explicit contract, protect itself from liability for injury and delay not occurring on its own line.¹⁰² But the contract, to have this effect, must clearly limit the liability to the line of the initial carrier and in effect provide for transportation solely on his line. It was held in one case that a stipulation that the carrier should be liable only for safe carriage on its own road was ineffectual, where the contract also provided that the goods should be transported over its own line to a certain point, and there delivered to a certain named connecting carrier with which the initial carrier

⁹⁸ Chicago &c. R. Co. v. Kapp, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 233.

⁹⁹ Fisher v. Boston &c. R. Co., 99 Me. 338; s. c. 59 Atl. Rep. 532.

¹⁰⁰ That the liability of the initial carrier ceases on safe transportation and delivery to the connecting carrier, see: Chicago &c. R. Co. v. Woodward, 164 Ind. 360; s. c. 72 N. E. Rep. 558; 73 N. E. Rep. 810; Hubbard v. Mobile &c. R. Co., 112 Mo. App. 459; s. c. 87 S. W. Rep. 52; Southern Ry. Co. v. Vaughn, 86 Miss. 367; s. c. 38 South. Rep. 500; Bishawaiti v. Pennsylvania R. Co., 92 N. Y. Supp. 783; Meredith v. Seaboard Air Line R., 137 N. C. 478; s. c. 50 S. E. Rep. 1.

¹⁰¹ St. Louis &c. R. Co. v. Marshall, 74 Ark. 597; s. c. 86 S. W. Rep. 802;

Eckert v. Pennsylvania R. Co., 211 Pa. 267; s. c. 60 Atl. Rep. 781; International &c. R. Co. v. Aten (Tex. Civ. App.), 81 S. W. Rep. 346. A railroad company which receives as connecting carrier, outside of the State, cotton in bales shipped in sealed cars, which were in good condition, under through contracts to which it was not a party, and which hauls such cars unopened to their place of destination and delivers the cotton to the consignee, is not liable for the wet, dirty condition of such cotton when so delivered: Vincent & Hayne v. Yazoo &c. R. Co., 114 La. 1021; s. c. 38 South. Rep. 816.

¹⁰² Eckles v. Missouri Pac. R. Co., 112 Mo. App. 240; s. c. 87 S. W. Rep. 99.

had a traffic arrangement, and the freight charges for the entire distance were collected by the initial carrier.¹⁰³

§ 6562. Liability for Loss where Partnership Exists between Connecting Carriers.—Under the American rule the connecting carrier is not liable for a loss not occurring on its portion of the through route, unless it stands in the relation of principal and agent, or partner, or some similar relation to the negligent carrier, and the facts showing such a relation must be alleged in a declaration against such carrier.¹⁰⁴ A bill of lading guarantying a through rate to destination does not establish an agency or partnership relation between the different connecting carriers.¹⁰⁵ The partnership relation is not shown by proof of a traffic arrangement between the different connecting carriers for a division of the receipts or profits of transportation over the connecting lines.¹⁰⁶

§ 6563. Joint Liability under Texas Statute.¹⁰⁷

¹⁰³ *Eckles v. Missouri Pac. R. Co.*, 112 Mo. App. 240; s. c. 87 S. W. Rep. 99.

¹⁰⁴ *Chesapeake &c. R. Co. v. F. W. Stock & Sons*, 104 Va. 97; s. c. 51 S. E. Rep. 161.

¹⁰⁵ *Chesapeake &c. R. Co. v. F. W. Stock & Sons*, 104 Va. 97; s. c. 51 S. E. Rep. 161.

¹⁰⁶ *Wilson v. Louisville &c. R. Co.*, 103 App. Div. (N. Y.) 203; s. c. 92 N. Y. Supp. 1091.

¹⁰⁷ The initial carrier may limit its liability for damages on interstate shipments to those occurring on its own line: *Gulf &c. R. Co. v. McCampbell*, — Tex. Civ. App. —; s. c. 85 S. W. 1158, 854. Where the undertaking of the connecting carriers to transport freight is a joint one every carrier is liable for the negligence of each: *Chicago &c. R. Co. v. Halsell*, 98 Tex. 244; s. c. 83 S. W. Rep. 15; aff'g s. c. 80 S. W. Rep. 140. And this is the case where the freight is shipped over connecting lines under a through contract of shipment: *Texas &c. R. Co. v. Andrews* (Tex. Civ. App.), 80 S. W. Rep. 390. Where transportation was over the lines of several connecting carriers under a bill of lading limiting the liability of each carrier to its own line, and constituting a separate contract on behalf of the shipper and each carrier, the shipper is not entitled to sue one of the carriers for a separate default in a

county where it has no agent or place of business and through which its line of railroad does not run: *Atchison &c. R. Co. v. Waddell Bros.*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 390. The shipper suing for damages is not required to allege or prove the precise amount of damages done by each of the connecting carriers: *Atchison &c. R. Co. v. Williams*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 38. Where there is evidence of negligence on the part of each of the defendants it is the province of the jury to apportion among such carriers the total damages found: *San Antonio &c. R. Co. v. Doan*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 302. Where it is shown that the negligence of the carrier sued concurred in causing injuries to a shipment with that of other railroads over which the shipment was actually transported, and the amount of damages occasioned by each cannot be definitely ascertained, the defendant is liable for the damages proximately resulting from the combined negligence: *Pecos River R. Co. v. Latham*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 392. Where horses shipped received injuries by a carrier's negligence, the carrier was liable for the death or permanent effects of such injuries, whether such death or permanent injuries became known before or after the horses left its line, and

§ 6564. **Duty and Liability of Initial Carrier as Forwarder.**—The failure of a carrier to perform a special agreement to forward a through shipment by the steamer of a connecting carrier sailing on a designated day is not excused by the refusal of the deputy collector of the port to grant a clearance while the freight was on board because it was contraband of war, where the contract was not unlawful when made, and was not rendered unlawful by any subsequent legislation, and was made with knowledge that difficulties might arise in the course of transportation because of the character of the freight.¹⁰⁸

§ 6566. **Contracts with the Initial Carrier for Through Transportation.**—A common carrier may undoubtedly contract for the safe carriage and delivery of property at a destination beyond its own line, unless prohibited by its charter, and thereby render itself liable for loss, injuries, or delay on the line of another carrier over which a part of the transportation is performed.¹⁰⁹ And this is the effect of a contract to deliver the shipment to a place designated within a certain time.¹¹⁰

§ 6567. **Contracts Limiting Liability of Initial Carrier in Jurisdictions Recognizing English Rule.**¹¹¹

§ 6568. **Whether Contract with the Initial Carrier Inures to Benefit of Succeeding Carrier.**¹¹²

§ 6569. **Presumption that Loss Occurred During Transportation by Terminal Carrier.**¹¹³—But this presumption cannot be invoked where

this, though the carrier limited its liability to such injuries as occurred on its own line: *Texas & C. R. Co. v. Stephens*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 933.

¹⁰⁸ *Northern Pac. R. Co. v. American Trading Co.*, 195 U. S. 439; s. c. 49 L. Ed. 269; 25 Sup. Ct. Rep. 84.

¹⁰⁹ *Graham & Ward v. Macon & C. R. Co.*, 120 Ga. 757; s. c. 49 S. E. Rep. 75; *Chicago & C. R. Co. v. Woodward*, 164 Ind. 360; s. c. 72 N. E. Rep. 558; 73 N. E. Rep. 360; *Steidl v. Minneapolis & C. R. Co.*, 94 Minn. 233; s. c. 102 N. W. Rep. 701.

¹¹⁰ *Texas Cent. R. Co. v. Miller*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 499.

¹¹¹ An express stipulation that the initial carrier's responsibility should cease on the arrival of the freight at its terminal depot, where it was to be delivered to the connecting carrier, limits the initial carrier's liability to loss accruing on its own

line, though the blank in the bill of lading for insertion of the connecting point is not properly filled: *Nenno v. St. Louis & C. R. Co.*, 105 Mo. App. 540; s. c. 80 S. W. Rep. 24. A stipulation of this character is valid without regard to consideration, since the carrier is under no obligation to carry the freight beyond its own terminus: *Nashville & C. R. v. Stone & Haslett*, 112 Tenn. 348; s. c. 79 S. W. Rep. 1031.

¹¹² A stipulation in a bill of lading for notice of claim for damages within ninety days is restricted to claims against the initial carrier, and cannot inure to the final carrier's benefit: *Grayson Co. Nat. Bank v. Nashville & C. R. (Tex. Civ. App.)*, 79 S. W. Rep. 1094.

¹¹³ That there is a presumption that the loss occurred on the line of the last carrier, where goods were delivered to initial carrier in good order, see: *St. Louis & C. R. Co. v.*

it is indisputably shown that no act of the last carrier occasioned any part of the damage to the shipment.¹¹⁴ Where the last carrier proves that the goods were not damaged while in its possession, then the burden of proof shifts to the next preceding carrier to acquit itself of the presumption that the goods were damaged on its line.¹¹⁵

§ 6572. Duty of Inspection of Rolling Stock as Between Carriers.

—The last carrier is not liable for damages to perishable goods by freezing while such goods are being held by the carrier at the consignee's request, and the freezing is because of a defect in the car which was furnished by the initial carrier.¹¹⁶

§ 6576. Carriers of Live Stock are Common Carriers.¹¹⁷

§ 6578. Carrier must Furnish Cars Suitable for Transportation of Animals.—It is the general rule that a railroad company contracting to carry animals beyond the terminus of its own line assumes the duty of delivering them at the terminus of its own road to the connecting carrier in a car suitable to transport them to their destination.¹¹⁸ The fact that the bill of lading for an interstate shipment contains a stipulation that the shipper accepts the cars tendered, and agrees that they are satisfactory, will not relieve the carrier from liability for injuries due to defects therein.¹¹⁹

§ 6579. Condition of Yards and Pens.—The duty to furnish shippers reasonable facilities for transportation and for the use of depots, buildings and grounds in connection with such transportation, in-

Birdwell, 72 Ark. 502; s. c. 82 S. W. Rep. 835; Bullock v. Boston & C. Dispatch Co., 187 Mass. 91; s. c. 72 N. E. Rep. 256; Thyll v. New York & C. R. Co., 92 App. Div. (N. Y.) 513; s. c. 87 N. Y. Supp. 345; modif'g s. c. 84 N. Y. Supp. 175; Gulf & C. R. Co. v. H. B. Pitts & Son, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 727; Ft. Worth & C. R. Co. v. Shanley, 36 Tex. Civ. App. 291; s. c. 81 S. W. Rep. 1014.

¹¹⁴ Missouri & C. R. Co. v. Clayton, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 1069; Bibb v. Missouri & C. R. Co., — Tex. Civ. App. —; s. c. 84 S. W. Rep. 663.

¹¹⁵ Gulf & C. R. Co. v. H. B. Pitts & Son, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 727; Ft. Worth & C. R. Co. v. Shanley, 36 Tex. Civ. App. 291; s. c. 81 S. W. 1014.

¹¹⁶ St. Louis & C. R. Co. v. Myer, 75 Ark. 159; s. c. 86 S. W. Rep. 999.

¹¹⁷ That the liability of a railroad company in the transportation of live stock is the same as that of a common carrier respecting other property except as to injuries resulting from the natural propensities of the animals, see: Baltimore & C. R. Co. v. Fox, 113 Ill. App. 180; Chicago & C. R. Co. v. Woodward, 164 Ind. 360; s. c. 72 N. E. Rep. 558; 73 N. E. Rep. 810; Keyes-Marshall Bros. Livery Co. v. St. Louis & C. R. Co., 105 Mo. App. 556; s. c. 80 S. W. Rep. 53; Lewis v. Pennsylvania R. Co., 71 N. J. L. 339; s. c. 59 Atl. Rep. 1117; aff'g s. c. 70 N. J. L. 132; 56 Atl. Rep. 128.

¹¹⁸ Eckert v. Pennsylvania R. Co., 211 Pa. 267; s. c. 60 Atl. Rep. 781.

¹¹⁹ San Antonio & C. R. Co. v. Dolan, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 302.

cludes the duty of a railroad company to furnish cattle yards to restrain cattle offered for transportation prior to their being loaded.¹²⁰ The railroad company is only required to have such a number of pens as, according to the business of the carrier at that point, is sufficient for the ordinary and usual volume of business tendered.¹²¹ The railroad company is not responsible as a carrier for such live stock before the stock is tendered for shipment. In this situation the liability of the railroad company is that of an ordinary bailee.¹²²

§ 6581. **Loading and Unloading Live Stock.**¹²³—A provision in a contract for an interstate shipment that the shipper shall attend to the loading and unloading at his own risk cannot be invoked where the carrier himself assumes control of these matters.¹²⁴

§ 6582. **Care of Live Stock During Transit—Duty to Feed, Water and Rest Cattle.**—It is the duty of a carrier of live stock properly to care for the same during transit, or afford the shipper a reasonable opportunity to do so.¹²⁵ It is his duty to furnish a suitable quality of water and he will be liable for injuries due to the use of unwholesome water where it was possible to supply a better grade.¹²⁶ In the absence of a statute forbidding the limitation of a carrier's liability¹²⁷ the carrier may stipulate that the shipper shall take care of and feed and water the live stock.¹²⁸ Where the stock is accompanied by a caretaker, the carrier will not be charged with neglect to afford a reasonable opportunity to feed and water the stock until this opportunity has been requested by the care-taker and refused.¹²⁹ The carrier is not required to accede to a demand of this kind without regard to its reasonableness.¹³⁰ It is held in one case that a contract for the ship-

¹²⁰ *Flint v. Boston & C. R. Co.*, 73 N. H. 141; s. c. 59 Atl. Rep. 938.

¹²¹ *Casey v. St. Louis & C. R. Co.*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 20.

¹²² *Chicago & C. R. Co. v. Powers*, — Neb. —; s. c. 103 N. W. Rep. 678.

¹²³ That a carrier may stipulate for the loading, care and unloading of live stock by the shipper, see: *Baltimore & C. R. Co. v. Fox*, 113 Ill. App. 180.

¹²⁴ *San Antonio & C. R. Co. v. Dolan*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 302.

¹²⁵ *Olds v. New York & C. R. Co.*, 107 App. Div. (N. Y.) 26; s. c. 94 N. Y. Supp. 924; *Texas & C. R. Co. v. Byers Bros.*, —Tex. Civ. App. —; s. c. 84 S. W. Rep. 1087.

¹²⁶ *Chicago & C. R. Co. v. Mitchell*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 286 (alkali water).

¹²⁷ Under Const., § 196, prohibiting common carriers from contracting for relief from any liability imposed on them by law, provisions in a bill of lading for stock that the shipper should feed, water, and attend to the stock at his own risk while in transit do not relieve the carrier of its duty to look after the stock: *Cincinnati & C. R. Co. v. Sanders & Russell*, 118 Ky. 115; s. c. 80 S. W. Rep. 488; 25 Ky. L. Rep. 2333.

¹²⁸ *Lewis v. Pennsylvania R. Co.*, 71 N. J. L. 339; s. c. 59 Atl. Rep. 1117; aff'g s. c. 70 N. J. L. 132; 56 Atl. Rep. 132.

¹²⁹ *McKenzie v. Michigan Cent. R. Co.*, 137 Mich. 112; s. c. 100 N. W. Rep. 260; 11 Det. Leg. N. 214.

¹³⁰ *Missouri & C. R. Co. v. Clark* (Tex. Civ. App.), 79 S. W. Rep. 827.

ment of cattle, limiting the initial carrier's liability to damages for loss or injury occurring on its own line, does not preclude the shipper from recovering from the initial carrier damages resulting from its negligence in failing properly to bed the cars in the first place, although the injuries occasioning such damages did not develop until after the cattle had left such carrier's line, and were in the hands of a connecting carrier.¹³¹ In the absence of evidence to the contrary, it will be assumed that the railroad employes did their duty in watering the stock during transportation.¹³²

§ 6583. Statutory Limitations of Time of Confinement of Animals —Federal Act.¹³³

§ 6586. Contributory Negligence of Shipper.—On the principle of contributory negligence a shipper loading his own stock cannot recover for injuries due to his overcrowding the car.¹³⁴ In all cases it is essential to this defense that the shipper's contributory negligence should have been the proximate cause of the injuries or contributed thereto.¹³⁵

§ 6592. Transportation of Perishable Articles.—It is the duty of a carrier to re-ice a car of perishable freight where ice sufficient for the journey is placed therein by the shipper, and has not lasted because of the carrier's negligent delay.¹³⁶ Where it is the duty of the carrier to furnish ice he will be liable for injuries due to his failure to perform this duty, though some of the injuries complained of resulted after the shipment had passed into the possession of a connecting carrier.¹³⁷

§ 6594. Protection of Goods from Danger by Fire.—Proof of usual diligence to prevent injury to goods in course of transportation by fire is insufficient as a defense to the carrier. He must show that the fire was purely accidental and impossible to prevent.¹³⁸ The carrier will

¹³¹ Texas Cent. R. Co. v. O'Loughlin, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 1104.

¹³² Peterson v. Chicago &c. R. Co., — S. D. —; s. c. 102 N. W. Rep. 595.

¹³³ International &c. R. Co. v. Startz (Tex. Civ. App.), 82 S. W. Rep. 1071 (the Federal statute controls where transportation is between States). A carrier is liable under this act whenever the period of twenty-eight hours from the time the animals were last fed expires, although they were in the possession of a connecting carrier during a part of that period: Cincinnati &c.

R. Co. v. Gregg, 80 S. W. Rep. 512; 25 Ky. L. Rep. 2329.

¹³⁴ Texas &c. R. Co. v. Edins, 36 Tex. Civ. App. 639; s. c. 83 S. W. Rep. 253.

¹³⁵ Ft. Worth &c. R. Co. v. Alexander, 36 Tex. Civ. App. 297; s. c. 81 S. W. Rep. 1015.

¹³⁶ Chicago &c. R. Co. v. Reyman, — Ind. —; s. c. 73 N. E. Rep. 587.

¹³⁷ Houston &c. R. Co. v. Wilkerson Bros., — Tex. Civ. App. —; s. c. 82 S. W. Rep. 1069.

¹³⁸ Lehman, Stern & Co. v. Morgan's &c. R. Co., 115 La. 1; s. c. 38 South. Rep. 873.

not be charged with negligence in failing to take precautions to guard against danger from fire to cotton awaiting transportation in locked box cars on a side track, in the open country, established and maintained for the accommodation of the planters in that neighborhood, where the carrier is merely following a practice which has continued for years without any resulting loss or complaint.¹³⁹ The carrier will not be liable as a carrier for loss from fire where the relation of shipper and carrier has not been fully consummated.¹⁴⁰ On the question as to whether a railroad company was negligent in failing to control a fire started on its premises, evidence as to the facilities provided by the city for extinguishing fires is admissible.¹⁴¹

§ 6600. **Presumptions of Negligence.**¹⁴²—Where the burden of proof of negligence is placed on the shipper his case is not made out by proof that the goods were delivered to him in an injured condition. He must also show they were in good condition when received by the carrier.¹⁴³

§ 6601. **Delays—In General.**¹⁴⁴—Mere delay on the part of a carrier in delivering goods is not generally regarded as a conversion no matter how long continued.¹⁴⁵ A connecting carrier cannot be held

¹³⁹ Charnock v. Texas & C. R. Co., 24 Sup. Ct. 671; s. c. 194 U. S. 432; 48 L. Ed. 1057; aff'g s. c. 113 Fed. Rep. 92; 51 C. C. A. 78.

¹⁴⁰ H. L. Edwards & Co. v. Texas Midland R. Co. (Tex. Civ. App.), 81 S. W. Rep. 800.

¹⁴¹ Peerless Mfg. Co. v. New York & C. R. Co., 73 N. H. 328; s. c. 61 Atl. Rep. 511.

¹⁴² That a *prima facie* case of negligence is established by proof that goods were delivered to the carrier in good condition, and were lost or destroyed while in its possession, see: Paterson v. Chicago & C. R. Co., 95 Minn. 57; s. c. 103 N. W. Rep. 621; Gulf & C. R. Co. v. Roberts, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 479; St. Louis & C. R. Co. v. McIntyre, 36 Tex. Civ. App. 399; s. c. 82 S. W. Rep. 346.

¹⁴³ Jean Garrison & Co. v. Flagg, 45 Misc. (N. Y.) 421; s. c. 90 N. Y. Supp. 289. In a case where a railroad delivered china consigned to it for shipment to a transfer company at its destination, and the china was found broken after its delivery by the transfer company to the consignee, it was held that the railroad was not liable for the loss in the absence of evidence showing either

the condition of the china when delivered to the transfer company or any evidence to show where or how it was broken: Texas & C. R. Co. v. Capper, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 694.

¹⁴⁴ That it is the duty of a carrier to use reasonable diligence to transport freight within a reasonable time, see: Southern R. Co. v. Railey Bros., 80 S. W. Rep. 786; s. c. 26 Ky. L. Rep. 53; McKenzie v. Michigan Cent. R. Co., 137 Mich. 112; s. c. 100 N. W. Rep. 260; 11 Det. Leg. N. 214; Bibb Broom Corn Co. v. Atchison & C. R. Co., 94 Minn. 269; s. c. 102 N. W. Rep. 709; Gulf & C. Ry. Co. v. Beattie, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 367; Houston & C. R. Co. v. Foster, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 44; St. Louis & C. R. Co. v. Hunt (Tex. Civ. App.), 81 S. W. Rep. 322.

¹⁴⁵ Fishman v. Platt, 90 N. Y. Supp. 354; Ryland & Rankin v. Chesapeake & C. R. Co., 55 W. Va. 181; s. c. 46 S. E. Rep. 923. Where a consignor, having heard nothing from the goods shipped, asked the carrier what had become of the goods, and was told that he did not know, there was no demand, so as to render the carrier guilty of conversion:

liable for damages resulting from an improper routing of the shipment.¹⁴⁶ A North Carolina statute imposing a penalty on a railroad company for a failure to transport goods received by it for shipment for a longer period than four days after receipt of the same, unless otherwise agreed between the parties, is construed to refer to a delay in beginning the transportation or starting the goods from the station of their receipt, and does not require a delivery at their destination within the time specified.¹⁴⁷

§ 6602. Delay must be an Unreasonable Delay.¹⁴⁸

§ 6606. Excuses for Delay.—Where the carrier accepts freight without notice to the shipper that its delivery will be delayed, he cannot urge as a defense to an action for delaying the shipment that the delay was occasioned by an unusual rush of business or a large accumulation of freight at the point of shipment.¹⁴⁹

§ 6610. When Carrier will Become a Warehouseman.¹⁵⁰—Formal notice is not usually required where the consignee has actual notice of the arrival of the goods from other sources.¹⁵¹ Notice by mail addressed to the consignee at the point of destination is sufficient.¹⁵² Where the contract between the carrier and the shipper requires the

St. Louis R. Co. v. Tyler Coffin Co. (Tex. Civ. App.), 81 S. W. Rep. 826.

¹⁴⁶ Houston &c. R. Co. v. Buchanan, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 1073.

¹⁴⁷ Walker Bros. v. Southern R. Co., 137 N. C. 163; s. c. 49 S. E. Rep. 84.

¹⁴⁸ Northern Pac. R. Co. v. Kempton, 138 Fed. Rep. 992. Whether a tender of delivery to the consignee by a city delivery company on Monday of goods intrusted to it by the consignor on the preceding Saturday was made within a reasonable time was a question of fact: Dressner v. Manhattan Delivery Co., 92 N. Y. Supp. 800. In an action against a carrier for failure to deliver goods to a consignee in Denver, evidence that the goods were shipped July 2 from New York and had not been delivered down to July 10, did not show an unreasonable delay: Brooks v. Delaware &c. R. Co., 88 N. Y. Supp. 961.

¹⁴⁹ Texas &c. R. Co. v. E. R. & D. C. Kolp, Jr., — Tex. Civ. App. —; s. c. 83 S. W. Rep. 417.

¹⁵⁰ The carrier relation continues on the arrival of the goods at their destination until the lapse of a reasonable time for their removal after

the carrier has notified the consignee of their arrival (Gulf &c. R. Co. v. Fuqua & Horton, 84 Miss. 490; s. c. 36 South. Rep. 449; Burr v. Adams Exp. Co., 71 N. J. L. 263; s. c. 58 Atl. Rep. 609); although the consignee knows the probable date of shipment and the probable time of arrival (Walters v. Detroit United R. Co., 139 Mich. 303; s. c. 102 N. W. Rep. 745; 11 Det. Leg. N. 828). The question of what is a reasonable time for a consignee after notice to take goods away, where the facts are in dispute, or the inference to be drawn therefrom is a matter of doubt, is a question of fact and not of law: Burr v. Adams Exp. Co., 71 N. J. L. 263; s. c. 58 Atl. Rep. 609.

¹⁵¹ Normile v. Northern Pac. R. Co., 36 Wash. 21; s. c. 77 Pac. Rep. 1087; 67 L. R. A. 271.

¹⁵² Friedman v. Metropolitan S. S. Co., 45 Misc. (N. Y.) 383; s. c. 90 N. Y. Supp. 401 (postal card notice sufficient); G. S. Roth Clothing Co. v. Maine S. S. Co., 44 Misc. (N. Y.) 237; s. c. 88 N. Y. Supp. 987; Normile v. Northern Pac. R. Co., 36 Wash. 21; s. c. 77 Pac. Rep. 1087; 67 L. R. A. 271.

carrier to deliver the goods at the nearest point to destination, and it has no line running to the destination of the consignment, it is its duty to forward the shipment to the nearest point, and then make a constructive delivery by giving the consignee notice of the arrival of the shipment at this place.¹⁵³ A delay of one day in removing the goods after their arrival is not unreasonable.¹⁵⁴

§ 6613. Sidetrack Delivery at Points where there are No Depots.—It may be said generally that the contract of the carrier to transport and deliver freight is not complied with by the mere placing of the car containing the goods on a side track in its yard at the station of consignment, but the obligation continues until there is a delivery to the station or warehouse where such goods are customarily unloaded and delivered.¹⁵⁵ Where the carrier has no freighthouse at the station the consignees are expected to unload from the car, and the consignment will not be considered as delivered and the transportation ended until the consignee has been notified, and the carrier has placed the car where it can be conveniently unloaded.¹⁵⁶

§ 6620. Delivery—In General.—A delivery is regarded as complete when the consignee or his agent verifies the goods in the car and gives his receipt for the same.¹⁵⁷ Where the goods have been carried over the lines of connecting carriers, the last carrier is bound to deliver the goods to the holder of the bill of lading issued by the first carrier.¹⁵⁸

§ 6621. Duty of Consignee to Receive and Remove Goods.—It is the duty of a consignee to provide himself with the necessary facilities for the prompt unloading and the release of the carrier's cars. If the number of cars consigned to him is so large as to make this impracticable, it is his duty to limit his shipments to his capacity for unloading them, or pay charges for the delay.¹⁵⁹ In case of a partial injury to the shipment it is the duty of the consignee to accept the same in

¹⁵³ *Rogers v. Fargo*, 47 Misc. (N. Y.) 155; s. c. 93 N. Y. Supp. 550.

¹⁵⁴ *Normile v. Northern Pac. Ry. Co.*, 36 Wash. 21; s. c. 77 Pac. Rep. 1087; 67 L. R. A. 271.

¹⁵⁵ *Loeb v. Wabash R. Co.* (Mo. App.), 85 S. W. Rep. 118. Where goods were consigned to plaintiff at a flag station on defendant's road, where it maintained a warehouse and side track, but no station or agent, the carrier, not having placed the goods in its warehouse on their arrival, as it might have done, was liable to plaintiff for their loss: *Nor-*

mile v. Northern Pac. R. Co., 36 Wash. 21; s. c. 77 Pac. Rep. 1087; 67 L. R. A. 271.

¹⁵⁶ *Bachant v. Boston & C. R. Co.*, 187 Mass. 392; s. c. 73 N. E. Rep. 642.

¹⁵⁷ *C. D. Kenny Co. v. Atlanta & C. R. Co.*, 122 Ga. 365; s. c. 50 S. E. Rep. 132.

¹⁵⁸ *Grayson Co. Nat. Bank v. Nashville & C. R. (Tex. Civ. App.)*, 79 S. W. Rep. 1094.

¹⁵⁹ *Baltimore & C. R. Co. v. Gray's Ferry Abattoir Co.*, 27 Pa. Super. Ct. 511.

their damaged state. He is not entitled to refuse to accept the entire shipment because of a partial injury thereto and then sue the carrier for the value of the entire consignment.¹⁶⁰ A shipper cannot recover damages for delay in the delivery of the consignment where it is shipped in the name of the consignee and he was not present to demand delivery at the time of its arrival, and delivery was made to the servant of the consignee immediately on the carrier ascertaining such servant's authority to receive it.¹⁶¹ A recovery of damages was sustained in a case where a railroad company refused to deliver a carload of fruit to the owner for the specific reason that he would not pay the amount of freight demanded, which was in excess of that due and offered by him, and the shipment of fruit was injured by freezing before the railroad company discovered its error. In this case it was further decided that the fact that at the time the shipper demanded the goods the bill of lading had not been transferred to the owner by the bank to which the goods were consigned was not fatal to his right to recover such damages.¹⁶²

§ 6624. Where Delivery should be Made.—Where it is the usage of a certain trade to receive delivery and unload cars while they are standing in some convenient place for unloading, the location of a car at that point, and the readiness to permit the consignee to take possession, relieve the carrier of further obligation as a common carrier.¹⁶³

§ 6627. When Delivery should be Made.¹⁶⁴

§ 6628. Persons to whom Delivery should be Made.¹⁶⁵—The carrier bears the risk of delivering the goods to the person entitled to them under the bill of lading and its indorsements.¹⁶⁶ The delivery must be made to the true owner, claiming under the consignee, when he has notice of this owner's rights and the bill of lading has been surrendered to him.¹⁶⁷ Where the carrier refuses on demand to make a delivery to the person entitled thereto, it renders itself liable for any

¹⁶⁰ *Gulf &c. R. Co. v. Everett & Long*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 257; *Gulf &c. R. Co. v. H. B. Pitts & Son*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 727.

¹⁶¹ *Moore v. Baltimore &c. R. Co.*, 103 Va. 189; s. c. 48 S. E. Rep. 887.

¹⁶² *Clegg v. Southern R. Co.*, 134 N. C. 756; s. c. 135 N. C. 148; 47 S. E. Rep. 667; 65 L. R. A. 717.

¹⁶³ *Chicago &c. R. Co. v. Reyman*, — Ind. —; s. c. 73 N. E. Rep. 587.

¹⁶⁴ That where there is no dispute about the material facts concerning the loss of goods the question what

is a reasonable time for their removal by the consignee is one of law for the court, see: *Normile v. Northern Pac. R. Co.*, 36 Wash. 21; s. c. 77 Pac. Rep. 1087; 67 L. R. A. 271.

¹⁶⁵ That the carrier may require identification, see: *Sellers v. Savannah &c. R. Co.*, 123 Ga. 386; s. c. 51 S. E. Rep. 398.

¹⁶⁶ *Grayson Co. Nat. Bank v. Nashville &c. R. Co.* (Tex. Civ. App.), 79 S. W. Rep. 1094.

¹⁶⁷ *National Newark Banking Co. v. Delaware &c. R. Co.*, 70 N. J. L. 774; 58 Atl. Rep. 311.

damages which the goods may thereafter sustain.¹⁶⁸ The delivery may be made to the duly authorized agent of the consignee.¹⁶⁹ On the question whether the carrier was justified in delivering the goods shipped by the plaintiff's assignor, to the actual purchaser, who was not named in the bill of lading, and without the production of such bill, evidence is admissible to show that the plaintiff's assignor had acquiesced in a course of dealing justifying this kind of delivery.¹⁷⁰

§ 6634. **Delivery by Express Companies.**¹⁷¹—The duty of the express company to deliver packages intends a delivery to the true consignee. A delivery to a person other than the consignee renders the express company liable for conversion,¹⁷² though its liability is merely that of a warehouseman or an involuntary bailee at the time.¹⁷³

§ 6635. **Packages Sent "C. O. D."**—A C. O. D. consignment, on which the shipper agrees to pay the charges of transportation both ways in the event of its refusal by the consignee, contemplates a return of the package in good order. A shipper may refuse to receive a package returned to him in a damaged condition.¹⁷⁴

§ 6646. **Responsibility as Warehouseman—In General.**¹⁷⁵—In a case of theft while the goods are being removed from a car, the carrier is responsible only for gross negligence and as a gratuitous bailee.¹⁷⁶ On the question of care for the protection of goods destroyed by fire, it has been held proper to show the condition of the surrounding buildings, and that smoking in the locality had been prohibited by city ordinance—as tending to show the hazardous character of the place;¹⁷⁷ that the carrier was involved in a labor dispute,—as bear-

¹⁶⁸ *Thyll v. New York &c. R. Co.*, 92 App. Div. (N. Y.) 513; s. c. 87 N. Y. Supp. 345; modif'g s. c. 84 N. Y. Supp. 175.

¹⁶⁹ *Brunswick &c. R. Co. v. D. Rothchild & Co.*, 119 Ga. 604; s. c. 46 S. E. Rep. 830.

¹⁷⁰ *Bernstein v. New York &c. R. Co.*, 88 N. Y. Supp. 971.

¹⁷¹ That it is the duty of the express company to deliver, see: *Burr v. Adams Exp. Co.*, 71 N. J. L. 263; s. c. 58 Atl. Rep. 609.

¹⁷² An express company is not relieved from liability for delivering a package of money to a person other than the consignee by the fact that the consignor might have discovered by the exercise of due care that the order and check for the money were forgeries: *Security Trust Co. v. Wells &c. Exp. Co.*, 81

App. Div. (N. Y.) 426; s. c. 80 N. Y. Supp. 830; s. c. aff'd, 178 N. Y. 620; 70 N. E. Rep. 1109.

¹⁷³ *Security Trust Co. v. Wells &c. Exp.*, 81 App. Div. (N. Y.) 426; s. c. 80 N. Y. Supp. 830; s. c. aff'd, 178 N. Y. 620; 70 N. E. Rep. 1109.

¹⁷⁴ *Freeman v. Weir*, 47 Misc. (N. Y.) 681; s. c. 94 N. Y. Supp. 327.

¹⁷⁵ That the carrier is held to the exercise of ordinary diligence only in the care of the shipment after the expiration of a reasonable time after notice to the consignee of its arrival, see: *Southern R. Co. v. Al-dredge & Shelton*, 142 Ala. 368; s. c. 38 South. Rep. 805.

¹⁷⁶ *C. D. Kenny Co. v. Atlanta &c. R. Co.*, 122 Ga. 365; s. c. 50 S. E. Rep. 132.

¹⁷⁷ *H. C. Judd & Root v. New York &c. S. Co.*, 130 Fed. Rep. 991.

ing on the question of the employment of a sufficient number of watchmen,¹⁷⁸ and that the employé charged with the care of the place of storage was habitually intoxicated and neglectful of his duties¹⁷⁹ to an extent to impute the carrier with notice.

¹⁷⁸ Texas &c. R. Co. v. Coutourie, 135 Fed. Rep. 465; s. c. 68 C. C. A. 177.

¹⁷⁹ Texas &c. R. Co. v. Coutourie, 135 Fed. Rep. 465; s. c. 68 C. C. A. 177.

TITLE TWENTY-THREE.

INNKEEPERS.

[§§ 6653-6674.]

§ 6653. **Analogies between Innkeepers and Common Carriers.**—In analogy to the common-carrier relation the innkeeper, under the common law, is liable to one to whom he refuses the privilege of a guest.¹

§ 6656. **Distinction between Innkeeper and Proprietor of Restaurant or Lodging-House.**—The restaurant keeper is liable to his patrons for the negligence of his servants while in the conduct of the business for which they are employed.²

§ 6659. **Who Are Guests.**—A person received at an inn as a guest retains this status, though after remaining a short time he is charged at the weekly instead of the daily rate.³ The status of guest was denied to a woman who had lived for seventeen months in an inn accommodating transient and permanent lodgers, and had moved property into her rooms which indicated an intention to make more than a temporary sojourn, and had made the arrangement for her stay with the proprietors themselves instead of the clerk, although when she first went to the inn she contemplated housekeeping, and never made any agreement for lodging for a definite time and had frequently changed her apartments during her stay.⁴

§ 6662. **The Innkeeper an Insurer of the Guest's Goods.**—It may be again stated that an innkeeper is an insurer of the property of his guest, and liable for its loss from any cause whatever, except from neglect of the guest or act of God or the public enemy.⁵ In a case where a person delivered baggage to a hotel previous to becoming a guest, which, however, he afterwards became, it was held that an

¹ *Cornell v. Huber*, 102 App. Div. (N. Y.) 293; s. c. 92 N. Y. Supp. 434.

² Whether the spilling of a glass of water on a guest by a waiter in a crowded restaurant is negligence depends on the circumstances of the particular case: *Block v. Sherry*, 43 Misc. (N. Y.) 342; s. c. 87 N. Y. Supp. 160.

³ *R. L. Polk & Co. v. Melenbacker*, 136 Mich. 611; s. c. 99 N. W. Rep. 867; 11 Det. Leg. N. 130.

⁴ *Crapo v. Rockwell*, 94 N. Y. Supp. 1122.

⁵ *Crapo v. Rockwell*, 94 N. Y. Supp. 1122.

inference that the baggage was still in the hands of the hotel at the time that he became a guest was justified, and the burden of proving the contrary in an action for the loss of the baggage was on the hotel proprietor.⁶ In an action for the loss of baggage, evidence is admissible as to the assurance by the clerk that the hotel was fire-proof.⁷

§ 6674. Duty of Care with Reference to the Person of the Guest.

—Generally speaking, the innkeeper is not an insurer of the person of his guest. The limit of his liability is the exercise of reasonable care for his safety and comfort.⁸ This requires that the innkeeper should use such care to protect his guest against assaults of employés.⁹ Generally he will not be liable for the acts of his servants beyond the scope of their employment.¹⁰ He may be liable where he is negligent in the employment of his servants, and, as a result, guests suffer from the assaults of violent or disorderly employés.¹¹ The failure of an innkeeper to comply with the statute regulating fire-escapes on hotels will not impute the innkeeper with negligence, unless the omission was the proximate cause of the guests's injuries.¹² In one case it was properly held that the fact that a door on one of the stairways of a hotel was locked at the time of a fire was not actionable negligence with respect to a guest suffocated by smoke at the time of the fire, where this guest made no attempt to descend the stairway which was blocked by the door, but successfully descended by another stairway in the hotel.¹³

⁶ *Oriental Hotel Ass'n v. Faust*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 373.

⁷ *Jefferson Hotel Co. v. Warren*, 128 Fed. Rep. 565; s. c. 63 C. C. A. 193.

⁸ *Clancy v. Barker*, 131 Fed. Rep. 161.

⁹ *Clancy v. Barker*, — Neb. —; s. c. 103 N. W. Rep. 446; 69 L. R. A. 642; aff'g s. c. 98 N. W. Rep. 440.

¹⁰ *Clancy v. Barker*, 131 Fed. Rep. 161 (youthful guest accidentally shot by hotel employé).

¹¹ *Rahmel v. Lehndorff*, 142 Cal. 681; s. c. 76 Pac. Rep. 659; 65 L. R. A. 88.

¹² *Acton v. Reed*, 104 App. Div. (N. Y.) 507; s. c. 93 N. Y. Supp. 911.

¹³ *Acton v. Reed*, 104 App. Div. (N. Y.) 507; s. c. 93 N. Y. Supp. 911.

TITLE TWENTY-FOUR.

NEGLIGENCE OF PROFESSIONAL MEN.

[§§ 6680-6725.]

§ 6680. **Duty to Exercise Reasonable Care and Diligence.**—It may be again said that an attorney is liable to his client for all damages proximately flowing from his failure to possess and exercise such skill, prudence and diligence in the prosecution of his business as are possessed and commonly exercised by lawyers of ordinary skill and capacity in like localities.¹ There is authority that an attorney, through whose negligence a cause of action is lost to a client, is liable to the client for the actual as well as the exemplary damages that he might reasonably have recovered in the action.²

§ 6683. **The Attorney is Not an Insurer of Success.**³

§ 6692. **Duties in Connection with Institution and Conduct of Cause or Proceeding.**—In matters of procedure the authority of the attorney is generally regarded as supreme.⁴ An attorney has the implied authority to enter into a stipulation in advance of the trial that the judgment which may be entered therein shall be final, and that no appeal or writ of error shall be prosecuted therefrom.⁵ It is clear

¹ *Patterson & Wallace v. Frazer* (Tex. Civ. App.), 79 S. W. Rep. 1077.

² *Patterson & Wallace v. Frazer* (Tex. Civ. App.), 79 S. W. Rep. 1077.

³ An attorney is not liable to his client for a failure to succeed, resulting in loss to the client, unless this is due to his mismanagement of the business intrusted to him through bad faith, inattention, or want of professional skill. The attorney must, at least, be familiar with the well-settled principles of law and rules of practice which are of frequent application in the ordinary business of the profession, must observe the utmost good faith toward his client, and must give such attention to his duties and to the interests of his client as ordinary prudence demands, or members of the profession usually be-

stow. For loss to his client, resulting from the lack of this measure of professional duty and attainments, he must be held liable; and such loss forms an equitable defense to his demand for compensation: *Enterline v. Miller*, 27 Pa. Super. Ct. 463.

⁴ *Hill v. Penn Mut. Life Ins. Co.*, — Ky. —; s. c. 85 S. W. Rep. 759; 27 Ky. L. Rep. 567. But see *Schaefer v. Schoenborn*, 94 Minn. 490; s. c. 103 N. W. Rep. 501, where it is held that where an attorney, in dismissing an action by stipulation proceeds on the mistaken assumption that express authority thereto has been conferred on him, his client is not necessarily bound by the stipulation, but may repudiate it and have the cause reinstated under the sound discretion of the court.

⁵ *Leahy v. Stone*, 115 Ill. App. 138.

that a client acting on and taking advantage of a stipulation entered into by his attorney with the attorney of the adverse party by these acts recognizes such stipulation and is bound thereby, although he may not in the first instance have authorized its execution.⁶ The attorney, in the absence of express authority, is without power to compromise his client's claim.⁷ Where the client has authorized his attorney to settle a claim, and this fact is known to the other party, the act of the attorney in compromising the claim will be binding on his client, though in so doing he violated restrictions as to the amount for which he should settle, of which fact the other party was ignorant.⁸

§ 6696. Duty in Connection with Judgment.—The attorney may not compromise or discharge a judgment recovered for his client for a less sum than its value without authority from his client, and where he does so the client is entitled to the sum so paid and may maintain an action against the attorney for the balance.⁹ Generally an attorney is not responsible for the mistake of the sheriff in which he in no way participates; but when he acquiesces in such a mistake and directs further proceedings founded on the mistake, he makes the error his own, and is liable for loss to his client so sustained.¹⁰

§ 6700. The Attorney as a Collector.—An attorney employed to collect is without authority to extend the time of the payment¹¹ or waive the payment of interest on the claim.¹² Under the New York procedure the client cannot by motion summarily require an attorney to pay over money collected and unlawfully retained by him. The client must proceed by action.¹³ Where the attorney claims that he retained the client's funds with his consent, the client, in an action for their recovery may show that this consent was induced by the attorney's deceit.¹⁴

⁶ *Leahy v. Stone*, 115 Ill. App. 138.

⁷ *Kelly v. Chicago &c. R. Co.*, 113 Mo. App. 468; s. c. 87 S. W. Rep. 583; *Fleishman v. Meyer*, — Or. —; s. c. 80 Pac. Rep. 209. It is incumbent upon the client, in an action against his attorney, to show that the settlement was unauthorized and that his claim was valid and worth more than the amount collected thereon: *Vooth v. McEachen*, 181 N. Y. 28; s. c. 73 N. E. Rep. 488; *rev'g* s. c. 91 App. Div. (N. Y.) 30; 86 N. Y. Supp. 431.

⁸ *Kelly v. Chicago &c. R. Co.*, 113

Mo. App. 468; s. c. 87 S. W. Rep. 583.

⁹ *Burgraf v. Byrnes*, 94 Minn. 418; s. c. 103 N. W. Rep. 215.

¹⁰ *Enterline v. Miller*, 27 Pa. Super. Ct. 463.

¹¹ *Mason v. Edward Thompson Co.*, 94 Minn. 472; s. c. 103 N. W. Rep. 507.

¹² *Real Estate Trust Co. v. Union Trust Co.*, 102 Md. 41; s. c. 61 Atl. Rep. 228.

¹³ *Arone v. Launderers*, 43 Misc. (N. Y.) 138; s. c. 88 N. Y. Supp. 259.

¹⁴ *Reilly v. Provost*, 98 App. Div. (N. Y.) 208; s. c. 90 N. Y. Supp. 591.

§ 6703. Duty of Attorney Employed to Invest Funds for Client.

—An attorney employed to invest funds for his client must exercise the skill ordinarily possessed by persons with common capacity engaged in the business of loaning money on property, and failing therein, he will be liable to his client for the amount of the loss sustained by his negligence.¹⁵ In an action against the attorney for this form of negligence, the burden is not on the attorney to establish that the transaction was fair and honest, as this obligation obtains only in a case where the attorney obtains some property or property rights from his client.¹⁶

§ 6705. Advice as to Titles.—An attorney employed to examine the title to land with a view to placing a mortgage thereon, with knowledge that a building was being erected on the premises, is required to ascertain whether there were liens on the building for materials and labor furnished; and his failure to do so, thereby causing loss to the mortgagor, is a breach of the contract of employment rendering him liable for the amount of the loss sustained.¹⁷ Notice to an attorney charged with the duty of having a deed to his client executed and acknowledged, that there was in fact a mortgage on the premises, though it did not appear of record owing to a mistake in the description, has been held notice to the client.¹⁸ In England, the legal owner of property is entitled to the custody of the title deeds, even though only a bare trustee. Solicitors who hold title deeds are under no obligation to keep possession of them until the equitable owner joins with the legal owner in demanding them, or to refuse to hand them over to the legal owner without such concurrence.¹⁹

§ 6711. Competency of Physicians, Surgeons and Dentists.—It is a restatement of the doctrine of the main title to say that a physician and surgeon in the treatment of a patient impliedly promises that he possesses that reasonable degree of learning and skill ordinarily possessed by physicians and surgeons in localities similar to that in which he practices, and it is his duty to use reasonable care and diligence in the exercise of this skill and the application of this learning, and to act according to his best judgment.²⁰

¹⁵ *Kissam v. Squires*, 102 App. Div. (N. Y.) 536; s. c. 92 N. Y. Supp. 873.

¹⁶ *Schreiber v. Heath*, 103 App. Div. (N. Y.) 364; s. c. 92 N. Y. Supp. 1043.

¹⁷ *Humboldt Bldg. Ass'n Co. v. Ducker*, 82 S. W. Rep. 969; s. c. 26 Ky. L. Rep. 931.

¹⁸ *Allison v. Falconer*, 75 Ark. 343; s. c. 87 S. W. Rep. 639.

¹⁹ *Tendring Hundred Waterworks Co. v. Jones*, [1903] 2 Ch. 615; s. c. 73 L. J. Ch. 41; 52 Wkly. Rep. 61.

²⁰ *MacKenzie v. Carman*, 103 App. Div. (N. Y.) 246; s. c. 92 N. Y. Supp. 1063; *Wood v. Wyeth*, 106 App. Div. (N. Y.) 21; s. c. 94 N. Y. Supp. 360; *Bigney v. Fisher*, 26 R. I. 402; s. c. 59 Atl. Rep. 72.

§ 6713. Practitioner Must Use Reasonable Care and Diligence.

—There is a holding that the fact that a patient was severely burned by X-rays, while being treated by his physician for appendicitis, was of itself evidence that the treatment was improper.²¹ In another case—an action against a dentist for malpractice in extracting a tooth—it was held proper, on the question of the dentist's care, to allow the jury to take into consideration that the plaintiff's injuries were aggravated by delay on the advice of the dentist in consulting a physician and obtaining treatment.²²

§ 6715. Care Measured by Standard of Physician's School.—In conformity to the doctrine of the main section, the rule is announced that the standard of care by which a Christian Science healer is to be judged is the care, skill and knowledge of the ordinary Christian Scientist who undertakes to treat diseases according to the method practiced by such healers, and not that of the ordinary physician,²³ and one voluntarily consenting to follow the advice and abide by the results of the prayers of a Christian Science healer cannot recover damages for negligence based on the sole ground that the treatment of this cult is contrary to public policy.²⁴ In the case of magnetic healers, belonging to no particular school, the plaintiff is not compelled to prove that the method of treatment adopted was not proper or usual with magnetic healers, but it is sufficient to show that the treatment was not proper to be given in any case to one in the plaintiff's condition at the time of its application.²⁵

§ 6717. Care as to Diagnosis.—A physician will be answerable, on the ground of negligence, for failure to discover a serious condition in his patient, where he has a reasonable opportunity for examination, and the condition could have been ascertained by the exercise of ordinary care.²⁶ But the fact that a physician erroneously diagnoses an injury as of one character instead of another is immaterial on the issue of his liability for the treatment given where the remedy applied, if suitable at all, is clearly as appropriate to the one condition as to the other.²⁷ In another case the fact that a patient whose trouble was wrongfully diagnosed as dislocation of the hip, and who was treated for such dislocation and thereby caused to suffer a shortening

²¹ Shockley v. Tucker, 127 Iowa 456; s. c. 103 N. W. Rep. 360.

²² Mernin v. Cory, 145 Cal. 573; s. c. 79 Pac. Rep. 174.

²³ Spead v. Tomlinson, 73 N. H. 46; s. c. 59 Atl. Rep. 376.

²⁴ Spead v. Tomlinson, 73 N. H. 46; s. c. 59 Atl. Rep. 376.

²⁵ Longan v. Weltmer, 180 Mo. 322; s. c. 79 S. W. Rep. 655; 64 L. R. A. 969.

²⁶ Manser v. Collins, 69 Kan. 290; s. c. 76 Pac. Rep. 851.

²⁷ Tomer v. Aiken, 126 Iowa 114; s. c. 101 N. W. Rep. 769.

of the leg and curvature of the spine, was in fact suffering from incipient hip disease, which would, without improper treatment, have developed into a permanent condition resulting in such shortening and curvature, did not preclude the patient from recovering damages for the improper treatment.²⁸

§ 6718. Duty of Care Continues Throughout Illness Unless Sooner Terminated.—The question whether a physician is negligent in the length of intervals between calls on his patient depends, under the prevailing rule, on the custom in similar localities in the treatment of similar cases, and not upon the custom of any particular physician in his own practice.²⁹ A physician will not be imputed with negligence on account of intervals between visits, where the injury requires no attention during the intervals; but he is negligent where the malady or injury requires attention.³⁰ The mere fact that one of two physicians employed to attend an injured person was negligent in not attending his patient with sufficient frequency was held immaterial on the question of the liability of the other physician, who was discharged after his first call.³¹ A physician whose employment has been terminated may refuse further employment by the patient.³²

§ 6719. Not an Insurer and Not Liable for Error of Judgment.³³

§ 6725. Contributory Negligence of Patient.—The negligence of a patient, aggravating an injury improperly treated, may be shown in mitigation of the damages;³⁴ but it will not suffice entirely to defeat an action for clear malpractice.³⁵

²⁸ Grainger v. Still, 187 Mo. 197; s. c. 85 S. W. Rep. 1114.

²⁹ Tomer v. Aiken, 126 Iowa 114; s. c. 101 N. W. Rep. 769.

³⁰ Tomer v. Aiken, 126 Iowa 114; s. c. 101 N. W. Rep. 769.

³¹ Tomer v. Aiken, 126 Iowa 114; s. c. 101 N. W. Rep. 769.

³² Tomer v. Aiken, 126 Iowa 114; s. c. 101 N. W. Rep. 769.

³³ It has been held that the failure of a physician to effect a cure of a dislocated clavicle does not of it-

self show a want of care or skill in its treatment, where it appears that the results are not always satisfactory under any form of treatment, and there is no assurance that the bone will permanently remain in place: Tomer v. Aiken, 126 Iowa 114; s. c. 101 N. W. Rep. 769.

³⁴ Beadle v. Paine, — Or. —; s. c. 80 Pac. Rep. 903.

³⁵ Beadle v. Paine, — Or. —; s. c. 80 Pac. Rep. 903.

TITLE TWENTY-FIVE.

BOOM COMPANIES.

[§ 6742.]

§ 6742. **Negligence of Boom Companies.**—"Those who operate a boom are bailees for hire, and in the handling of the logs they have in charge, and in maintaining the boom, are held to an ordinary degree of care; that is to say, that degree of care which an ordinarily prudent man would in that business exercise in respect to his own property. The operators of booms are not insurers, nor have they the duties of a common carrier, but their obligations are similar to those of warehousemen, wharfingers, and bailees of like character. * * * The peculiar nature of the bailment, and the general usages and the generally understood methods of operating booms under similar environments, may regulate and determine what is reasonable care and diligence; but it is the exercise of proper care and diligence and not mere good faith and honesty which is the test of the performance of the contract."¹

¹ Morris, J., in *C. Crane & Co. v. Fry*, 126 Fed. Rep. 278; s. c. 61 C. C. A. 260.

TITLE TWENTY-SIX.

SHIPPING AND NAVIGATION.

[§§ 6754-6951.]

§ 6754. **The Various Navigation Rules.**—It is to be observed at the outset that the general maritime law is not the law of the United States except as it is adopted by statute.¹ A violation of a statutory rule of navigation is not to be justified on the ground that it is customarily violated by vessels under certain tidal conditions.²

§ 6755. **Other Regulations.**³

§ 6764. **Lights—Steam Vessels Engaged in Towing.**⁴

§ 6779. **Audible Signals—Vessels Meeting Head On or Nearly Head On.**—The signal of the pilot of an ascending steamer, indicating the side on which he desires to pass, is controlling, unless the descending steamer shall deem the passing dangerous, and indicate that fact by danger signals and by a contrary signal, as required by the rule.⁵

§ 6782. **Assenting Signals.**—Where vessels sound signals at the same time, and they are not understood for this reason, both will be held in fault in persisting in the course signaled and colliding. In this situation it is their duty to indicate that the signals are not understood and to slow down until an agreement is reached and understood, or until they have passed each other.⁶

¹The *Sacramento*, 131 Fed. Rep. 373.

²The *Transfer No. 10*, 137 Fed. Rep. 666.

³A Federal case is authority that the New York statute requiring vessels navigating East river to keep near the middle of the river is not changed or superseded by the pilot rules established by the Act of Congress of 1897: *The Hartford*, 135 Fed. Rep. 1021; 68 C. C. A. 230; aff'g s. c. 125 Fed. Rep. 559.

⁴The rule requiring steam vessels towing other vessels to carry two bright white lights in a vertical line, one over the other, not less than six

feet apart, is clearly violated by a tug which displays the lights from either end of a horizontal crosspiece on the flagstaff, about a yard in length, and this failure to observe the rule is regarded as a serious violation, which will render the tug liable for damages caused by a collision between her tow and another vessel: *Foster v. Merchants' &c. Transp. Co.*, 134 Fed. Rep. 964.

⁵*Hudson v. Monongahela River Consol. Coal &c. Co.*, 136 Fed. Rep. 173; s. c. 69 C. C. A. 85.

⁶The *Atlantic City*, 136 Fed. Rep. 996.

§ 6789. Necessity for Maintenance of Lookouts.⁷

§ 6790. Efficiency of Lookout.—Generally speaking, the master of a vessel,⁸ and other officers and men occupied with the navigation of the vessel,⁹ do not fulfill the requirement that the lookout shall be sufficient for the purpose.

§ 6791. Position of Lookout.—The rules of good navigation require the lookout to be placed at the point on the vessel best suited for the purpose alike of seeing and hearing the approach of objects likely to be brought into collision with the vessel.¹⁰ The lookout on a large ocean-going steamship in the crow's-nest, sixty feet above the deck, and one hundred feet from the stem, is not properly located to see or hear objects in front of the vessel, and especially small vessels of the character that usually navigate the bay, and which are frequently loaded down to their water mark.¹¹

§ 6798. Meeting or Crossing Vessels—Vessels Close-Hauled and Free.—A vessel sailing close-hauled is justified in maintaining her course as against an approaching vessel sailing free, in the absence of some clear indication that the latter will fail in her duty to keep out of the way.¹²

§ 6802. The Privileged Vessel must Keep her Course.—Where the privileged vessel has kept her course until the collision, as required by the rules, it is not material to inquire whether or not her lookout was incompetent, since, even if this were true, it was not a fault contributing to the collision.¹³

§ 6806. Steam-Vessels Meeting End On.—The question in these cases is not so much what the colliding vessels do when they get down close to each other, but what maneuver they should have adopted under the rules when they were far enough apart to maneuver deliberately and safely.¹⁴

⁷ In one case it was held, that the failure of a steam yacht navigating New York Harbor at a speed of sixteen miles an hour to maintain a lookout was a fault and a contributing cause of a collision between the yacht and a submerged scow in tow, where a vigilant lookout might have seen the scow or noted her position from the hawser with which she was being towed: *The H. S. Beard*, 134 Fed. Rep. 648.

⁸ *The Echo*, 131 Fed. Rep. 622.

⁹ *The Fannie Hayden*, 137 Fed. Rep. 280.

¹⁰ *The Vedamore*, 137 Fed. Rep. 844; aff'g s. c. 131 Fed. Rep. 154.

¹¹ *The Vedamore*, 137 Fed. Rep. 844; aff'g s. c. 131 Fed. Rep. 154.

¹² *The Pierre Corneille*, 133 Fed. Rep. 604.

¹³ *The Fannie Hayden*, 137 Fed. Rep. 280.

¹⁴ *The Transfer No. 10*, 137 Fed. Rep. 666.

§ 6809. Privileged Vessel must Maintain her Course and Speed.

—A vessel which suddenly sheers from her proper course in ordinary weather, where she has ample space for navigation, and there is no apparent reason for the maneuver, is presumably in fault for an ensuing collision and has the burden of exonerating herself.¹⁵ It may be said generally, that while there is a presumption that the privileged one of two meeting vessels, which came into collision, obeyed the law and kept her course, yet, when such presumption is overthrown, and her fault is clearly established, and is in itself sufficient to account for the collision, she can only avoid full liability by proving the fault of the other vessel beyond reasonable doubt.¹⁶

§ 6814. Steam-Vessel must Keep Out of the Way of Sailing-Vessel.

—The rules for the navigation of the Great Lakes require a steam vessel to keep out of the way of a sailing vessel, when the vessels are proceeding in such directions as to involve the risk of collision.¹⁷ The rule requires timely action on the part of the steam vessel; the steamer has no right to keep her course and speed in the expectation that the sailing vessel will change her tack.¹⁸

§ 6822. When a Vessel is an Overtaking Vessel.¹⁹

§ 6829. Duty of Moving Vessel to Avoid Anchored Vessels.—It is the duty of the moving vessel to avoid collision with one at anchor or moored, when she can do so with reasonable care, having regard to her own safety, and this rule applies though the anchored vessel is in an improper or an unsafe place.²⁰ There is a presumption that the moving vessel is in fault in the collision, and the burden rests on her to show that the collision could not have been avoided by the exercise of reasonable care and skill.²¹

§ 6831. Anchorage in Improper and Exposed Places.²²—A vessel running down an anchored vessel in a fog has the burden of proving clearly that the anchored vessel was chargeable with contributory

¹⁵ *Minnesota S. S. Co. v. Lehigh Valley Transp. Co.*, 129 Fed. Rep. 22; s. c. 63 C. C. A. 672.

¹⁶ *The Eagle Wing*, 135 Fed. Rep. 826.

¹⁷ *Chicago Transit Co. v. Campbell*, 110 Ill. App. 366.

¹⁸ *Donald v. Guy*, 135 Fed. Rep. 429. See also *The Anson M. Bangs*, 129 Fed. Rep. 103; s. c. 63 C. C. A. 605.

¹⁹ A steam-vessel coming up with another from a direction more than two points abaft her beam does not cease to be an overtaking vessel be-

cause of the fact that the overtaken vessel is at the time going astern: *The Sicilian Prince*, 128 Fed. Rep. 133.

²⁰ *Rebstock v. Gilchrist Transp. Co.*, 132 Fed. Rep. 174.

²¹ *Rebstock v. Gilchrist Transp. Co.*, 132 Fed. Rep. 174.

²² *The City of Birmingham*, 138 Fed. Rep. 555 (dredge anchored near center of narrow channel of Savannah river held to have obstructed passage of other vessels in violation of Act of Congress of March 3, 1899).

fault in anchoring outside of anchorage grounds.²³ In selecting the place for anchorage the vessel is only required to exercise precaution commensurate with the dangers.²⁴ The mere fact that a harbor master saw a vessel, anchored without a permit in a certain part of the harbor, and made no objection, or, that he habitually neglected to enforce the regulation requiring a permit, does not amount to an acquiescence, and does not exonerate the vessel from liability from the consequences of its violation of regulations governing anchorage grounds.²⁵

§ 6833. Sufficiency of Anchor.²⁶—In one case it was held that an anchored schooner was not in fault for a collision with another vessel which dragged anchor and drifted against her at night in a gale, either because her captain was on shore, or because she did not hoist sail and attempt to move out of the way, where it appeared that those in charge of the vessel were competent, and it did not appear that the setting of the sails would not have been as likely to increase as diminish the danger, and it would have been likely to cause the vessel to drag her own anchor.²⁷

§ 6845. Duty where Vessel Moored Alongside Other Vessels.²⁸

§ 6846. Vessel Lying at End of Pier.—The New York statute prohibiting vessels from lying at the end of the pier in the North or East river, and imposing a penalty for its violation, is strictly construed, and thus construed the exemption from liability it gives extends only to injury to a vessel so lying which results from her obstructing the entrance to the adjacent pier.²⁹ It has been held that a barge lying at the end of the pier, though rightfully there, which refused the offer of a steamship to remove her temporarily, while the ship was making her berth in an adjacent slip, and to return her afterwards, took the risk of injury from the docking of the ship if it

²³ The Newburgh, 130 Fed. Rep. 321; s. c. 64 C. C. A. 567; rev'g s. c. 124 Fed. Rep. 954.

²⁴ The Newburgh, 130 Fed. Rep. 321; s. c. 64 C. C. A. 567; rev'g s. c. 124 Fed. Rep. 954.

²⁵ The Admiral Cecille, 134 Fed. Rep. 673.

²⁶ The Robert Rickmers, 131 Fed. Rep. 638 (evidence that the anchors of all other vessels in the bay held, tends to show that the vessel in fault for collision either was not equipped with suitable and safe anchors, or was not properly anchored).

²⁷ The Robert Rickmers, 131 Fed. Rep. 638.

²⁸ In one case it was held that a barge was negligent in remaining tied up on the outside of five others, the inner one only being fast to the pier, during a stormy day, with the wind blowing at a high velocity from the side, and is liable for a collision caused by her swinging around on the parting of the line by which the stern of the inner boat was held to the pier: The Atlas, 135 Fed. Rep. 1020; s. c. 68 C. C. A. 666 aff'g s. c. 115 Fed. Rep. 856.

²⁹ The Chauncey M. Depew, 130 Fed. Rep. 59.

was properly handled, and hence could not recover for injuries without proving the fault of the steamship.³⁰

§ 6849. Hawsers Stretched Across Slip.³¹

§ 6854. Vessels at Rest.—A steamship which has stopped her machinery while lying at quarantine, where it is not customary to anchor, and is moving only slightly, with the tide and without headway, is regarded as a vessel at rest.³² And this is the case with the vessels which, while not anchored, are about to anchor and have stopped their machinery.³³

§ 6857. Tug and Tow Regarded as a Single Steam-Vessel, and Amenable to Rules Governing Steam-Vessels.³⁴

§ 6858. Rule where Steamship Encounters Encumbered Tug.³⁵

§ 6859. Tug Not an Insurer of Tow against Marine Perils.—The law does not impose upon towing tugs the obligation of an insurer, or that of a common carrier, but it presumes that those in control of the tow are perfectly familiar with the locality and the difficulties of navigation, and they are required to exercise the care and skill of prudent navigators to avoid injury to their tow or other vessels. The duty rests upon the tow to exercise all reasonable care, and particularly to conform to and promptly obey the signals and directions of the pilot tug.³⁶

§ 6860. Tug Not Servant nor Agent of Tow.³⁷

§ 6861. Joint Liability.—In a case where two tugs belonging to a common owner were employed generally under a single contract to tow a steamer, both were held liable for an injury to another vessel

³⁰ *The Minneapolis*, 130 Fed. Rep. 111; s. c. 64 C. C. A. 648.

³¹ It is the duty of a vessel stretching a hawser across a slip to place a light on it, or in some other way notify approaching vessels of its presence: *The Roma*, 138 Fed. Rep. 218.

³² *The Col. John F. Gaynor*, 130 Fed. Rep. 856; 65 C. C. A. 340; aff'g s. c. 115 Fed. Rep. 382.

³³ *Britain S. S. Co. v. J. B. King Transp. Co.*, 131 Fed. Rep. 62; s. c. 65 C. C. A. 300.

³⁴ See generally: *The Gladys*, 135 Fed. Rep. 601.

³⁵ A steamship meeting an encumbered tug is under the duty of keep-

ing out of the way (*The Georgetown*, 135 Fed. Rep. 854); and the fact that the tug on meeting the steamer gave the first passing signal does not make the steamer the privileged vessel (*The Georgetown*, 135 Fed. Rep. 854).

³⁶ *Rebstock v. Gilchrist Transp. Co.*, 132 Fed. Rep. 174.

³⁷ That the tow and not the tug is liable on the theory that the tug acts as pilot and servant of the tow, see: *The Admiral Cecille*, 134 Fed. Rep. 673; *The Echo*, 131 Fed. Rep. 622; *In re Walsh*, 136 Fed. Rep. 557; s. c. 69 C. C. A. 267; *The Robert Rickmers*, 131 Fed. Rep. 638.

through a collision with the tow, resulting from the failure of either tug properly to perform the service.³⁸

§ 6866. Length of Hawser.³⁹

§ 6877. Casting Off Tow.⁴⁰

§ 6878. Care in Towing Rafts.⁴¹

§ 6885. Vessels in Harbors and Channels held to the Observance of the General Navigation Rules.⁴²

§ 6888. Channel Defined.—The entire body of navigable water in a bay is not to be considered a single narrow channel within the navigation rule requiring a steam vessel, when safe and practicable, to keep to that side of the fairway which lies on its starboard side, and this particularly where numerous channels through the bay have been specifically designated.⁴³

§ 6893. Vessels Turning in Stream.⁴⁴

§ 6895. Navigation of East River.—There is authority that a tug with long car floats in tow alongside is not at fault for being on the east side of the channel in the East river in passing up to make a landing on the Brooklyn side, where this position is necessary and customary to enable her to round to and land safely in the state of the tide at the time.⁴⁵

§ 6903. Navigation by Unlicensed Mate.—The navigation of a vessel in charge of an unlicensed mate, in violation of the positive pro-

³⁸ *Rebstock v. Gilchrist Transp. Co.*, 132 Fed. Rep. 174.

³⁹ *The New York Central No. 22*, 135 Fed. Rep. 1021; s. c. 68 C. C. A. 661; aff'g s. c. 124 Fed. Rep. 750 (method of towing on long hawser in New York bay justifiable only where utmost vigilance and care are exercised).

⁴⁰ A loaded scow cast loose by a dredge in the evening, with misleading lights, has the burden of proving by clear evidence that the guilty steamer was in fault: *The Tarpon*, 132 Fed. Rep. 277.

⁴¹ That a tug burdened with a heavy and unwieldy tow has the duty of extraordinary care to keep the tow out of the way of other vessels, see: *The Admiral Schley*, 131 Fed. Rep. 433; s. c. 65 C. C. A. 417; aff'g s. c. 115 Fed. Rep. 378; *The Bayonne*, 128 Fed. Rep. 288.

⁴² A vessel passing from Philadelphia down the Delaware river on the left side assumes the risk incident to being on the wrong side of the channel and is bound to exercise extra precautions to avoid collisions with vessels coming up which are rightfully on that side of the channel: *The Winfield S. Cahill*, 130 Fed. Rep. 989.

⁴³ *The Bee*, 138 Fed. Rep. 303; aff'g s. c. 127 Fed. Rep. 453.

⁴⁴ *The Deutschland*, 137 Fed. Rep. 1018; aff'g s. c. 129 Fed. Rep. 964 (large steamship held solely in fault for collision with small vessel where she attempted to turn in the channel and back without maintaining a lookout at the stern).

⁴⁵ *The New Hampshire*, 136 Fed. Rep. 769; s. c. 69 C. C. A. 415.

visions of the law, raises a presumption of negligence, and the vessel has the burden of showing that this fact did not contribute to the collision.⁴⁶

§ 6919. **Fog Signals—Other Means Not Permitted.**—It is clear that the noise made by the use of patent rowlocks on a row boat is not equivalent to the fog horn required by the navigation rules.⁴⁷

§ 6924. **Weather Conditions Calling for Signals and Care.**⁴⁸

§ 6926. **Vessels not Required to Cease Navigation while in Fog or Thick Weather.**—But a vessel may be in fault for a collision in a fog which would not have occurred but for the vessel being in the usual track of vessels leaving the port, and she is there without necessity, although if the vessel had been in the line of her voyage she might have been within her right and not chargeable with fault.⁴⁹

§ 6930. **Provision as to Moderate Speed.**—The term “moderate speed,” required of steam-vessels in a fog, is regarded as a purely relative term; and what will constitute a moderate speed in a given case is to be determined with reference to the time, place and circumstances rather than from the actual speed.⁵⁰ No exception is made in the matter of speed in favor of passenger steamers running regularly on schedule time and on an established route.⁵¹ Courts have held that vessels, running through a fog at the rate of six knots an hour, in a frequented part of the ocean,⁵² and that vessels propelled at rates of seven and one-half to nine miles,⁵³ and ten miles an hour on rivers,⁵⁴ are navigated at an immoderate speed.

§ 6933. **Duty to Stop on Hearing Signal.**⁵⁵

§ 6939. **Navigation Rules may be Departed From under Special Circumstances.**⁵⁶

⁴⁶ *The Eagle Wing*, 135 Fed. Rep. 836.

⁴⁷ *Quinette v. Bisso*, 136 Fed. Rep. 825; s. c. 69 C. C. A. 503.

⁴⁸ *The Cyromene*, 135 Fed. Rep. 558 (held, under evidence, that there was not such a fog as to require the ship to ring her fog bell).

⁴⁹ *The Admiral Schley*, 131 Fed. Rep. 433; s. c. 65 C. C. A. 417; aff'g s. c. 115 Fed. Rep. 378.

⁵⁰ *Quinette v. Bisso*, 136 Fed. Rep. 825; s. c. 69 C. C. A. 503.

⁵¹ *The Bellingham*, 138 Fed. Rep. 619.

⁵² *In re Clyde S. S. Co.*, 134 Fed. Rep. 95.

⁵³ *Quinette v. Bisso*, 136 Fed. Rep. 825; s. c. 69 C. C. A. 503.

⁵⁴ *The Charlotte*, 128 Fed. Rep. 38; s. c. 62 C. C. A. 546; aff'g s. c. 124 Fed. Rep. 989.

⁵⁵ *In re Clyde S. S. Co.*, 134 Fed. Rep. 95 (vessel held in fault for failing to stop engines on hearing fog signals of another vessel apparently forward of her beam).

⁵⁶ *The C. R. Hoyt*, 136 Fed. Rep. 671 (example of “special circumstance”).

§ 6940. Burden of Proof in Collision Cases.⁵⁷

§ 6941. Presumption of Negligence from Failure to Stand By After Collision.—It has been held that the failure of a vessel to stand by after a collision with another that had been beached, or to take off her passengers, did not render the vessel liable for the collision where the weather was calm and there was little danger to the passengers, and the extent of the injury to the escaping vessel was unknown, and especially where after proceeding to port, only four miles distant, the master returned with a tug, and all the passengers and crew were safely taken off.⁵⁸

§ 6944. Admiralty Doctrine of Contributory Negligence is Recognized only in Admiralty Courts.⁵⁹—The measure of a cargo owner's recovery from either vessel where both were in fault in a collision pertains to the remedy, and is governed by the law of the forum and not the flag.⁶⁰ Thus, for example, where two British vessels are both in fault for a collision on the high seas, an American admiralty court will apply the American rule, which permits the cargo owner to recover his full damages from either vessel, and not the English rule, by which he can recover but half his loss from either.⁶¹

§ 6945. Cases where Division of Damages will be Allowed.—“Neither is it enough, when the negligence of one vessel is great, to condemn the other to a division of damages, that the question is a close one as to whether she might not have done something she did not do to avoid the consequences of the other's negligence. The evidence that the situation was one which required her to do more than she did must be clear and convincing, for all questions of doubt should be settled in her favor.”⁶² There is a presumption that a vessel was in fault where no entries in relation to the collision under investigation

⁵⁷ That courts of admiralty will accept the statement of a crew as to the movements of their own vessel rather than statements coming from the crew of the other vessel, see: *The Dorchester*, 134 Fed. Rep. 1023; s. c. 68 C. C. A. 518; aff'g s. c. 121 Fed. Rep. 889. In a case where the testimony of a crew of a schooner as to her course before and at the time of the collision, and as to the bearing of the light of the approaching steamer, with which the collision occurred, cannot be correct in both particulars or the collision could not have occurred, assuming the witnesses to be honest, the court should give greater weight to the

testimony of the course, as that is less liable to error: *The Helen G. Moseley*, 128 Fed. Rep. 402; s. c. 63 C. C. A. 144; aff'g s. c. 117 Fed. Rep. 760.

⁵⁸ *The Trader*, 129 Fed. Rep. 462.

⁵⁹ Damages will be equally divided where each of two vessels contributes by her fault to a collision under both the American and English admiralty rules: *The C. R. Hoyt*, 136 Fed. Rep. 671.

⁶⁰ *The Eagle Point*, 136 Fed. Rep. 1010.

⁶¹ *The Eagle Point*, 136 Fed. Rep. 1010.

⁶² *The Phillip Minch*, 128 Fed. Rep. 578; s. c. 63 C. C. A. 14.

were made in the ship's log, or if made were intentionally meager, vague and perfunctory, or the log itself has the appearance of having been mutilated.⁶³ So the failure to take the testimony of the navigators or crew of a vessel, in a suit for collision, tends against the vessel in the absence of equivalent testimony.⁶⁴ Where all the persons on the vessel are drowned as a result of the collision, the court is not required to accept as true the testimony of the navigators of the vessel running down the other, where it is inherently improbable.⁶⁵

§ 6947. Burden of Proving Mutuality of Fault where Fault of One is Manifest.—A vessel, having been found chargeable with fault sufficient to account for the collision, has the burden of proving by clear evidence that the fault could not have caused or contributed to the collision and every reasonable doubt is to be resolved in favor of the other vessel.⁶⁶

§ 6949. What Damages are Included.—Where the damages are divided under the rule, the costs are considered as part of the damages and are also to be divided, unless in exceptional cases.⁶⁷ The cost of repairs for damages by collision is proved *prima facie* by testimony that the repairs were rendered necessary by reason of the collision, that they were made, and at the lowest price, and the testimony of the ship's agent that they had paid the bills.⁶⁸

§ 6951. Inevitable Accidents.—"Inevitable accident," in this connection, means a cause against which human skill and foresight could not have provided in the exercise of ordinary prudence.⁶⁹ An accident must have occurred without any fault on the vessel's part, and notwithstanding the exercise of due care and a proper degree of nautical skill.⁷⁰

⁶³ The Sicilian Prince, 128 Fed. Rep. 133.

⁶⁴ The Gladys, 135 Fed. Rep. 601; The Georgetown, 135 Fed. Rep. 854.

⁶⁵ The Dauntless, 129 Fed. Rep. 715; s. c. 64 C. C. A. 243; modif'g s. c. 121 Fed. Rep. 420.

⁶⁶ The Georgetown, 135 Fed. Rep. 854; American S. S. Co. v. American Steel Barge Co., 129 Fed. Rep. 65; s. c. 63 C. C. A. 507.

⁶⁷ The Frank S. Hall, 128 Fed. Rep. 816.

⁶⁸ The Bratsberg, 127 Fed. Rep. 1005.

⁶⁹ The Drumcraig, 133 Fed. Rep. 804.

⁷⁰ The Surf, 132 Fed. Rep. 880 (example of negligent navigation and not inevitable accident). It was held that the dragging of a ship from her moorings at a dock, during a severe storm, and drifting into collision with another moored vessel, was not due to inevitable accident where the vessel was warned of the approach of the storm in time to put out more fastening lines: The Drumcraig, 133 Fed. Rep. 804.

TITLE TWENTY-SEVEN.

DEATH BY WRONGFUL ACT.

[§§ 6978-7148.]

§ 6978. **The Common-Law Rule.**¹

§ 6981. **Maritime Law Without a Remedy.**²

§ 6984. **Lord Campbell's Act and Other Similar Statutes.**—A statute giving an express remedy for death by wrongful act to railway employés merely enlarges the Lord Campbell's act and is to be construed with it.³

§ 6985. **Whether Liberally or Strictly Construed.**⁴—One court has held that the motorman of a street car is not a "driver" within the meaning of a statute giving an action for death from the negligence of any "driver of any stage coach or other public conveyance."⁵ A statute allowing a recovery by a father for the death of a minor child cannot be invoked in an action by a father for injuries to his child, from which death does not result.⁶

§ 6987. **Survival Statutes.**⁷

§ 6991. **Lex Loci and not Lex Fori Governs.**⁸

¹Harshman v. Northern Pac. R. Co., — N. D. —; s. c. 103 N. W. 412 (remedy unknown to the common law). In Kentucky a parent cannot maintain an action not based on any statute, for the loss of his infant's services owing to the infant's death by the wrongful act of another. In that State the common-law rule is in force except as modified by the constitution or by statute: Gregory v. Illinois Cent. R. Co., 80 S. W. Rep. 795; 26 Ky. L. Rep. 76.

²The Harrisburg, 119 U. S. 199; The Alaska, 130 U. S. 201; Robinson v. Navigation Co., 73 Fed. Rep. 883; Rundell v. La Campagnie Gen. Trans. Co., 94 Fed. Rep. 366; s. c. 100 Fed. Rep. 655; 40 C. C. A. 625.

³Dennis v. Atlantic Coast Line R.

Co., 70 S. C. 254; s. c. 49 S. E. Rep. 869.

⁴That wrongful death statutes are to be closely construed, see: Bowen v. Illinois Cent. R. Co., 136 Fed. Rep. 306; s. c. 69 C. C. A. 444; Chicago Bridge & C. Co. v. La Mantia, 112 Ill. App. 43.

⁵Drolshagen v. Union Depot R. Co., 186 Mo. 258; s. c. 85 S. W. Rep. 344.

⁶Bube v. Birmingham R. & C. Co., 140 Ala. 276; s. c. 37 South. Rep. 285.

⁷An action in Illinois is based on the deceased's own right: Donk Bros. Coal & C. Co. v. Leavitt, 109 Ill. App. 385.

⁸That the law of the place and not of the forum governs, see: Chi-

§ 6992. **Action in Another State if Statute is Not Dissimilar.**—As pointed out in the main section, the action for death in one State can be prosecuted in another State if the statutes of the two States on the subject are not dissimilar.⁹ An action cannot be maintained in Illinois on the Missouri statute, which does not require any proof of damage. The statute allows a recovery of five thousand dollars by way of forfeit, on proof of the wrongful death, and hence is construed by the Illinois courts,—where proof of pecuniary loss must be made,—as a penal statute and clearly repugnant to their statute.¹⁰

§ 6994. **Action Will Not Lie where Statutes so Dissimilar as to be Incapable of Enforcement.**¹¹

§ 6997. **Non-Residents Aliens as Beneficiaries.**¹²

§ 6999. **Jurisdiction of State Courts for Injuries on the Seas.**¹³

§ 7000. **Admiralty Jurisdiction.**—There is authority that a court of admiralty has jurisdiction of actions for loss of life caused by a collision on the high seas where a right of recovery is given by the statutes of the State in which both vessels belong. Under this view both vessels are a part of the territory of such State and subject to its laws.¹⁴

cago Transit Co. v. Campbell, 110 Ill. App. 366; Stockwell v. Boston &c. R. Co., 131 Fed. Rep. 153; Dennis v. Atlantic Coast Lone R. R., 70 S. C. 254; s. c. 49 S. E. Rep. 869.

⁹ Schell v. Youngstown Iron Sheet &c. Co., 26 Ohio Cir. Ct. R. 209. In these cases no fatal repugnancy between the statutes of the two States was discovered: Whitlow v. Nashville &c. R. Co., 114 Tenn. 344; s. c. 84 S. W. Rep. 618 (Alabama and Tennessee); Leman v. Baltimore &c. R. Co., 128 Fed. Rep. 191 (Illinois and Pennsylvania); Baltimore &c. R. Co. v. Ryan, 31 Ind. App. 597; s. c. 68 N. E. Rep. 923 (Indiana and Illinois); Strauss v. New York &c. R. Co., 91 App. Div. (N. Y.) 583; s. c. 87 N. Y. Supp. 67 (New York and Connecticut); Williams v. Camden Interstate R. Co., 138 Fed. Rep. 571 (Ohio and Kentucky).

¹⁰ Raisor v. Chicago &c. R. Co., 215 Ill. 47; s. c. 74 N. E. Rep. 69; aff'g s. c. 117 Ill. App. 488.

¹¹ The wrongful death statutes of Texas and the Mexican Republic are so dissimilar in the matter of damages recoverable that the courts of Texas cannot render a decree enforce-

ing the Mexican statute: Slater v. Mexican Nat. R. Co., 24 Sup. Ct. Rep. 581; s. c. 194 U. S. 120; 48 L. Ed. 900; aff'g s. c. 115 Fed. Rep. 593; 53 C. C. A. 239.

¹² That it is not a defense to an action that the beneficiaries are non-resident aliens, see: Hirschkovitz v. Pennsylvania R. Co., 138 Fed. Rep. 438; Romano v. Capital City Brick &c. Co., 125 Iowa 591; s. c. 101 N. W. Rep. 437; 68 L. R. A. 132; Cleveland &c. R. Co. v. Osgood, 36 Ind. App. 34; s. c. 73 N. E. Rep. 285; Naylor v. Pittsburgh &c. R. Co., 26 Ohio Cir. Ct. R. 277; Pocahontas Collieries Co. v. Rukas, 104 Va. 278; s. c. 51 S. E. Rep. 449; Robertson v. Chicago &c. R. Co., 122 Wis. 66; s. c. 99 N. W. Rep. 433.

¹³ Where the wrongful death occurs on the high seas within the jurisdiction of a State, the laws of that State governing such actions are applicable: Chicago Transit Co. v. Campbell, 110 Ill. App. 366. See also Alaska Commercial Co. v. Williams, 128 Fed. Rep. 362; s. c. 63 C. C. A. 92.

¹⁴ *In re Clyde S. S. Co.*, 134 Fed. Rep. 95.

§ 7004. **The Wrongful Act—In General.**¹⁵

§ 7007. **What if the Act Amounts to a Felony.**¹⁶

§ 7012. **Statute of Limitations—Accrual of Action.**¹⁷

§ 7020. **Death of Beneficiary.**—In Missouri the right of action for wrongful death survives to the administrator of the party in whose favor it accrues.¹⁸ In South Carolina an action brought by an administrator of a son for his wrongful death for the benefit of his father and brothers and sisters, does not abate on the death of the father, though he was the sole beneficiary under the statute when the action was commenced. On the death of the father the action may be carried on to the benefit of all persons who may be entitled to participate in the recovery.¹⁹ It is held in Indiana that an action for the benefit of a widow under the statute—the right of the widow therein having vested—abates on her death pending suit for her husband's wrongful death.²⁰

§ 7022. **View that Amount of Damages is Limited to Lifetime of Deceased Beneficiary.**²¹

§ 7028. **Settlement with Injured Person in his Lifetime.**²²

§ 7038. **Distribution of Damages.**—Under the rule of *lex loci* heretofore adverted to,²³ the damages are distributed according to the law

¹⁵ Northern Pac. R. Co. v. Adams, 192 U. S. 440; s. c. 24 Sup. Ct. Rep. 408; 48 L. Ed. 513; rev'g s. c. 116 Fed. Rep. 324; 54 C. C. A. 196 (no recovery unless death is result of negligent act).

¹⁶ Where a brakeman shot a trespasser on the train, and thereafter threw his body on the track, causing it to be mutilated by the train, it was held that the mutilation of the body was so intimately connected with the wrongful act of the brakeman in killing the trespasser that it would not be regarded as a separate cause of action and submitted to the jury apart from the wrongful death: Houston & C. R. Co. v. Bowen, 36 Tex. Civ. App. 165; s. c. 71 S. W. Rep. 80.

¹⁷ Louisville & C. R. Co. v. Robinson, 141 Ala. 325; s. c. 37 South. Rep. 431 (two years in Alabama); Radezky v. Sargent & Co., 77 Conn. 110; s. c. 58 Atl. Rep. 709 (one year in Connecticut); Negaubauer v. Great Northern R. Co., 92 Minn. 184; s. c. 99 N. W. Rep. 620 (three years in Montana).

¹⁸ Behen v. St. Louis Transit Co., 186 Mo. 430; s. c. 85 S. W. Rep. 346.

¹⁹ Morris v. Spartanburg R., Gas & C. Co., 70 S. C. 279; s. c. 49 S. E. Rep. 854.

²⁰ Dillier v. Cleveland & C. R. Co., 34 Ind. App. 52; s. c. 72 N. E. Rep. 271.

²¹ To this effect, see: Pitkin v. New York & C. R. Co., 94 App. Div. (N. Y.) 31; s. c. 87 N. Y. Supp. 906.

²² That a release of damages, signed by the injured person before death, abates an action by his personal representative, see: Thompson v. Ft. Worth & C. R. Co., 97 Tex. 590; s. c. 80 S. W. Rep. 990; Blount v. Gulf & C. R. Co. (Tex. Civ. App.), 82 S. W. Rep. 305. In Missouri a husband or father suffering injuries through the negligence of another person cannot, by executing a release, deprive his widow and children, in case of his death from such injuries, of their right to recover under the wrongful death statute: Strode v. St. Louis Transit Co. (Mo.), 87 S. W. Rep. 976.

²³ See *ante*, § 6991.

of the place where the injury was received.²⁴ In Iowa the widow of a person negligently killed, who is the sole beneficiary under her husband's will, is entitled to the damages collected by her as executrix for his death to the exclusion of his children.²⁵ The fact that a minor attained his majority after bringing the action, but before judgment, does not cut him off from his right to damages during his minority.²⁶ Under the New York statute, providing that the recovery shall be distributed as unbequeathed assets for the benefit of the wife and next of kin of the deceased, after deducting the expenses of the action, the administrator is entitled to deduct from the damages recovered the expenses incurred in procuring necessary medical expert witnesses to testify on the trial.²⁷ In South Carolina the money paid to the representative of an unmarried son, killed by the negligence of another, is equally divided between his father and mother where there is neither brother nor sister.²⁸

§ 7042. Statutes Designating Parties and Beneficiaries Closely Followed.²⁹

§ 7043. Personal Representative—Definition.³⁰—Where the action is brought by the representative of deceased in his representative capacity, the beneficiaries cannot compromise or control the action.³¹

²⁴ *Leman v. Baltimore &c. R. Co.*, 128 Fed. Rep. 191; *Hartley v. Hartley*, 71 Kan. 691; s. c. 81 Pac. Rep. 505.

²⁵ *In re Cook's Estate*, 126 Iowa 158; s. c. 101 N. W. Rep. 747.

²⁶ *Eichorn v. New Orleans &c. R. &c. Co.*, 114 La. 712; s. c. 38 South. Rep. 526.

²⁷ *In re Snedeker*, 95 App. Div. (N. Y.) 149; s. c. 88 N. Y. Supp. 847.

²⁸ *Childs v. Bolton*, 69 S. C. 555; s. c. 48 S. E. Rep. 618.

²⁹ See generally: *Swift & Co. v. Johnson*, 138 Fed. Rep. 867; *Eichorn v. New Orleans &c. R. &c. Co.*, 114 La. 712; s. c. 38 South. Rep. 526; *Harshman v. Northern Pac. R. Co.*, — N. D. —; s. c. 103 N. W. Rep. 412. That the action cannot be maintained where there is a failure of statutory beneficiaries, see: *Chicago &c. R. Co. v. La Porte*, — Ind. App. —; s. c. 71 N. E. Rep. 166. Under the Indiana statute designating the beneficiaries as the widow of deceased and children, if any, or next of kin, no right of action exists in favor of the next of kin where the deceased left a widow though no children: *Dillier v. Cleveland &c. R. Co.*, 34 Ind. App. 52; s. c. 72 N. E. Rep.

271. The words "heir" and "distributee" in the South Carolina death statute mean the same thing: *Kitchen v. Southern R.*, 68 S. C. 554; s. c. 48 S. E. Rep. 4.

³⁰ That the action must be prosecuted by the personal representative of deceased and not the beneficiary, see: *Mobile &c. R. Co. v. Bromberg*, 141 Ala. 258; s. c. 37 South. Rep. 395; *United States Electric Lighting Co. v. Sullivan*, 22 App. (D. C.) 115; *Chicago Terminal Transfer R. Co. v. O'Donnell*, 114 Ill. App. 345; s. c. aff'd, 213 Ill. 545; 72 N. E. Rep. 1133; *Baltimore &c. R. Co. v. Gillard*, 34 Ind. App. 339; s. c. 71 N. E. Rep. 58; *Seney v. Chicago &c. R. Co.*, 125 Iowa 290; s. c. 101 N. W. Rep. 76; *Shaw v. Charleston*, 57 W. Va. 433; s. c. 50 S. E. Rep. 527. An action is to be brought by the administrator of the deceased notwithstanding the statute directs the recovery, if any, to be distributed to the beneficiaries to the exclusion of creditors: *Western Union T. Co. v. Lipscomb*, 22 App. (D. C.) 104.

³¹ *Cleveland &c. R. Co. v. Osgood*, 36 Ind. App. 34; s. c. 73 N. E. Rep. 285.

§ 7044. Special and Ancillary Administrators.³²

§ 7045. **Beneficiaries and Not Personal Representatives must Sue in Some Jurisdictions.**³³—The Missouri statute gives the right of action to the surviving husband or wife of the deceased, or, in case there is no husband or wife, or if he or she neglect to sue within six months, then to the children. The statute is construed not to give a concurrent right of action in the husband or wife and the children, but during the first six months after the death it is absolute in the husband or wife alone. If he or she fails to sue within that time, then the right vests in the children and in them alone. It is further held that a suit by the husband or wife within six months constitutes an election to appropriate the cause of action and cuts off the right of the children to sue after the expiration of six months, although the action is mistakenly commenced against one not actually liable for the wrongful death.³⁴ The Delaware statute gives the right of action to the widow or widower of deceased, or if there be none, then to the deceased's personal representatives, but does not authorize an action by a father to recover for the death of a minor child.³⁵

§ 7048. Who are "Next of Kin."³⁶

§ 7049. Dependent Next of Akin.³⁷

§ 7050. Pecuniary Benefit from Life of Deceased as a Condition to Recovery.³⁸

³² In Colorado the action for wrongful death in another State cannot be prosecuted by an administrator appointed in Colorado: *Sambo v. Union Pac. Coal Co.*, 130 Fed. Rep. 52; *Robertson v. Chicago & C. R. Co.*, 122 Wis. 66; s. c. 99 N. W. Rep. 433 (the action is prosecuted in the Wisconsin courts by the foreign administrator).

³³ The action must be brought by the widow alone in Pennsylvania, though the damages are to be shared with the children: *Haughey v. Pittsburg R. Co.*, 210 Pa. 367; s. c. 59 Atl. Rep. 1112.

³⁴ *Packard v. Hannibal & C. R. Co.*, 181 Mo. 421; s. c. 80 S. W. Rep. 951.

³⁵ *Kennedy v. Delaware Cotton Co.*, 4 Penn. (Del.) 477; s. c. 58 Atl. Rep. 825.

³⁶ That the husband and wife are not next of kin to each other, see: *Gottlieb v. North Jersey St. R. Co.*, 71 N. J. L. 47; s. c. 58 Atl. Rep. 1088; *Johnson v. Seattle Electric*

Co., 39 Wash. 211; s. c. 81 Pac. Rep. 705. *Contra*, that the surviving husband is next of kin to his wife under the Kansas statute, see: *Atchison & C. R. Co. v. Townsend*, 71 Kan. 524; s. c. 81 Pac. Rep. 205.

³⁷ That it is not necessary that deceased should have been sole support, see: *Central of Georgia R. Co. v. Henson*, 121 Ga. 462; s. c. 49 S. E. Rep. 278.

³⁸ A married daughter whose husband contributed nothing to her support held dependent on parents: *International & C. R. Co. v. Boykin*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 1163. In a case where deceased left surviving her two brothers and a nephew with whom she lived, they contributing their earnings in consideration of her services to the support of the family, it was held that they were entitled to recover for her wrongful death though there was no legal obligation resting on her to render these services: *Smith v.*

§ 7052. **Widow Entitled to Entire Recovery under Certain Circumstances.**—The Louisiana statute is construed to give two causes of action when deceased leaves a widow and minor children—one to recover the damages the father might have recovered if he had survived, and the other founded on his death: the first cause of action surviving in favor of the widow or minor children. When the widow sues alone a judgment in her favor under this statute exhausts the first cause of action, leaving to the minors only the right of action for the death of their father.³⁹

§ 7055. **Parents and Collateral Relatives Not Included in Term "Heirs."**⁴⁰

§ 7056. **Whether Father or Mother Meant by Term "Parent."**—Under the Minnesota statute, where the deceased leaves no widow or child, the father, if living, is the sole next of kin to the exclusion of the surviving mother and sisters.⁴¹

§ 7057. **Who Included in the Term "Children"—Illegitimate Children.**⁴²

§ 7063. **Persons Liable.**—Under the Missouri statute giving a widow a right of action for the wrongful death of her husband her right of action is against all whose negligence caused her husband's death, and she may sue all jointly, or as many as she sees fit. All the parties are liable at her election until satisfaction.⁴³ Under a statute providing that action for death may be brought where the death is caused by the wrongful act, negligence, unskillfulness, or default of another, it has been held that an employer can be held liable for the death of a third person only when the death results from the em-

Michigan Cent. R. Co., — Ind. App. —; s. c. 73 N. E. Rep. 928. The wrong-doer is in no wise interested in the fact that the recovery against him may be shared finally with persons whose claims are of varying merit: *United States Electric Lighting Co. v. Sullivan*, 22 App. (D. C.) 115. Parents of a married son who contributed nothing to their support after his marriage are without reasonable expectation of receiving a pecuniary benefit from him in the future, and may not recover for his wrongful death: *Texas Portland Cement & Co. v. Lee*, 98 Tex. 236; s. c. 82 S. W. Rep. 1025; 82 S. W. Rep. 306. It is not a defense that after the death of a son who had supported a parent, such parent then went to live with other children:

McDaniels v. Royle Min. Co., 110 Mo. App. 706; s. c. 85 S. W. Rep. 679.

³⁹ *Eichorn v. New Orleans & C. R. & Co.*, 112 La. 236; s. c. 36 South. Rep. 335.

⁴⁰ That parents are not heirs, see: *Johnson v. Seattle Electric Co.*, 39 Wash. 211; s. c. 81 Pac. Rep. 705; *Manning v. Tacoma R. & Co.*, 34 Wash. 406; s. c. 75 Pac. Rep. 994.

⁴¹ *Swift & Co. v. Johnson*, 138 Fed. Rep. 867.

⁴² That a mother cannot recover as sole beneficiary for the death of her illegitimate child, see: *McDonald v. Southern R. Co.*, 71 S. C. 352; s. c. 51 S. E. Rep. 138.

⁴³ *Packard v. Hannibal & C. R. Co.*, 181 Mo. 421; s. c. 80 S. W. Rep. 951.

ployer's own negligent act, and not when it results from the negligence of an employé.⁴⁴

§ 7071. Deceased must have been Free from Contributory Negligence.⁴⁵—Under a statute giving the benefit of the action for wrongful death to the father and mother of a deceased child, the father's right to recover is not affected by his wife's negligence in which he did not participate. Her negligence can only be considered in determining the amount of the damages.⁴⁶

§ 7078. Duty of Jury in Estimating Damages.—The jury are to exercise their sound discretion as to what will fairly compensate the beneficiary for the pecuniary loss sustained by him in the wrongful death.⁴⁷ They are conscientiously to apply their own observation, experience and knowledge to the facts and circumstances of the case,⁴⁸ but they may not fix the damages arbitrarily. The amount returned must be sustained by the evidence.⁴⁹

§ 7079. Nominal Damages.⁵⁰

§ 7080. Exemplary Damages.—Exemplary damages are not recoverable under the Kansas statute.⁵¹

§ 7082. Damages Limited to Pecuniary Injury, Allowing Nothing by Way of Solatium.⁵²

"Shippers' Compress &c. Co. v. Davidson, 35 Tex. Civ. App. 558; s. c. 80 S. W. Rep. 1032.

"Elliott v. Canadian Pac. R. Co., 129 Fed. Rep. 163 (burden of proof on defendant); Chicago &c. R. Co. v. Stone, 109 Ill. App. 517 (burden on plaintiff); Indianapolis St. R. Co. v. Antrobus, 33 Ind. App. 663; s. c. 71 N. E. Rep. 971; Driver v. Southern R. Co., 103 Va. 650; s. c. 49 S. E. Rep. 1000.

"Donk Bros. Coal &c. Co. v. Leavitt, 109 Ill. App. 385.

"Predmore v. Consumers' Light &c. Co., 99 App. Div. (N. Y.) 551; s. c. 91 N. Y. Supp. 118.

"Denver &c. R. Co. v. Gunning, 33 Colo. 280; s. c. 80 Pac. Rep. 727.

"Hirschkovitz v. Pennsylvania R. Co., 138 Fed. Rep. 438.

⁵⁰ That nominal damages are recoverable where the evidence is uncertain as to the pecuniary loss sustained by the beneficiary, see: Swift & Co. v. Johnson, 138 Fed. Rep. 867. A verdict of nominal damages should be set aside, however, where

there is some evidence of a pecuniary loss from the wrongful death of the deceased: Smith v. Cissel, 22 App. (D. C.) 318; Predmore v. Consumers' Light &c. Co., 99 App. Div. (N. Y.) 551; s. c. 91 N. Y. Supp. 118.

⁵¹ Atchison &c. R. Co. v. Townsend, 71 Kan. 524; s. c. 81 Pac. Rep. 205.

⁵² See generally: Swift & Co. v. Johnson, 138 Fed. Rep. 867; Denver &c. R. Co. v. Gunning, 33 Colo. 280; s. c. 80 Pac. Rep. 727; Smith v. Cissel, 22 App. (D. C.) 318; Barnes v. Columbia Lead Co., 107 Mo. App. 608; s. c. 82 S. W. Rep. 203; Haines v. Pearson, 107 Mo. App. 481; s. c. 81 S. W. Rep. 645; Johnson Co. v. Carmen, — Neb. —; s. c. 99 N. W. Rep. 502; Houston &c. R. Co. v. Bowen, 36 Tex. Civ. App. 165; s. c. 81 S. W. Rep. 80; International &c. R. Co. v. Glover, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 515; San Antonio &c. R. Co. v. Brock, 35 Tex. Civ. App. 155; s. c. 80 S. W. Rep. 422.

§ 7084. **Damages for Death of Parent.**—A minor child suing for the death of a parent is entitled to recover the reasonable value of such nurture, care and education as he would have received from the parent had he lived, but this does not, of course, include sorrow for the death of the parent nor the loss of his society.⁵³

§ 7085. **Damages for Death of Husband.**—The jury, in reaching a conclusion, may consider the wife's right to the personal attention of her husband.⁵⁴

§ 7086. **Damages for Death of Wife.**⁵⁵

§ 7087. **In Case of Death of Infant.**—The measure of damages to a parent for the wrongful death of his child is the value of the child's services until he should have arrived at majority taken in connection with his prospects for life, less the costs of support and maintenance, together with the expenses of his care and attention made necessary by the injury and the funeral and medical expenses.⁵⁶

§ 7089. **Expectation of Pecuniary Benefits from Child After Attaining Majority.**⁵⁷—The right of a parent to recover for expected benefits from the child is limited to the parent's life and not the life of the child had he lived.⁵⁸

§ 7091. **Expectation of Future Pecuniary Benefits.**⁵⁹—In an action under the Federal statute, an instruction was held not improper which told the jury in effect, that the plaintiff, father of deceased, was entitled to recover such sum as would reasonably compensate him for any financial loss sustained by reason of his son's death, such loss

⁵³ *International &c. R. Co. v. McVey*, — Tex. —; s. c. 87 S. W. Rep. 328; rev'g s. c. 81 S. W. Rep. 991.

⁵⁴ *Haines v. Pearson*, 107 Mo. App. 481; s. c. 81 S. W. Rep. 645.

⁵⁵ On the question of damages suffered by a husband in the wrongful death of his wife, the jury may consider what she might earn per annum had she lived: *Denver &c. R. Co. v. Cunning*, 33 Colo. 280; s. c. 80 Pac. Rep. 727.

⁵⁶ *Southern Indiana R. Co. v. Moore*, 34 Ind. App. 154; s. c. 71 N. E. Rep. 516. See also *Cleveland &c. R. Co. v. Miles*, 162 Ind. 646; s. c. 70 N. E. Rep. 985.

⁵⁷ That the jury may consider the probability that a child after becoming of age would have been led by natural affection to contribute to

the parent's support, see: *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531; s. c. 71 N. E. Rep. 1081; aff'g s. c. 113 Ill. App. 435; *St. Louis &c. R. Co. v. Shiflet*, 98 Tex. 102; s. c. 81 S. W. Rep. 524. In an action for the death of a child between ten and twelve years old, evidence of his expressed purpose to contribute to the support of his parents is admissible: *Freeman v. Carter* (Tex. Civ. App.), 81 S. W. Rep. 81.

⁵⁸ *Fidelity Land &c. Co. v. Buzzard*, 69 Kan. 330; s. c. 76 Pac. Rep. 832.

⁵⁹ That the jury may consider expectation of pecuniary benefits from deceased, see, generally: *Eichorn v. New Orleans &c. R., Light &c. Co.*, 114 La. 712; s. c. 38 South. Rep. 526.

to be measured by such sum as the evidence showed the father would have probably received from the son had he continued to live.⁶⁰

§ 7092. **What are Probable Earnings.**—An instruction has been held not improper which told the jury that the plaintiff was entitled to a sum equal to the probable earnings of the deceased, considering his age, business capacity, experience, habits, health, energy and perseverance.⁶¹

§ 7100. **Duty of Jury to Consider Present Worth of Recovery.**⁶²

§ 7101. **Probable Duration of Life-Mortality Tables as Evidence.**⁶³—Mortality tables are admissible only as an aid in determining the expectancy of life of the deceased, but they are not conclusive on that question.⁶⁴

§ 7102. **Deduction of Support and Other Items.**—Under the Michigan statute—a survival statute—the administrator of one who died the day following his injury is entitled to recover the amount the deceased would have earned during the period he probably would have lived, without any deduction for what it would probably have cost him for food, clothing, and other personal expenditures.⁶⁵

§ 7103. **Mitigation of Damages.**⁶⁶

§ 7110. **Notice Not Necessary Unless Required by Statute.**⁶⁷

§ 7114. **Pleading Existence of Beneficiaries.**⁶⁸—There is a holding that the matter of the existence of beneficiaries is sufficiently covered by averments from which there is a necessary inference that such

⁶⁰ United States Electric Lighting Co. v. Sullivan, 22 App. (D. C.) 115.

⁶¹ Norfolk & c. R. Co. v. Cheatwood, 103 Va. 356; s. c. 49 S. E. Rep. 489.

⁶² That the jury may consider present worth of recovery, see: McCabe v. Narragansett Elec. Lighting Co., 26 R. I. 427; s. c. 59 Atl. Rep. 112; Reynolds v. Narragansett Elec. Lighting Co., 26 R. I. 457; s. c. 59 Atl. Rep. 393.

⁶³ That mortality tables are admissible, see: St. Louis & c. R. Co. v. Hitt, — Ark. —; s. c. 88 S. W. Rep. 908; International & c. R. Co. v. McVey (Tex. Civ. App.), 81 S. W. Rep. 991; s. c. 83 S. W. Rep. 34.

⁶⁴ Farrell v. Chicago & c. R. Co., 123 Iowa 690; s. c. 99 N. W. Rep. 578.

⁶⁵ Olivier v. Houghton Co. St. R. Co., 138 Mich. 242; s. c. 101 N. W. Rep. 530; 11 Det. Leg. N. 559.

⁶⁶ It is no ground for mitigation of damages that deceased was insured (Illinois Cent. R. Co. v. Prickett, 210 Ill. 140; s. c. 71 N. E. Rep. 435; aff'g s. c. 109 Ill. App. 468); or that the surviving spouse married again (International & c. R. Co. v. Boykin, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 1163).

⁶⁷ The fact that the law of the State where injuries resulting in death were received required notice does not control, where the action is brought in the Federal court of a State not requiring such notice: Brown v. New York & c. R. Co., 136 Fed. Rep. 700.

⁶⁸ That complaint should show existence of beneficiaries, see: Chicago & c. R. Co. v. Kinnare, 115 Ill. App. 132; Southern R. Co. v. Maxwell, 113 Tenn. 464; s. c. 82 S. W. Rep. 1137.

beneficiaries exist.⁶⁹ A complaint by a father and mother for the wrongful death of their son, alleging that he was under twenty-one years of age and a single, unmarried man, has been held sufficient without an allegation that the son left no minor children surviving.⁷⁰

§ 7115. Whether Particular Acts of Negligence must be Pleaded.—Under the Georgia practice an allegation that the death of the decedent was the result of the negligence of the officers and servants of a railroad company is sufficient, without setting forth the names of such officers and servants.⁷¹

§ 7123. Joinder of Causes of Action.—One Florida statute authorizes the action for death by wrongful act to be brought by the representative of the deceased. Another statute authorizes an action for the wrongful death of a minor child by the father or mother of the child. It has been held that the procedure in that State allows the father of a minor, who is also administrator, to sue for the wrongful death in both capacities in the same action, joining counts under each statute in the same declaration.⁷² A Massachusetts case holds that a count in which the plaintiff sought to recover for a death as the representative of the next of kin of the deceased, and a count at common law for injuries to the deceased for which he had a right of action during his life, and for which the plaintiff sought to recover as his representative, did not accrue to the plaintiff in the same capacity and could not be joined in the same action.⁷³

§ 7125. Amendments.⁷⁴

⁶⁹ *Zipple v. Sandford & Harris Co.*, — N. J. L. —; s. c. 58 Atl. Rep. 176.

⁷⁰ *Jackson v. Lincoln Min. Co.*, 106 Mo. App. 441; s. c. 80 S. W. Rep. 727.

⁷¹ *Pierce v. Seaboard Air Line R. Co.*, 122 Ga. 664; s. c. 50 S. E. Rep. 468.

⁷² *Callison v. Brake*, 129 Fed. Rep. 196; s. c. 63 C. C. A. 354; aff'g s. c. 122 Fed. Rep. 722.

⁷³ *Brennan v. Standard Oil Co.*, 187 Mass. 376; s. c. 73 N. E. Rep. 472.

⁷⁴ A complaint may be amended to correspond with proof showing the existence of beneficiaries omitted therefrom: *Chicago & C. R. Co. v. La Porte*, 33 Ind. App. 691; s. c. 71 N. E. Rep. 166. A complaint alleging the inability of the beneficiary to support his family without the assistance of the deceased, may be amended by striking out the words "his family" and inserting the word "himself:" *Central of Georgia R. Co.*

v. Henson, 121 Ga. 462; s. c. 49 S. E. Rep. 278. The cause of action for wrongful death given by the North Carolina statute does not accrue until death occurs, and cannot be set up by amendment to action brought by the injured person himself prior to his death, for injuries which resulted in his death: *Bolick v. Southern R. Co.*, 138 N. C. 370; s. c. 50 S. E. Rep. 689. In Pennsylvania, where the action is brought in the name of the widow instead of the personal representative, an action erroneously brought in the name of the administrator may be amended by substituting the name of the widow in the complaint where the name of the administrator appears in any material allegation, and such amendment does not amount to the commencement of a new cause of action or work a discontinuance of the original action: *Leman v. Baltimore & C. R. Co.*, 128 Fed. Rep. 191.

§ 7129. **Evidence Relating to Deceased.**—Evidence is admissible as to the deceased's average monthly contribution to the support of his family at the time of his death.⁷⁵ His earning capacity may be shown,⁷⁶ and for this purpose evidence as to his earnings immediately prior to his death is admissible.⁷⁷ In the absence of better evidence as to earning capacity, evidence is admissible showing the amount spent by the deceased on his family, though this may be overcome by evidence that he derived his money otherwise than from his earnings.⁷⁸ It is competent to prove that the deceased, notwithstanding he was a man above middle age, contributed to his parents' support, and the amount he was in the habit of so contributing.⁷⁹ Though the complaint alleges that the deceased was the only support of a parent, an offer of evidence by the defendant of contributions from another son is properly excluded where the offer does not show whether this son was a minor to whose earnings the mother was entitled or whether he was of age.⁸⁰ Evidence as to the cheerfulness of disposition of the deceased is irrelevant.⁸¹ A particular description of the various injuries sustained by the deceased should be excluded where the injuries caused almost instantaneous death.⁸² On the question of the support of a child during minority, which is generally deducted, evidence is admissible as to the cost of board and the reasonable value of clothing at the place where the deceased resided at and prior to his death.⁸³

§ 7132. **Health of Deceased.**—There is authority that evidence is not improper as to the age of the deceased's parents at the time of their death as bearing on the question of the health and constitution of deceased.⁸⁴ There is a holding that the Carlisle tables are not admissible to show the expectancy of life of a beneficiary entitled to a present right to the recovery.⁸⁵

⁷⁵ *Powley v. Swensen*, 146 Cal. 471; s. c. 80 Pac. Rep. 722.

⁷⁶ *United Electric Light & Co. v. State*, 100 Md. 634; s. c. 60 Atl. Rep. 248.

⁷⁷ *Halverson v. Seattle Elec. Co.*, 35 Wash. 600; s. c. 77 Pac. Rep. 1058.

⁷⁸ *Memphis Consol. Gas & Co. v. Letson*, 135 Fed. Rep. 969; s. c. 68 C. C. A. 453.

⁷⁹ *Prendergast v. Chicago City R. Co.*, 114 Ill. App. 156.

⁸⁰ *Gulf & C. R. Co. v. Johnson*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 34.

⁸¹ *Di Prisco v. Wilmington City R. Co.*, — Del. —; s. c. 57 Atl. Rep. 906.

⁸² *Jordan v. Grand Rapids & C. R. Co.*, 162 Ind. 464; s. c. 70 N. E. Rep. 524.

⁸³ *Southern Indiana R. Co. v. Moore*, 34 Ind. App. 154; s. c. 71 N. E. Rep. 516.

⁸⁴ *Rincicotti v. John J. O'Brien Contracting Co.*, 77 Conn. 617; s. c. 60 Atl. Rep. 115.

⁸⁵ *Emery v. Philadelphia*, 208 Pa. 492; s. c. 57 Atl. Rep. 977.

§ 7134. **Condition and Circumstances of Beneficiaries.**—On the question of the reasonable probability of the continuance of contributions to the support of parents, evidence is admissible to show their age, feeble health, and poverty.⁸⁶

§ 7135. **Number, Age and Sex of Children.**⁸⁷

§ 7139. **Rules of Evidence where Action is Criminal in Form.**⁸⁸

§ 7140. **Presumption and Burden of Proof in Actions for Death—Habits of Deceased.**⁸⁹—There can be no recovery under the death statutes in the absence of evidence of the negligence of the defendant,⁹⁰ and the plaintiff has the burden, not only to prove the negligence and injury complained of, but also a causal connection between them;⁹¹ the mere proof of an accident not being sufficient.⁹² Evidence of the careful habits of the deceased, sometimes admitted where there were no eye-witnesses,⁹³ is clearly inadmissible where eye-witnesses have testified to the facts and circumstances surrounding the accident.⁹⁴ The presumption that the wife and children of the deceased suffered pecuniary loss in his death does not obtain in the case of next of kin in no wise pecuniarily dependent on him.⁹⁵ In the absence of evidence to the contrary, there is a presumption that a deceased husband

⁸⁶ *United States Electric Lighting Co. v. Sullivan*, 22 App. (D. C.) 115.

⁸⁷ Under the Michigan survival act evidence that deceased left a family is immaterial: *Olivier v. Houghton Co. St. R. Co.*, 138 Mich. 242; s. c. 101 N. W. Rep. 530; 11 Det. Leg. N. 559.

⁸⁸ A Massachusetts statute declares that if by reason of the negligence or carelessness of a corporation operating a street railway, or the unfitness or negligence of its servants, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger, is lost, the corporation shall be liable in damages to be recovered in an action of tort. The courts of that State hold that the statute is to be construed as if the proceeding were by indictment, as was the case in all the preceding statutes on the subject, and the same proof of due diligence is required as would be required under a proceeding by indictment: *Hudson v. Lynn & C. R. Co.*, 185 Mass. 510; s. c. 71 N. E. Rep. 66.

⁸⁹ In Alabama contributory negligence of deceased is a matter of defense: *Mobile & C. R. Co. v. Brom-*

berg, 141 Ala. 258; s. c. 37 South. Rep. 395.

⁹⁰ *Thompson v. Metropolitan St. R. Co.*, 89 App. Div. (N. Y.) 10; s. c. 85 N. Y. Supp. 181.

⁹¹ *Warner v. St. Louis & C. R. Co.*, 178 Mo. 125; s. c. 77 S. W. Rep. 67; *Shore v. American Bridge Co.*, 111 Mo. App. 278; s. c. 86 S. W. Rep. 905.

⁹² *United Electric Light & Co. v. State*, 100 Md. 634; s. c. 60 Atl. Rep. 248. Where there is no evidence as to the cause of the death the presumption that deceased was free from negligence is balanced by a presumption that defendant was also free from negligence: *Allen v. Kingston Coal Co.*, 212 Pa. 54; s. c. 61 Atl. Rep. 572.

⁹³ *Cleveland & C. R. Co. v. Moss*, 89 Ill. App. 1; *Cox v. Chicago & C. R. Co.*, 92 Ill. App. 15; *Smith v. Boston & C. R.*, 70 N. H. 53; s. c. 47 Atl. Rep. 290.

⁹⁴ *Illinois Cent. R. Co. v. Kief*, 111 Ill. App. 354.

⁹⁵ *Chicago Bridge & C. Co. v. La Mantia*, 112 Ill. App. 43; *Cleveland & C. R. Co. v. Drumm*, 32 Ind. App. 547; s. c. 70 N. E. Rep. 286.

supported his wife.⁹⁶ Where it is a question whether the death resulted from injury or from a disease with which it had become involved, the defendant, to avoid liability, must show that death must have resulted even if the injury had not been inflicted.⁹⁷

§ 7144. Instructions—General Rules.⁹⁸

§ 7148. Misleading Instructions.⁹⁹

⁹⁶ Toledo R. &c. Co. v. Ward, 25 Ohio Cir. Ct. R. 399.

⁹⁷ Richards v. Riverside Iron Works, 56 W. Va. 510; s. c. 49 S. E. Rep. 437.

⁹⁸ An instruction that the jury may consider the probable "or even possible" benefits which might result to next of kin from the life of deceased is erroneous since it allows the jury to enter the domain of speculation: Cleveland &c. R. Co. v. Drumm, 32 Ind. App. 547; s. c. 70 N. E. Rep. 286. It has been held in Virginia that evidence that deceased left a family, and followed a trade which gave practically constant employment, is sufficient to warrant an instruction that the jury, in estimating the damages for his death,

may take into consideration compensation for the loss of his care, attention, society, and comfort to his family and for solace to them for the sorrow, suffering and mental anguish occasioned by his death: Portsmouth St. R. Co. v. Peed, 102 Va. 662; s. c. 47 S. E. Rep. 850. It is not proper to require the jury to itemize the elements of damages for death by wrongful act: Southern Indiana R. Co. v. Moore, 34 Ind. App. 154; s. c. 71 N. E. Rep. 516.

⁹⁹ Swift & Co. v. Johnson, 138 Fed. Rep. 867 (instruction misleading in that it conveyed to the jury the impression that a mother could share in the distribution where the father was the sole beneficiary).

TITLE TWENTY-EIGHT.

MEASURE OF DAMAGES.

[§§ 7152-7363.]

§ 7152. Object of Damages.¹

§ 7158. Nominal Damages.²

§ 7159. **General and Special Damages.**—General damages are such damages as the law implies and presumes from the negligent act complained of. Special damages are such as have proximately resulted from the act, but do not always immediately result therefrom and, will not therefore be implied by law but must be pleaded.³ The aggravation of injuries to a passenger received in a collision due to fright or nervous shock incident to the collision and its attendant circumstances is regarded as the direct and proximate effect of the collision, and hence need not be specially pleaded, but is provable under the general allegations of bodily injuries.⁴ Objection to evidence of damages claimed to be special on the ground that such damages were insufficiently pleaded must be made at the trial, and if not so made will be disregarded on appeal.⁵

§ 7163. **Exemplary Damages—In General.**⁶—Exemplary damages cannot be recovered by a father for a negligent injury of his minor

¹In the absence of aggravating circumstances the measure of damages for personal injuries is the pecuniary loss sustained and compensation for suffering endured: *Peterson v. Roessler & Co. Chemical Co.*, 131 Fed. Rep. 156.

²That nominal damages are recoverable where negligence is shown, but the proof fails to show the amount of damages, see: *Crutcher v. Choctaw & Co. R. Co.*, 74 Ark. 358; s. c. 85 S. W. Rep. 770; *St. Louis & Co. R. Co. v. Linam*, 68 Ark. 621; s. c. 60 S. W. Rep. 951 (nominal damages only recoverable for ejection of a passenger by a conductor in obedience to command of quarantine guard); *Baldwin v. Webb*, 121 Ga. 416; s. c. 49 S. E. Rep. 265; *Green v. Farmers' Consol. Dairy Co.*, 113

L. 869; s. c. 37 South. Rep. 858; *Holt v. Hannibal & Co. R. Co.*, 174 Mo. 524; s. c. 74 S. W. Rep. 631; *Marquardt v. Hudson Co. Gas Co.*, — N. J. L. —; s. c. 59 Atl. Rep. 1054; *St. Louis R. Co. v. Musick*, 35 Tex. Civ. App. 591; s. c. 80 S. W. Rep. 673.

³*Lillard v. Kentucky Distilleries & Co.*, 134 Fed. Rep. 168; s. c. 67 C. C. A. 74; *Texas & Co. R. Co. v. Ellerd*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 362 (evidence of special damages to shipper of horses through delay not admissible because not pleaded).

⁴*Denver & Co. R. Co. v. Roller*, 100 Fed. Rep. 738; s. c. 41 C. C. A. 22; 49 L. R. A. 77.

⁵*Cosgriff v. Miller*, 10 Wyo. 190; s. c. 68 Pac. Rep. 206.

son in the absence of a statute permitting such a recovery, as the action by the father is one solely for the loss of the child's services.⁷

§ 7165. **Right of Recovery of Exemplary Damages Depends on Motive.**⁸—It follows that exemplary damages cannot be recovered for a tort committed by mistake in the assertion of a supposed right and without a wrong intent.⁹

§ 7167. **"Gross Negligence."**—"Gross negligence" has been defined as "the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal or similar danger."¹⁰ Exemplary damages are recoverable under this head only where the negligence is so gross as to amount to wantonness.¹¹

§ 7170. **Exemplary Damages Proper Only where Actual Damages have been Suffered.**¹²

⁶ Exemplary damages are regarded as a punishment for a wrong suffered and as a vindication of a private right and are recoverable on proof of a wanton, willful or malicious violation of plaintiff's rights: Jackson Elec. R. & Co. v. Lowry, 79 Miss. 431; s. c. 30 South. Rep. 634; Beaudrot v. Southern R. Co., 69 S. C. 160; s. c. 48 S. E. Rep. 106. Whether there is any evidence in a case to justify the assessment by the jury of exemplary damages is one for the court: Lexington R. Co. v. Fain, 80 S. W. Rep. 463; s. c. 25 Ky. L. Rep. 2243. Whether such damages shall be awarded in a particular case where the claim to such damages is sustained by the pleading is a question for the jury: Norman v. Southern R. Co., 65 S. C. 517; s. c. 44 S. E. Rep. 83.

⁷ Bube v. Birmingham R. & Co., 140 Ala. 276; s. c. 37 South. Rep. 285.

⁸ Exemplary damages are recoverable where the act complained of displayed such wantonness or recklessness as to indicate a willful disregard of the injured person's rights: Thomasson v. Southern R., 72 S. C. 1; s. c. 51 S. E. Rep. 443; Boyd v. Seaboard Air Line R. Co., 67 S. C. 218; s. c. 45 S. E. Rep. 186; Nashville St. R. Co. v. O'Bryan, 104 Tenn. 28; s. c. 55 S. W. Rep. 300;

Stevens v. Friedman, — W. Va. —; s. c. 51 S. E. Rep. 132.

⁹ Gwynn v. Citizens' Tel. Co., 69 S. C. 434; s. c. 48 S. E. Rep. 460; Yazoo & C. R. Co. v. Faust (Miss.), 32 South. Rep. 9 (not recoverable for failure to stop train where passenger's signal was not seen by conductor).

¹⁰ Illinois Cent. R. Co. v. Stewart, 63 S. W. Rep. 596, 23 Ky. L. Rep. 637. The same court has held it error to define gross negligence as "either an intentional wrong or such a reckless disregard of security and right as to imply bad faith:" Macon v. Paducah St. R. Co., 110 Ky. 680; s. c. 62 S. W. Rep. 496; 23 Ky. L. Rep. 46.

¹¹ Atchison & C. R. Co. v. Ringle, 71 Kan. 839; s. c. 80 Pac. Rep. 43; Kentucky Distilleries & Co. v. Schreiber, 73 S. W. Rep. 769; s. c. 24 Ky. L. Rep. 2236. In Kentucky it has been held proper to submit to the jury the question whether the failure to signal the approach of a train to a street crossing and to keep a lookout for persons on the street was gross negligence, so as to authorize exemplary damages: Louisville & C. R. Co. v. Cooper, 65 S. W. Rep. 795; s. c. 23 Ky. L. Rep. 1658.

¹² Cole v. Gray, 70 Kan. 705; s. c. 79 Pac. Rep. 654.

§ 7175. **Ratification by Corporation.**—A general statement by the superintendent of a street railroad company that the company would stand by anything a conductor had done, and that he had the right to eject a passenger, has been held not to show a ratification of malicious or insulting conduct on the part of the conductor in making the ejection, so as to render the street railroad company liable for exemplary damages.¹³

§ 7179. **The Rule in Its Application to Carriers Generally.**¹⁴—Exemplary damages are properly allowed in actions for injuries to passengers assaulted by conductors under circumstances showing wantonness.¹⁵ Similarly an allowance of exemplary damages was upheld in a case where the conductor refused to receive a transfer tendered him by a passenger, though the passenger explained the conditions under which he received the transfer from the preceding conductor, and the conductor forcibly resisted the efforts of the passenger to leave the car, and carried him several miles and subjected him to humiliation by threats of arrest.¹⁶ The act of an engineer in disregarding a signal to stop at the station will not be held willful or wanton in the absence of proof that he saw and understood the signal to be one requiring him to stop.¹⁷

§ 7180. **Wrongful Ejection of Passenger.**¹⁸

§ 7182. **Failure to Stop Trains.**¹⁹

¹³ *Vassau v. Madison Elec. R. Co.*, 106 Wis. 301; s. c. 82 N. W. Rep. 152.

¹⁴ That such damages are recoverable where the act of the carrier's servant was willful, malicious or wanton, see: *Chicago U. T. Co. v. Lauth*, 216 Ill. 176; s. c. 74 N. E. Rep. 738; *Northern Cent. R. Co. v. Newman*, 98 Md. 507; s. c. 56 Atl. Rep. 973 (not recoverable for efforts of trainman to collect for carriage of package carried by passenger where rule of company required payment of such charges, and exemplary damages were sought on the ground that the official was dictatorial in his manner); *Miller v. Southern R. Co.*, 69 S. C. 116; s. c. 48 S. E. Rep. 99; *Illinois Cent. R. Co. v. Pearson*, 80 Miss. 26; s. c. 31 South. Rep. 435 (not recoverable for delays of train in the absence of willfulness and wantonness); *Fort v. Southern R.*, 64 S. C. 423; s. c. 42 S. E. Rep. 196 (not recoverable for depositing passenger short of his destination—no

proof of willfulness, wantonness or rudeness). That malicious act must have been ratified by the company, see: *Townsend v. Texas & C. R. Co.*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 302.

¹⁵ *Artherholt v. Erie Electric Motor Co.*, 27 Pa. Super. Ct. 141; *McNamara v. St. Louis Transit Co.*, 182 Mo. 676; s. c. 81 S. W. Rep. 880.

¹⁶ *Mueller v. St. Louis Transit Co.*, 108 Mo. App. 325; s. c. 83 S. W. Rep. 270.

¹⁷ *Southern R. Co. v. Lanning*, 83 Miss. 161; s. c. 35 South. Rep. 417.

¹⁸ *Dagnall v. Southern R. Co.*, 69 S. C. 110; s. c. 48 S. E. Rep. 97 (properly allowed where ejection was wanton and willful).

¹⁹ An instruction that, if the act of defendant in refusing to stop a train at a station was done wrongfully and recklessly the plaintiff would be entitled to recover exemplary damages by way of punishment by adding to the compensatory damages a sufficient amount to pre-

§ 7183. Negligence in Connection with Boarding and Alighting from Cars.²⁰

§ 7186. Dishonor of Railroad Tickets.—It has been held that there was sufficient evidence to go to the jury on the question of exemplary damages where a passenger travelling on a limited ticket missed the connecting train at a junction and took the next train,—the limit on the ticket having expired in the meantime,—and the conductor, after a full explanation of the matter, collected fare from the passenger on threats of expulsion.²¹ In another case the same court has held that there was sufficient evidence to go to the jury on the question of exemplary damages for refusal to honor a ticket, where the evidence showed that the conductor knew that the railroad agent selling the ticket had made a mistake in the limit of the ticket, and notwithstanding this knowledge, he compelled the passenger to pay additional fare under a threat of expulsion.²²

§ 7193. Damages Limited to Proximate Result of Wrongful Act.²³—It is a rule without exception that the damages recoverable for an act of negligence are limited to those which are the natural and probable results of the wrongful act complained of,²⁴ and that this causal connection between the act and the injuries suffered must be shown to warrant a recovery.²⁵

§ 7195. Remote, Speculative or Conjectural Damages.²⁶—Thus a person whose injury caused dizziness cannot recover for injuries after-

vent the defendant from doing a like wrong to anybody else, was held not open to the objection that it authorized the award of compensatory damages on the failure of the plaintiff to prove the willfulness alleged: *Reeves v. Southern R. Co.*, 67 S. C. 515; s. c. 46 S. E. Rep. 543. The allowance of exemplary damages is proper in a case where a passenger through the willfulness or gross negligence of the conductor was carried past the place at which, when paying his fare, he told the conductor he wanted to get off: *Birmingham R. & Co. v. Nolan*, 134 Ala. 329; s. c. 32 South. Rep. 715.

²⁰ *Pickett v. Southern R. Co.*, 69 S. C. 445; s. c. 48 S. E. Rep. 466 (passenger boarding moving train on advice of ticket agent—carrier not liable).

²¹ *Myers v. Southern R. Co.*, 64 S. C. 491; s. c. 42 S. E. Rep. 598.

²² *Chiles v. Southern R.*, 69 S. C. 327; s. c. 48 S. E. Rep. 252.

²³ That recovery may be had for an effect of the defendant's negligence not immediately perceived, but showing itself later, see: *West Chicago St. R. Co. v. Dougherty*, 209 Ill. 241; s. c. 70 N. E. Rep. 586; aff'g s. c. 110 Ill. App. 204; *Wood v. New York & C. R. Co.*, 83 App. Div. (N. Y.) 604; s. c. 82 N. Y. Supp. 160; s. c. aff'd, 179 N. Y. 557; 71 N. E. Rep. 1142; *Muller v. Metropolitan St. R. Co.*, 77 App. Div. (N. Y.) 221; s. c. 78 N. Y. Supp. 1069; s. c. aff'd, 177 N. Y. 565; 69 N. E. Rep. 1127.

²⁴ *Enlow v. Hawkins*, 71 Kan. 633; s. c. 81 Pac. Rep. 189.

²⁵ *Costello v. New York City R. Co.*, 91 N. Y. Supp. 23.

²⁶ That speculative, remote, or contingent damages cannot be recovered, see: *Atchison & C. R. Co. v. Thomas*, 70 Kan. 409; s. c. 78 Pac. Rep. 861; *Swift & Co. v. Johnson*, 138 Fed. Rep. 867. An instruction that the jury may consider, in making up their verdict, the "probable"

ward suffered as a result of this dizziness.²⁷ So a person injured by a defective sidewalk and compelled to use crutches, can recover for his injury from the defective sidewalk but not for a later injury caused by the slipping of his crutch.²⁸ So where, as a result of an injury, a woman suffered a miscarriage, and some time thereafter had another miscarriage, it was held proper for the jury to consider the second miscarriage for the purpose of determining the extent of the injury, but not for the purpose of allowing specific damages for it.²⁹

§ 7196. Cases Where Damages have been held Remote or Speculative.³⁰

§ 7197. Examples of Damages not Remote or Speculative.³¹

§ 7200. The Doctrine in its Application to Injuries of Passengers.—The fact that an unreasonable delay in furnishing a ticket to a person for whom an order for the ticket had been bought would cause the purchaser anxiety, distress and mental suffering was held reasonably within the contemplation of the parties, so that the purchaser was entitled to recover the damages thus caused.³²

§ 7202. Loss of Profits.—It is clear that the wages or profits which a passenger claims he could have earned by securing employment at his destination cannot be recovered in an action against a carrier for breach of the contract of transportation, where he did not know what his occupation or business would be at the place of destination.³³ So loss of

amount of pain, loss of time, and amount of expense plaintiff would suffer and be subjected to in the future on account of her injuries, is not open to the objection that it authorizes the jury to give contingent and speculative damages resting on mere possibilities: *Gallamore v. Olympia*, 34 Wash. 379; s. c. 75 Pac. Rep. 978.

²⁷ *Snow v. New York & C. R. Co.*, 185 Mass. 321; s. c. 70 N. E. Rep. 205.

²⁸ *Vander Velde v. Leroy*, 140 Mich. 359; s. c. 103 N. W. Rep. 812; 12 Det. Leg. N. 183. See also: *Wineberg v. Du Bois*, 209 Pa. 430; s. c. 58 Atl. Rep. 807.

²⁹ *Rapid Transit R. Co. v. Smith*, — Tex. —; s. c. 86 S. W. Rep. 322; rev'g s. c. 82 S. W. Rep. 788.

³⁰ *Lennox v. Interurban St. R. Co.*, 104 App. Div. (N. Y.) 110, 617; s. c. 93 N. Y. Supp. 230, 1137 (inability to bear children as a result of injuries not recoverable—speculative). So where land was injured by flood-

ing by reason of a city's negligence in failing to repair street curbing, damages consisting of the rental value of houses which the owner intended to erect on the land, and which he would have erected, had it not been for the flooding, were regarded as speculative and not recoverable: *Mahoney v. Kansas City*, 106 Mo. App. 39; s. c. 79 S. W. Rep. 1168.

³¹ See generally: *Homans v. Boston Elevated R. Co.*, 180 Mass. 456; s. c. 62 N. E. Rep. 737 (hysteria as result of injuries received in collision); *Moritz v. Interurban St. R. Co.*, 84 N. Y. Supp. 162 (passenger struck on chest by motorman with resulting weakness of heart).

³² *St. Louis Southwestern R. Co. v. Culver*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 628.

³³ *North American Transportation & Co. v. Morrison*, 178 U. S. 262; s. c. 20 Sup. Ct. Rep. 869; 44 L. Ed. 1061; rev'g s. c. 85 Fed. Rep. 802.

profits from a business cannot be recovered in an action for personal injuries where the earnings do not proceed entirely from labor of the injured person, but involve the use of capital and the labor of hired men.³⁴ And so, on the ground of speculativeness, a travelling man cannot recover his commissions on sales prevented by delay in the transportation and delivery of his sample trunks by a carrier.³⁵ In an action for the negligent delay of a telegraph company in delivering a telegram containing a bid by the sender for the erection of a building, the testimony of persons with whom the sender intended to make the contract has been held admissible to show that the sender's bid would have been accepted, and as bearing on the question of the loss of profits which could be ascertained.³⁶

§ 7204. **Past and Prospective Damages may be Recovered.**—An injured person suing for damages may recover damages not only for the suffering which he has endured before the accident, but also all damages resulting continuously from the injury up to the time of the trial and damages which it is reasonably certain he will suffer in the future.³⁷ An instruction authorizing the jury to consider the future effect of the injury on the plaintiff's ability "to work in his ordinary and former line of labor" has been held correctly to state the law, and not to exclude a consideration by the jury of what such person might be able to earn by other lines of employment.³⁸ Another instruction, that in determining the damages the jury should consider such future suffering and loss of health as they may believe the plaintiff would sustain, was held not open to the objection that it did not limit the jury to such future damages as was shown by the evidence, but allowed them to speculate.³⁹

§ 7205. **Reasonable Certainty Required for Prospective Damages.**⁴⁰

³⁴ *Jonas v. Interurban St. R. Co.*, 45 Misc. (N. Y.) 579; s. c. 90 N. Y. Supp. 1070.

³⁵ *Seaboard &c. R. v. Harris*, 121 Ga. 707; s. c. 49 S. E. Rep. 703.

³⁶ *Texas &c. Tel. &c. Co. v. Mackenzie*, 36 Tex. Civ. App. 178; s. c. 81 S. W. Rep. 581.

³⁷ *Newport Turnpike Co. v. Pirmann*, 82 S. W. Rep. 976; s. c. 26 Ky. L. Rep. 933; *Houston &c. R. Co. v. Batchler*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 902; *Norfolk R. &c. Co. v. Spratley*, 103 Va. 379; s. c. 49 S. E. Rep. 502.

³⁸ *Barnett &c. Co. v. Schlapka*, 208 Ill. 426; s. c. 70 N. E. Rep. 343; aff'g s. c. 110 Ill. App. 672.

³⁹ *Chicago &c. Electric R. Co. v.*

Ullrich, 213 Ill. 170; s. c. 72 N. E. Rep. 815.

⁴⁰ See generally: *Olson v. Chicago &c. R. Co.*, 94 Minn. 241; s. c. 102 N. W. Rep. 449; *Pentoney v. St. Louis Transit Co.*, 108 Mo. App. 681; s. c. 84 S. W. Rep. 140. Where the evidence showed that the plaintiff would be disabled in the future, and he testified that his foot still hurt him, and that he could not use it like the other foot, and this condition interfered with his getting employment, it was held proper to permit a recovery for loss of future earnings: *McCarthy v. St. Louis Transit Co.*, 108 Mo. App. 317; s. c. 83 S. W. Rep. 298.

§ 7209. No Recovery for Damages Enhanced by Negligence of Injured Person.—The law does not allow a recovery for damages which might have been prevented by reasonable efforts on the part of the person injured.⁴¹ Where there is testimony that some of the effects of the defendant's negligence could have been obviated at a small expense and with moderate effort by the injured person, it is the duty of the court to instruct that there can be no recovery for the damages that could have been so prevented.⁴² But the court should not charge that it was his duty to do some particular thing for that purpose, as this would invade the province of the jury.⁴³

§ 7210. Duty to Obtain Medical Attendance.—Here it is the rule that a person injured by the negligence of another is bound to use reasonable care to effect a speedy cure and must exercise reasonable care to employ physicians of ordinary skill, but the law does not make him an insurer of the skill of the physician employed nor does it require him to employ the highest medical skill available.⁴⁴

§ 7211. Damages Enhanced by Errors of Medical Attendants.—Where the injured person has exercised reasonable care in selecting a proper physician and in employing other means for recovery from injuries he is not prevented from recovering for the whole injury by the fact that the physician employed by him makes a mistake in the treatment, or that the means employed fails to effect a cure. The injury resulting from the mistake of the physician is regarded as part of the immediate and direct damage resulting from the original injury.⁴⁵

§ 7215. Contributory Negligence of Injured Person.⁴⁶

⁴¹ *Atchison & C. R. Co. v. Jones*, 110 Ill. App. 626. An instruction that it was the duty of an injured employé to submit to all treatment that a reasonably prudent person would have submitted to in order to improve his condition, and that his employer was liable for no damages which might have been prevented by reasonable care, was held not open to the objection that it authorized the inference that as a prudent man the employé might have postponed recovery from his injury to recovery of damages: *Texas & C. R. Co. v. Behymer*, 189 U. S. 468; s. c. 23 Sup. Ct. Rep. 622; 47 L. Ed. 905; aff'g s. c. 112 Fed. Rep. 35; 50 C. C. A. 106.

⁴² *Bennett v. Mt. Vernon*, 124 Iowa 537; s. c. 100 N. W. Rep. 349.

⁴³ *Southern R. Co. v. Cunningham*, 123 Ga. 90; s. c. 50 S. E. Rep. 979.

⁴⁴ *Chicago City R. Co. v. Saxby*, 213 Ill. 274; s. c. 72 N. E. Rep. 755; 68 L. R. A. 164.

⁴⁵ *Chicago City R. Co. v. Cooney*, 95 Ill. App. 471; s. c. aff'd, 196 Ill. 466; s. c. 63 N. E. Rep. 1029; *Joliet v. Le Pla*, 109 Ill. App. 336; *Chicago & C. R. Co. v. Burrigide*, 107 Ill. App. 23; *Seeton v. Dunbarton*, 72 N. H. 269; s. c. 59 Atl. Rep. 944; aff'g s. c. 72 N. H. 269; 56 Atl. Rep. 197.

⁴⁶ Under the Tennessee statute making a railroad company liable for all damages resulting from a collision where a lookout on a locomotive is not maintained the contributory negligence of an injured person goes only in mitigation of the damages: *Cincinnati & C. R. Co. v. Davis*, 127 Fed. Rep. 933; s. c. 62 C. C. A. 565. The negligence of an injured person, insufficient to defeat

§ 7216. Reduction of Damages by Insurance.⁴⁷

§ 7217. Charitable Subscriptions and Wages Paid.—It is very clear that a railroad company negligently injuring a mail clerk cannot urge by way of mitigation of the damages the fact that the government paid the clerk during his disability, as a gratuity, a sum equal to the wages he would have earned, as the purpose of the government was to assist the injured person and not to aid the person responsible for his injuries.⁴⁸

§ 7218. Prior Condition of Injured Person.⁴⁹—It has been held that an injured person who suffers without negligence on his part a second injury, which is more serious than it would have been had it not been for the first injury, may recover from the person responsible for the first injury the increased damages resulting from the second injury. The additional injury in reality is a result of the first injury.⁵⁰

§ 7220. Ejection of Passengers.—Generally speaking, the compensatory damages which may be recovered from the carrier for the wrongful ejection of a passenger are not subject to mitigation, nor is the liability of the carrier for such damages defeated by proof that the act which caused the injury was provoked or induced by abusive lan-

his recovery by reason of its remoteness, cannot be looked to in mitigation of damages: *Rice v. Crescent City R. Co.*, 51 La. 108; s. c. 24 South. Rep. 791. An instruction permitting the jury, in its discretion, to consider plaintiff's contributory negligence in mitigation of damages, in case such negligence was the remote cause of the accident, was erroneous, since it was the jury's duty to consider the contributory negligence of the plaintiff as a matter of law: *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712; s. c. 81 S. W. Rep. 374.

⁴⁷ That the damages may not be reduced by insurance carried by the injured person, see: *Consolidated Coal Co. v. Shepherd*, 112 Ill. App. 458; *Missouri & C. R. Co. v. Flood*, 35 Tex. Civ. App. 197; s. c. 79 S. W. Rep. 1106. Where a bill of lading limited the liability of the carrier, in case of loss or damage, to the value of the goods at the time and place of shipment, a further provision that he should have the benefit of any insurance effected by the owner is valid only as to such insurance, or so much of the insurance as represents the goods, and the value for which, in case of loss,

the carrier is liable; and he cannot claim the benefit of insurance covering the increased value of the goods at the port of destination, which the owner had the right to effect for his own protection: *Pennsylvania R. Co. v. Burr*, 130 Fed. Rep. 847; s. c. 65 C. C. A. 331.

⁴⁸ *Nashville & C. R. v. Miller*, 120 Ga. 453; s. c. 47 S. E. Rep. 959. See also: *International & C. R. Co. v. Haddox*, 36 Tex. Civ. App. 385 (wages while incapacitated not to be deducted).

⁴⁹ That the injured person may recover for injuries aggravating an existing physical condition, see: *Basham v. Hammond Packing Co.*, 107 Mo. App. 542; s. c. 81 S. W. Rep. 1227; *Chicago City R. Co. v. Saxby*, 213 Ill. 274; s. c. 72 N. E. Rep. 755; 68 L. R. A. 164; *Strode v. St. Louis Transit Co. (Mo.)*, 87 S. W. Rep. 976; *Delaplaine v. Kansas City*, 109 Mo. App. 107; s. c. 83 S. W. Rep. 71. But see where injuries are entirely attributable to previous disease or dissipation: *Ford v. Kansas City*, 181 Mo. 137; s. c. 79 S. W. Rep. 923.

⁵⁰ *Conner v. Nevada*, 188 Mo. 148; s. c. 86 S. W. Rep. 256. But see *ante*, § 7195.

guage used by the plaintiff to the agent of the carrier.⁵¹ Such words of provocation may, however, be considered in mitigation of the exemplary damages claimed, but not of the compensatory damages.⁵²

§ 7222. **Character of the Injured Person.**—The damages in actions for personal injuries being limited to compensation for the damages suffered, evidence as to the character of the injured person is clearly outside the issue.⁵³ But in a case of an injury to a minor, where the inquiry involves the question of his future earnings dependent on his adaptability for particular lines of work, evidence that he is obedient, industrious, sober and economical may be received as bearing on that question only.⁵⁴

§ 7229. **Permanent and Temporary Injuries to Land.**⁵⁵

§ 7230. **Failure of Excavator to Protect Foundation of Adjoining Building.**⁵⁶

§ 7232. **Flooding Lands.**⁵⁷

⁵¹ Mahoning Valley R. Co. v. De Pascale, 70 Ohio St. 179; s. c. 71 N. E. Rep. 633. But see Houston & Co. v. Batchler, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 902.

⁵² Mahoning Valley R. Co. v. De Pascale, 70 Ohio St. 179; s. c. 71 N. E. Rep. 633.

⁵³ Hunter v. Durand, 137 Mich. 53; s. c. 100 N. W. Rep. 191; 11 Det. Leg. N. 188; St. Louis & Co. R. Co. v. Smith, 34 Tex. Civ. App. 612; s. c. 79 S. W. Rep. 340; Wright v. Kansas City, 187 Mo. 678; s. c. 86 S. W. Rep. 452 (immorality of female plaintiff).

⁵⁴ Cameron Mill & Co. v. Anderson, 98 Tex. 156; s. c. 81 S. W. Rep. 282; aff'g s. c. 78 S. W. Rep. 8.

⁵⁵ Where the plaintiff, in an action against an adjoining land owner for damages for permitting noxious weeds to grow on his land, asks merely for a recovery of the expense which he would be called upon to pay in removing the weeds sown on his land, he cannot recover on this ground until the expense has been actually incurred and the amount definitely ascertained: Harndon v. Stultz, 124 Iowa 734; s. c. 100 N. W. Rep. 851. It is essential to a recovery for injuries to crops, and for permanent injury to land on which the crops were raised, from the pollution of waters flowing through the land, that it should be distinctly alleged and proved when the perma-

nent injury took place, how much of the land was permanently injured, and the annual injury to crops prior to that date: Watson v. Colusa-Parrot Mining & Co., 31 Mont. 513; s. c. 79 Pac. Rep. 14. Where damages are sought for the destruction of an oil well by the explosion of a torpedo, the jury may properly take into consideration in estimating the damages, that the well in question was run as one of a system of small wells, and also that the usual and ordinary result of shooting wells in that particular field, which had never been shot before, was to increase the production, and that this quality increased the market value of such wells: Donnan v. Pennsylvania Torpedo Co., 26 Pa. Super. Ct. 324. The damages recoverable for the subsidence of land caused by the removal of underlying coal is confined to the damages which accrue prior to the commencement of the action: Catlin Coal Co. v. Lloyd, 109 Ill. App. 122.

⁵⁶ The measure of damages for an injury to a building due to an excavation on adjoining land, is its permanent depreciation in value: Gerst v. St. Louis, 185 Mo. 191; s. c. 84 S. W. Rep. 34.

⁵⁷ The measure of damages for flooding lands is the depreciation in value of the property due to the negligent act, and is determined by

§ 7235. **Obstruction of Highway.**—Where the obstruction to a public highway could have been removed by the party complaining, at a trifling outlay, such cost is the measure of his damages.⁵⁸

§ 7236. **Destruction of Growing Crops.**⁵⁹—Other courts hold that the measure of damages for the total destruction, or nearly total destruction, of growing crops which would, to a reasonable certainty, have matured except for the wrongful act complained of, is the value of the probable yield of the crops under proper cultivation when matured and ready for market, less the estimated expense of producing, harvesting and marketing them, and the value of any portion of the crop that might have been saved by the diligence of the owner.⁶⁰

§ 7237. **Destruction of Grass and Hay.**⁶¹—One court has declared the measure of damages for the destruction of a meadow by fire to be the cost of restoring it to its former condition, and its rental value as such until it is restored.⁶²

finding the difference between the value of the property immediately before and its value immediately after the injury: *Mahoney v. Kansas City*, 106 Mo. App. 39; s. c. 79 S. W. Rep. 1168; *Houston v. Reichardt & Schule*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 74. Where damages were sought for injuries to willow land by reason of its negligent flooding with salt water from a factory, it appearing that the plant was perennial, it was held that the measure of damages, if the willows were actually destroyed with the roots when the land was overflowed, is the difference in the value of the land with and without the roots, and the plaintiff cannot recover for the loss of the several willow crops during four years thereafter: *Black v. Highland Solar Salt Co.*, 98 App. Div. (N. Y.) 409; s. c. 90 N. Y. Supp. 338. The fact that flooded lands have never been platted for building lots, though available for that purpose, has been held not to render evidence of its probable use for that purpose as a criterion of damages inadmissible: *McGroarty v. Lehigh Valley Coal Co.*, 212 Pa. 53; s. c. 61 Atl. Rep. 570.

⁵⁸ *Mellick v. Pennsylvania R. Co.*, 203 Pa. 457; s. c. 53 Atl. Rep. 340.

⁵⁹ That the measure of damages is the value of the crops in the condition they were in at the time of their injury or destruction, and not the market value at the time of maturity, see: *Lester v. Highland Boy*

Gold Min. Co., 27 Utah 470; s. c. 76 Pac. Rep. 341.

⁶⁰ *Candler v. Washoe Lake Reservoir & Co.*, — Nev. —; s. c. 80 Pac. Rep. 751; 82 Pac. Rep. 458; *San Antonio & R. Co. v. Kiersey* (Tex. Civ. App.), 81 S. W. Rep. 1045.

⁶¹ That the damages for the destruction of grass and turf is the value of the grass destroyed together with the difference in the value of the land immediately before and after the fire, see: *Toledo & R. Co. v. Fenstermaker*, 163 Ind. 534; s. c. 72 N. E. Rep. 561; *Texas & R. Co. v. Prude*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 1046; *Texas & P. R. Co. v. Rice*, 24 Tex. Civ. App. 374; s. c. 59 S. W. Rep. 833. Where the grass destroyed was especially valuable for grazing cattle, and there was no evidence of the market value of the grass, the jury had a right to take into consideration its value for the purposes of its use to the owner at the time of its destruction: *San Antonio & R. Co. v. Stone* (Tex. Civ. App.), 60 S. W. Rep. 461. Where a passing locomotive set fire to grass on ground part of which was owned by defendant and the rest leased, evidence of injury to the turf was properly received as affecting the amount of the next year's crop of grass: *San Antonio & R. Co. v. Stone* (Tex. Civ. App.), 60 S. W. Rep. 461.

⁶² *Bradley v. Iowa Cent. R. Co.*,

§ 7238. **Destruction of Trees.**—The measure of damages for injury to wood land by fire is the injury to the soil and the standing wood, though the owner had given a license to a third person to cut and remove the timber.⁶³ In an action for the burning of trees the defendant may show other available uses for the timber charred but not destroyed.⁶⁴

§ 7240. **Negligent Destruction of Buildings and Contents.**⁶⁵—Though the cost of building new houses of the kind burned is not the criterion by which to measure the damages caused by their destruction, yet evidence of this cost is sometimes received as tending to show the value of the buildings at the time of the fire.⁶⁶ On this ground it has been held proper to admit in evidence the plans under which the house was constructed, where they are shown to be correct.⁶⁷

§ 7243. **Injuries to Vehicle.**⁶⁸

§ 7246. **Damages from the Death or Injury of Domestic Animals.**⁶⁹—On the question of the value of the animal at the time of the injury, the plaintiff may show its adaptability for certain purposes.⁷⁰ It has been held in a case where a horse was temporarily disabled and permanently injured by the negligence of another, that the measure of damages included the reasonable hire of another animal while the disability continued, together with a sum representing the diminution of the market value of the animal due to the permanent injury.⁷¹

111 Iowa 562; s. c. 82 N. W. Rep. 996.

⁶³ Clarke v. New York &c. R. Co., 26 R. I. 59; s. c. 58 Atl. Rep. 245.

⁶⁴ Spink v. New York &c. R. Co., 26 R. I. 115; s. c. 58 Atl. Rep. 499.

⁶⁵ That the measure of damages is the difference between the value of the land before and after the destruction of the building, see: Baltimore &c. R. Co. v. Perryman, 95 Ill. App. 199.

⁶⁶ Alabama &c. R. Co. v. Johnston, 128 Ala. 283; s. c. 29 South. Rep. 771.

⁶⁷ Alabama &c. R. Co. v. Johnston, 128 Ala. 283; s. c. 29 South. Rep. 771.

⁶⁸ That plaintiff must show necessity of repairs and reasonableness of cost thereof, see: Reid v. New York R. Co., 93 N. Y. Supp. 533.

⁶⁹ That the measure of damages is the value of the animal at the time of the accident, see: Atwood v. Boston Forwarding &c. Co., 185 Mass. 557; s. c. 71 N. E. Rep. 72. That the owner may recover amount ex-

pendent in *bona fide* attempt to effect a cure, see: Atwood v. Boston Forwarding &c. Co., 185 Mass. 557; s. c. 71 N. E. Rep. 72. That the measure of damages for injuries not resulting in death is the difference in value before and after the accident, see: Chicago &c. R. Co. v. Willard, 111 Ill. App. 225. Where some of the animals were killed and some were injured testimony as to the value of the animals killed and injured without separation is too indefinite to base a judgment upon: Carman v. Montana Cent. R. Co., 32 Mont. 137; s. c. 79 Pac. Rep. 690.

⁷⁰ Campbell v. Iowa Cent. R. Co., 124 Iowa 248; s. c. 99 N. W. Rep. 1061 (brood mare).

⁷¹ Telfair Co. v. Webb, 119 Ga. 916; s. c. 47 S. E. Rep. 218. Where, in an action against a street railway company for injuries to plaintiff's horses, an instruction as to the right to recover for the loss of hire during the period the horses were idle because of the injury stated a correct principle, it was harmful to de-

§ 7249. **Injuries to Vessels.**—The measure of damages for the sinking of a vessel, resulting in a total loss, is the value of the vessel and interest, together with the necessary expense of raising her to determine whether she can be repaired advantageously, and in addition, the cost of removing her when sunk in a place rendering her an obstruction to navigation. If the vessel is not a total loss, then the measure of damages is the reasonable expense of raising and repairing her to an extent sufficient to put her in as good condition as she was before the collision. The burden is on the owner, in either case, to prove the extent of his loss.⁷² A vessel injured in a collision may recover the expenses of a new rating made necessary by the accident, and dockage expenses and the wages of a watchman during detention for the repairs,⁷³ but not the vessel's probable earnings on a voyage voluntarily abandoned because of the repairs, in order to be ready to enter on another charter previously made.⁷⁴ Demurrage is also a proper item.⁷⁵ In the case of injuries to a foreign vessel of steel construction, it was held proper to allow for the expenses of the ship's agent in drawing up contracts, holding consultations, and other services in connection with the repairs, and commissions for disbursing the amount of the repair bills.⁷⁶

§ 7255. **Damages for Injuries by Carrier to Subject of Shipment.**⁷⁷—It is another statement of the rule of the principal section to say that the measure of damages for injuries to the subject of the shipment is the difference in the market value of the property at the point of destination in an undamaged condition and the highest realizable value of the property as actually delivered at such point.⁷⁸ The

fendant unless it also charged that the jury could not in any event allow more for the injury and loss of service than the sound value of the animals at the time of the injury: *Georgia R. & Co. v. Wallace & Co.*, 122 Ga. 547; s. c. 50 S. E. Rep. 478.

⁷² *The Reno*, 134 Fed. Rep. 555; s. c. 67 C. C. A. 479 (the expense of restoring the vessel may not exceed her value when sunk).

⁷³ *The Sequoia*, 132 Fed. Rep. 625.

⁷⁴ *The Sequoia*, 132 Fed. Rep. 625.

⁷⁵ *The Cumberland*, 135 Fed. Rep. 234.

⁷⁶ *The Dorchester*, 134 Fed. Rep. 564.

⁷⁷ That measure is determined by value at place of destination, see: *St. Louis & C. R. Co. v. Marshall*, 74 Ark. 597; s. c. 86 S. W. Rep. 802 (even a contract designating an

other point is void unless supported by a consideration); *Gulf & C. R. Co. v. Roberts*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 479; *Missouri & C. R. Co. v. C. H. Rines & Co.*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 1092; *St. Louis & C. R. Co. v. Burns* (Tex. Civ. App.), 80 S. W. Rep. 104; *St. Louis & C. R. Co. v. Honea*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 267; *Texas & C. R. Co. v. Dishman & Tribble*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 319; *Texas & C. R. Co. v. White*, 35 Tex. Civ. App. 521; s. c. 80 S. W. Rep. 641; *Texas & C. R. Co. v. Tracy*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 833.

⁷⁸ *San Antonio & C. R. Co. v. Dolan*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 302. See also *Texas & C. R. Co. v. Snyder*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 1041; *St. Louis & C. R. Co. v. Henry* (Tex. Civ. App.), 81

shipper of live stock need not hold and feed them, but may dispose of them at once, and sue for the difference in their market value and what it would have been with proper transportation.⁷⁹ In the case of the loss or destruction of wearing apparel transported as baggage the jury are to consider their value as that of their condition at the time of the accident, and not necessarily the cost price of the articles.⁸⁰ In the case of the loss of goods, interest may be allowed from the time the goods should have reached their destination.⁸¹

§ 7256. **Damages for Delay of Carrier.**⁸²—The shipper of live stock is entitled to recover on the basis of the value of the stock at destination when they should have arrived, though they were not intended for immediate sale but for feeding.⁸³ The shipper may recover what he paid for extra feed because of the delay in addition to the difference between their value in the condition in which they arrived and the condition in which they should have arrived.⁸⁴ For delay in the delivery of household goods, the owner is entitled to recover the reasonable value of the use of the property during the time of the delay.⁸⁵ Special damages for delay in transportation of freight are not recoverable unless the carrier had notice before or at the time the contract of shipment was entered into of the special circumstances rendering prompt transportation necessary.⁸⁶ Thus it was held that a consignee of ice

S. W. Rep. 334; Atchison &c. R. Co. v. A. S. Veale & Co., — Tex. Civ. App. —; s. c. 87 S. W. Rep. 202.

⁷⁹ St. Louis &c. R. Co. v. Hunt (Tex. Civ. App.), 81 S. W. Rep. 322.

⁸⁰ Walsh v. New York City R. Co., 93 N. Y. Supp. 552; Brooke v. Cunard S. S. Co., 93 N. Y. Supp. 369.

⁸¹ Chesapeake &c. R. Co. v. F. W. Stock & Sons, 104 Va. 97; s. c. 51 S. E. Rep. 161.

⁸² That the measure of damages for delay of carrier in the transportation and delivery of goods is the difference in the value of the goods at the time and place they ought to have been delivered and the time of their actual delivery, see: G. S. Roth Clothing Co. v. Maine S. S. Co., 44 Misc. (N. Y.) 237; s. c. 88 N. Y. Supp. 987; R. A. Lee & Co. v. St. Louis &c. R. Co., 136 N. C. 533; s. c. 48 S. E. Rep. 809; Chicago &c. R. Co. v. Halsell, 35 Tex. Civ. App. 126; s. c. 81 S. W. Rep. 1241; Chicago &c. R. Co. v. C. C. Mill Elevator & Light Co., — Tex. Civ. App. —; s. c. 87 S. W. Rep. 753; Gulf &c. R. Co. v. Beattie, — Tex. Civ. App. —;

s. c. 88 S. W. Rep. 367; Houston &c. R. Co. v. Foster, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 44; Missouri &c. R. Co. v. Allen, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 168; Missouri &c. R. Co. v. Jarrell, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 632; St. Louis &c. R. v. Burns (Tex. Civ. App.), 80 S. W. Rep. 104; St. Louis &c. R. Co. v. Gunter, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 938; Texas &c. R. Co. v. Stephens, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 933; Texas Cent. R. Co. v. Miller, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 499; Texas &c. R. Co. v. Sherrod (Tex. Civ. App.), 87 S. W. Rep. 363; s. c. aff'd, — Tex. —; 89 S. W. Rep. 956.

⁸³ Missouri &c. R. Co. v. Kyser & Sutherland, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 389.

⁸⁴ Hendrix v. Wabash R. Co., 107 Mo. App. 127; s. c. 80 S. W. Rep. 970.

⁸⁵ Missouri &c. R. Co. v. Clifton (Tex. Civ. App.), 80 S. W. Rep. 386.

⁸⁶ Crutcher v. Choctaw &c. R. Co., 74 Ark. 358; s. c. 85 S. W. Rep. 770; American Exp. Co. v. Jennings, 86

could not recover for the loss of fish for the packing of which it was intended to use the ice, in the absence of any evidence that the carrier knew or should have known that the ice was intended for that purpose.⁸⁷

§ 7259. **Duty to Minimize Damages.**—It is plainly the duty of the shipper of stock injured in transit to exercise reasonable care to minimize the damages, and hence he is entitled to recover the value of time and medicine used for the relief of his animals.⁸⁸ In a case where the carrier failed to perform a contract to furnish cars to transport certain cattle as agreed, it was held that the shipper was not bound to arrange with another railroad company to transport the cattle over the defendant's road for a part of the distance in order to reduce the damages.⁸⁹

§ 7261. **Interest on Damages.**⁹⁰

§ 7270. **Permanent Injuries—Life-Tables.**⁹¹

Miss. 329; s. c. 38 South. Rep. 374; *Brown v. Weir*, 95 App. Div. (N. Y.) 78; s. c. 88 N. Y. Supp. 479; *Trawick v. Southern R. Co.*, 71 S. C. 82; s. c. 50 S. E. Rep. 549; *Chicago & C. R. Co. v. C. C. Mill Elevator & Light Co.*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 753; *Choctaw & C. R. Co. v. Bourland*, — Tex. Civ. App. —; s. c. 87 S. W. 173; *Daube & Kapp v. Chicago & C. R. Co.*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 797; *Missouri & C. R. Co. v. Allen*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 168.

⁸⁷ *Lewark v. Norfolk & C. R. Co.*, 137 N. C. 383; s. c. 49 S. E. Rep. 882.

⁸⁸ *Missouri & C. R. Co. v. Allen*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 168.

⁸⁹ *Pecos River R. Co. v. Latham*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 392.

⁹⁰ The judgment in an action for simple negligence should not include interest as such: *Missouri & C. Tel. Co. v. Vandervort*, 71 Kan. 101; s. c. 79 Pac. Rep. 1068. A shipper recovering judgment for injuries to a consignment is not entitled to interest on the amount recovered from the date of the injury to the date of the judgment: *Gulf & C. R. Co. v. Jackson & Edwards*, — Tex. —; s. c. 89 S. W. Rep. 968; rev'g s. c. 86 S. W. Rep. 47. The interest allowed in an action for damages to a shipment of cattle is al-

lowed as damages and not as interest: *St. Louis & C. R. Co. v. Dolan*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 393. The jury in an action for damages for destruction of property by fire set out by a railroad company have an equitable power to allow interest on the amount of loss as found by them: *Louisville & C. R. Co. v. Fort*, 112 Tenn. 432; s. c. 80 S. W. Rep. 429.

⁹¹ *Chicago & C. R. Co. v. Filler*, 195 Ill. 9; s. c. 62 N. E. Rep. 919 (instruction as to permanency proper where evidence showed that injury, although not serious, after six months appeared to be such that the plaintiff would probably never fully recover); *Ballard v. Kansas City*, 110 Mo. App. 391; s. c. 86 S. W. Rep. 479 (facts in case of injury to collar bone sufficient to raise issue of permanency of the injury). The jury should consider only such testimony on the subject of the permanency of the injuries as shows that there is a reasonable certainty that the injury is of that character: *Pittsburgh & C. R. Co. v. Moore*, 110 Ill. App. 304. Where the evidence in an action for injuries to a young woman showed that the day for her marriage had been set and preparations were at the time of the accident being made therefor and that after her injury the marriage was indefinitely postponed because of these injuries which were permanent it was held that this evidence

§ 7271. **Disfigurement and Deformity.**⁹²—The loss of child-bearing power is an element of damage for the consideration of the jury in an action for personal injuries sustained by a woman, when such loss is a probable result of the negligent act.⁹³

§ 7273. **Poverty of Plaintiff and Wealth of Defendant.**⁹⁴

§ 7275a. **Indemnity Insurance.**—The fact that the defendant carried liability insurance is not material to any issue before the jury in a personal injury case and cannot aid the jury, and admission of evidence of this fact is generally regarded as prejudicial error.⁹⁵

was sufficiently definite to warrant a recovery for postponement of the marriage: *Remey v. Detroit United R. Co.*, 141 Mich. 116; s. c. 104 N. W. Rep. 420; 12 Det. Leg. N. 368. Mortality tables are admissible only where the evidence shows a permanent impairment (*Howell v. Lansing City Electric R. Co.*, 136 Mich. 432; s. c. 99 N. W. Rep. 406; 11 Det. Leg. N. 82; *Hyland v. Southern Bell Tel. & Co.*, 70 S. C. 315; s. c. 49 S. E. Rep. 879; *International & C. R. Co. v. Reeves*, 35 Tex. Civ. App. 162; s. c. 79 S. W. Rep. 1099; *Northern Texas Const. Co. v. Crawford*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 223; *Virginia & C. R. Co. v. Bailey*, 103 Va. 205; s. c. 49 S. E. Rep. 33); but not otherwise (*MacGregor v. Rhode Island Co.*, 27 R. I. 85; s. c. 60 Atl. Rep. 761).

⁹² An instruction that the jury might take into consideration whether the plaintiff had been "marred physically" was held equivalent to allowing a recovery for disfigurement and was objectionable: *Cullen v. Higgins*, 216 Ill. 78; s. c. 74 N. E. Rep. 698.

⁹³ *Normile v. Wheeling Traction Co.*, 57 W. Va. 132; s. c. 49 S. E. Rep. 1030.

⁹⁴ These cases hold that evidence as to the worldly condition of the plaintiff is inadmissible: *National Biscuit Co. v. Nolan*, 138 Fed. Rep. 6 (size of family); *Davis v. Kornman*, 141 Ala. 479; s. c. 37 South. Rep. 789 (whether possessed of property); *St. Louis & C. R. Co. v. Adams*, 74 Ark. 326; s. c. 85 S. W. Rep. 768; 86 S. W. Rep. 287 (size of family); *Union Pac. R. Co. v. Hammerlund*, 70 Kan. 888; s. c. 79 Pac. Rep. 152 (whether married

man and father); *Maynard v. Oregon R. & C. Co.*, — Or. —; s. c. 78 Pac. Rep. 983 (number and ages of members of family); *International & C. R. Co. v. Goswick*, — Tex. —; s. c. 85 S. W. Rep. 785; aff'g s. c. 83 S. W. Rep. 423 (value of property). Evidence as to the occupation and compensation of the injured person and that he was unable to follow his occupation because of the accident does not fall within the principle which rejects evidence as to the worldly condition of the plaintiff: *McCarthy v. Philadelphia & C. R. Co.*, 211 Pa. 193; s. c. 60 Atl. Rep. 778. An instruction in an action for injuries caused by the negligent operation of an automobile that the jury in determining whether the defendant was exercising reasonable care could take into consideration "the situation and condition of the parties," was held not open to the objection that it authorized the jury to consider the wealth of the defendant and the poverty of the plaintiff in assessing the damages: *Christy v. Elliott*, 216 Ill. 31; s. c. 74 N. E. Rep. 1035. Evidence as to the wealth of the defendant is clearly irrelevant (*Bowe v. Bowe*, 26 Ohio Cir. Ct. R. 409); except in cases where the recovery of exemplary damages is justified (*Western Union Tel. Co. v. Cashman*, 132 Fed. Rep. 805; s. c. 65 C. A. 607; *King v. Hanson*, — N. D. —; s. c. 99 N. W. Rep. 1085; *Willet v. Johnson*, 13 Okl. 563; s. c. 76 Pac. Rep. 174).

⁹⁵ *Roche v. Llewellyn Ironworks Co.*, 140 Cal. 563; s. c. 74 Pac. Rep. 147; *Iverson v. McDonnell*, 36 Wash. 73; s. c. 78 Pac. Rep. 202.

§ 7276. **Physical Examination of Plaintiff to Determine Extent of his Injuries.**⁹⁶

§ 7278. **Evidence to Disprove Claim of Extent of Injury.**⁹⁷

§ 7279. **Susceptibility to Disease as Result of Injury may be Shown.**—Evidence of a physician that it was reasonably certain that a shock of the kind suffered by the plaintiff would cause a certain condition is not admissible, without evidence that it did so, where the predicted result would have taken place before the trial if at all.⁹⁸ It is the holding of one case that testimony of the injured person himself, in an action for being shot, that he was not as steady in his nerves as before he was shot, and lisped much more than before, was sufficient to go to the jury on the question of injury to his nervous system.⁹⁹

§ 7280a. **Danger of Surgical Operation Rendered Necessary by Injury.**—Evidence is admissible that an operation, made necessary by an injury, is one attended with great difficulty and danger and performed by comparatively few physicians.¹⁰⁰

§ 7281. **Instructions.**¹⁰¹—It has been held that an instruction was not open to the objection that it stated the right to recover too broadly

⁹⁶ These cases hold that the court cannot compel an injured person to submit to an examination at the instance of the defendant against his will: *Macon R. & Co. v. Vining*, 120 Ga. 511; s. c. 48 S. E. Rep. 232 (discretion of court refusing order not abused under the circumstances); *Houston & Co. R. Co. v. Anglin*, — Tex. —; s. c. 89 S. W. Rep. 966; rev'g s. c. 86 S. W. Rep. 785; *International & Co. R. Co. v. Butcher* (Tex. Civ. App.), 81 S. W. Rep. 819; *International & Co. R. Co. v. Gready*, 36 Tex. Civ. App. 536; s. c. 82 S. W. Rep. 1061; *St. Louis & Co. R. Co. v. Lindsey* (Tex. Civ. App.), 81 S. W. Rep. 87. In a State allowing an examination it is not an abuse of discretion by the court to overrule an application for such an examination where other examinations at the instance of the defendant had been made: *Helbig v. Grays Harbor Electric Co.*, 37 Wash. 130; s. c. 79 Pac. Rep. 612.

⁹⁷ In a case where the plaintiff testified that the injury had resulted in fainting fits which he had never before had, evidence was competent for the defendant that showed that

he was subject to these fits long before the accident under investigation: *Mullin v. Boston Elevated R. Co.*, 185 Mass. 522; s. c. 70 N. E. Rep. 1021.

⁹⁸ *Farnham v. Interurban St. R. Co.*, 94 N. Y. Supp. 364 (undue menstruation).

⁹⁹ *Howard v. Terminal R. Ass'n of St. Louis*, 110 Mo. App. 574; s. c. 85 S. W. Rep. 608.

¹⁰⁰ *Normile v. Wheeling Traction Co.*, 57 W. Va. 132; s. c. 49 S. E. Rep. 1030.

¹⁰¹ The word "destruction" in an instruction allowing a recovery for "a permanent impairment and destruction of the nervous system and the functions thereof" is used not in the sense of a total loss of nervous force, but as meaning an enfeeblement or impairment of the nervous system of a permanent nature: *Fishburn v. Burlington & Co. R. Co.*, 127 Iowa 483; s. c. 103 N. W. Rep. 481. The use of the words "reasonably apparent," instead of "reasonably certain," in an instruction relative to recovery for future pain and suffering, is not error; "apparent," as thus used, being the fair equivalent

which told the jury that if they found for the plaintiff, they should, in estimating the plaintiff's damages, consider the character and extent of her injuries, mental and physical, pain and suffering endured by her in consequence thereof, their permanency, if shown by the evidence to be permanent, and any amount shown by the evidence to have been expended by her or contracted by her for medical and surgical attention, not exceeding the sum specified.¹⁰² An instruction telling the jury that they could not award more than the amount demanded in the complaint, and naming this amount, is not erroneous on the ground that it makes the amount demanded unduly prominent.¹⁰³

§ 7286. **Loss of Time a Proper Element of Damages.**¹⁰⁴—These damages are recoverable, although at the time of the plaintiff's injury he was not actually engaged at his regular employment nor earning anything, where it appeared that since the injury he had sought employment, but because of injuries he was unable to work at his regular occupation.¹⁰⁵ Damages for loss of time and wages cannot be recovered where the injured person has retired from business, and during the time of his disability any services required of him were performed by others without compensation.¹⁰⁶

§ 7287. **Amount Depends on Nature of Employment or Business.**¹⁰⁷—The jury, in allowing damages, is not strictly limited to the particular calling in which the injured person was engaged at the time of

lent of "certain:" *Harrison v. Ayrshire*, 123 Iowa 528; s. c. 99 N. W. Rep. 132. A jury may properly be instructed to consider future suffering, where the evidence at the trial is conclusive that the plaintiff had not at that time recovered from his injuries: *Chicago & C. Electric R. Co. v. Ullrich*, 213 Ill. 170; s. c. 72 N. E. Rep. 815. An instruction in an action for injuries to a minor to allow him all damages naturally resulting from his injuries is not prejudicial, as permitting an award of damages for the loss of earning capacity during the minority of the child, where in the same instruction the jury are directed to bear in mind the fact that the plaintiff would not be entitled to his earnings until he came of age: *South Omaha v. Sutcliffe*, — Neb. —; s. c. 101 N. W. Rep. 997.

¹⁰² *Ashby v. Elsberry & N. H. Gravel Road Co.*, 111 Mo. App. 79; s. c. 85 S. W. Rep. 957.

¹⁰³ *Baltimore & C. R. Co. v. Cavanaugh*, 35 Ind. App. 32; s. c. 71 N. E. Rep. 239.

¹⁰⁴ That loss of time and wages is a proper element of damages, see: *Lake Shore & C. R. Co. v. Teeters*, — Ind. App. —; s. c. 74 N. E. Rep. 1014; *Clark v. Durham Traction Co.*, 138 N. C. 77; s. c. 50 S. E. Rep. 518.

¹⁰⁵ *Missouri & C. R. Co. v. Flood*, 35 Tex. Civ. App. 197; s. c. 79 S. W. Rep. 1106. See also *West Chicago St. R. Co. v. Dougherty*, 209 Ill. 241; s. c. 70 N. E. Rep. 586; aff'g s. c. 110 Ill. App. 204.

¹⁰⁶ *Shanahan v. St. Louis Transit Co.*, 109 Mo. App. 228; s. c. 83 S. W. Rep. 783.

¹⁰⁷ *Tullis v. McClary*, 128 Iowa 493; s. c. 104 N. W. Rep. 505; *Morrow v. Gaffney Mfg. Co.*, 70 S. C. 242; s. c. 49 S. E. Rep. 573 (wages of servants of plaintiff's class may be shown).

receiving the injuries or the wages he was then receiving, as such a rule would work injustice in cases where the plaintiff, trained for a particular line of work, was injured while engaged in some temporary employment.¹⁰⁸ It is the holding of one case that a minister cannot recover damages for hindrance in ministerial duties and loss of time from study and preparation for his work, resulting from an injury to his wife, where no pecuniary loss is shown; but he may recover the value of time necessarily lost in attendance upon his wife.¹⁰⁹

§ 7288. Employment of Substitute.¹¹⁰—Where it is sought to recover for the employment of a substitute while the plaintiff was incapacitated, both the necessity and the value of the substitute's services should be shown.¹¹¹

§ 7291. Averment and Proof of Loss of Time and Wages.—A physician injured by an act of negligence, incapacitating him for a time from his practice, may testify as to his earnings for a like period in the previous year.¹¹² In all cases it is incumbent upon the plaintiff to show the value of the time lost, and he cannot recover where there is entire failure of proof on this issue.¹¹³

§ 7294. Necessary that Injury should be Permanent to Warrant Allowance for Impairment of Capacity.¹¹⁴—Testimony of a physician that in all "likelihood" the injuries will be permanent is equivalent to

¹⁰⁸ *Dallas &c. R. Co. v. Hardy*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 1053; *Texarkana &c. R. Co. v. Toliver*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 375.

¹⁰⁹ *Dallas Consol. Electric St. R. Co. v. Ison*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 408. Evidence of the wages paid to the different employes working in the establishment where the plaintiff was employed at the time of receiving his injuries, or of a scale of wages there paid, is improperly admitted, in the absence of evidence showing what amount was paid to the plaintiff and the capacity in which he was employed: *Davis v. Kornman*, 141 Ala. 479; s. c. 37 South. Rep. 789.

¹¹⁰ *Moran v. New York City R. Co.*, 94 N. Y. Supp. 302 (evidence of employment of substitute proper). Testimony that after a wife was injured her husband kept hired help to do the work as long as he was able, and that afterwards he and the children did the work, was relevant, as corroborating her testimony that she was unable to do the work:

Denison &c. R. Co. v. Powell, 35 Tex. Civ. App. 454; s. c. 80 S. W. Rep. 1054. Evidence that plaintiff was compelled to put a man to work in his place, to do the work he had previously done, at a certain amount per week, was evidence bearing on the value of plaintiff's earning capacity: *Galveston City R. Co. v. Chapman*, 35 Tex. Civ. App. 551; s. c. 80 S. W. Rep. 856.

¹¹¹ *Costello v. New York City R. Co.*, 91 N. Y. Supp. 23.

¹¹² *Sluder v. St. Louis Transit Co.*, 189 Mo. 107; s. c. 88 S. W. Rep. 648.

¹¹³ *Pennsylvania Co. v. Scofield*, 121 Fed. Rep. 814; s. c. 58 C. C. A. 176; *Kane v. Metropolitan St. R. Co.*, 88 N. Y. Supp. 162.

¹¹⁴ That there can be no recovery for damages for impairment, unless the evidence shows a reasonable certainty that the injuries are permanent, see: *MacGregor v. Rhode Island Co.*, 27 R. I. 85; s. c. 60 Atl. Rep. 761; *San Antonio &c. R. Co. v. Lester*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 401.

a statement that there is a reasonable certainty that they will be permanent.¹¹⁵

§ 7295. Amount of Such Damages Difficult of Ascertainment.¹¹⁶

§ 7296. Fact of Present Payment to be Considered.—It is the holding of a carefully considered case in the Federal court that the pecuniary loss from a complete destruction of the plaintiff's earning power is to be theoretically estimated by the capital which, at a fair rate of interest, will produce a yearly sum equal to the average wages likely to be earned during the plaintiff's expectancy of life, less such sum as, at compound interest for the same period, will equal and offset such sum.¹¹⁷ In another case it is held that while present worth rather than the aggregate of future damage, should be estimated, yet, where no specific instruction as to present worth is asked, the jury may be directed as to the general basis on which the right to recover is founded, and then allowed to fix such sum as in their judgment is reasonable compensation for the injury.¹¹⁸

§ 7298. Comparison of Wages Before and After Injury as Indicating Extent of Impairment.¹¹⁹—The conclusion is clear that the injured person may not show the salary received by him for a period ending years before the happening of the injury for services in a different employment from that in which he was engaged when injured.¹²⁰

§ 7302. Personal Oversight and Superintendence of Business.—Generally speaking, proof of the earning power of an injured person may be shown by evidence of his age, his situation in life, his condition of health and habits of industry, and the profits derived from the management of his business, as distinct from profits arising from invested capital.¹²¹

§ 7303. Effect of Former Impairment.¹²²

¹¹⁵ *Ballard v. Kansas City*, 110 Mo. App. 391; s. c. 86 S. W. Rep. 479.

¹¹⁶ Evidence that the father of a boy earned two dollars a day was held admissible in one case on the presumption that the child on coming of age would follow his father's vocation: *Fishburn v. Burlington &c. R. Co.*, 127 Iowa 483; s. c. 103 N. W. Rep. 481.

¹¹⁷ *Peterson v. Roessler &c. Chemical Co.*, 131 Fed. Rep. 156.

¹¹⁸ *Hutcheis v. Cedar Rapids &c. R. Co.*, 128 Iowa 279; s. c. 103 N. W. Rep. 779.

¹¹⁹ The testimony of the plaintiff

as to his average weekly wages is not objectionable as being "speculative and remote:" *Tanzer v. New York City R. Co.*, 46 Misc. (N. Y.) 86; s. c. 91 N. Y. Supp. 334.

¹²⁰ *Chicago &c. Electric R. Co. v. Spence*, 213 Ill. 220; s. c. 72 N. E. Rep. 796.

¹²¹ *Simpson v. Pennsylvania R. Co.*, 210 Pa. 101; s. c. 59 Atl. Rep. 693.

¹²² *Hawkins v. Missouri &c. R. Co.*, 36 Tex. Civ. App. 633; s. c. 83 S. W. Rep. 52 (fact that the injured person was drawing a federal pension on the ground of physical disability admissible without being pleaded).

§ 7304. **Mental Impairment as Result of Injury may be Shown.**¹²³

§ 7307. **Extent of Loss must be Shown.**¹²⁴

§ 7308. **Evidence to Show whether Capacity for Labor has been Impaired.**—The plaintiff may be allowed to testify as to the extent that his ability to work has been impaired as a result of the injury.¹²⁵ Where he has a trade and his injury incapacitates him from following such trade he may show that he had no other trade, and was without education fitting him for professional or clerical work.¹²⁶ The injured person may also testify that since his injury he has been refused work in his employment, the purpose of such evidence being to show the kind of work he was unable to perform because of the injury and so tending to show the nature of his injury.¹²⁷ A married woman cannot recover for a diminished earning capacity, where there is no evidence that she ever did work outside her household duties, which is not within the terms of a statute giving her the wages of her own labor.¹²⁸ On the question of damages for the loss of an arm by a boy whose father is a farmer, the wages of ordinary farm labor in the neighborhood may be shown.¹²⁹ The earning capacity of a keeper of an established and fashionable boarding house may be proved by showing the net receipts therefrom during a given period prior to the injury.¹³⁰

§ 7309. **Mortality Tables as Evidence to Show Duration of Life of Injured Person.**—Mortality tables are not proper evidence unless there is some evidence as to the value of the injured person's services or his

¹²³ *Cashin v. New York & C. R. Co.*, 185 Mass. 543; s. c. 70 N. E. Rep. 930 (melancholia). A loss of memory and an impairment of the plaintiff's mental power is a proper element of damages in an action for personal injuries: *Nichols v. Oregon Short Line R. Co.*, 28 Utah 319; s. c. 78 Pac. Rep. 866.

¹²⁴ Testimony of a single witness that the injured person did not seem as "peart" after as before the accident was held insufficient to warrant a recovery for an alleged diminished earning capacity: *St. Louis & C. R. Co. v. Smith*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 943. In a Georgia personal injury case, where there was no evidence as to the plaintiff's earning capacity before the injury, it was held proper to instruct that there was no measure of damages except the enlight-

ened conscience of impartial jurors, guided by the facts and circumstances of the particular case: *Atlanta & C. R. Co. v. Gardner*, 122 Ga. 82; s. c. 49 S. E. Rep. 818.

¹²⁵ *Texas & C. R. Co. v. Watts* (Tex. Civ. App.), 81 S. W. Rep. 326.

¹²⁶ *Southern Kansas R. Co. v. Sage*, (Tex. Civ. App.), 80 S. W. Rep. 1038. See also *Beaudin v. Bay City*, 136 Mich. 333; s. c. 99 N. W. Rep. 285; 11 Det. Leg. N. 29.

¹²⁷ *Quigley v. Pennsylvania R. Co.*, 210 Pa. 162; s. c. 59 Atl. Rep. 958.

¹²⁸ *Kroner v. St. Louis Transit Co.*, 107 Mo. App. 41; s. c. 80 S. W. Rep. 915.

¹²⁹ *North Texas Const. Co. v. Bostick*, 98 Tex. 239; s. c. 83 S. W. Rep. 12; rev'g s. c. 80 S. W. Rep. 109.

¹³⁰ *Comstock v. Connecticut R. & Co.*, 77 Conn. 65; s. c. 58 Atl. Rep. 465.

capacity to earn money.¹³¹ These tables, though admissible in evidence, are not to be taken as facts in the case, but only as an aid in determining what might be the length of a particular life.¹³² Such tables are admissible for the purpose of proving a life expectancy, although they do not take into consideration the hazardous character of the occupation of the injured person.¹³³

§ 7310. Damages Recoverable by Parties Entitled Thereto—Children—Married Women.¹³⁴

§ 7315. Pain and Suffering a Proper Element.¹³⁵—Where damages are sought for injury to a brain, evidence is admissible to show the mental status of the injured person before the injury, and also continuously from and after the injury to the time of the trial.¹³⁶

§ 7317. Direct Evidence of Suffering Not Required.¹³⁷

¹³¹ *Atlanta &c. R. Co. v. Gardner*, 122 Ga. 82; s. c. 49 S. E. Rep. 818.

¹³² *Iseminger v. York Haven Water &c. Co.*, 209 Pa. 615; s. c. 59 Atl. Rep. 64.

¹³³ *International &c. R. Co. v. Brandon*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 272.

¹³⁴ A married woman, suing for personal injuries under an assignment to her by her husband of his right of action for damages for loss of services, can only recover the value of the services of which he had been or in the future might be deprived by reason of the injury: *Hutcheis v. Cedar Rapids &c. R. Co.*, 128 Iowa 279; s. c. 103 N. W. Rep. 779. A married woman given the right to sue for violation of her personal rights is entitled to recover for diminished ability to work and labor where she is engaged in business for herself, though she employs in this business the services of her husband: *Perrigo v. St. Louis*, 185 Mo. 274; s. c. 84 S. W. Rep. 30. A child cannot recover for diminished earning capacity during his minority as his services then belong to the parent who may recover for this element: *Porter v. Delaware &c. R. Co.*, 134 Fed. Rep. 155; *Gulf &c. R. Co. v. Grisom*, 36 Tex. Civ. App. 630; s. c. 82 S. W. Rep. 671.

¹³⁵ See generally: *Southern Pac. Co. v. Hetzer*, 135 Fed. Rep. 272; s. c. 68 C. C. A. 26; *Chicago v. Davies*, 110 Ill. App. 427; *Hill v. Union Ry.*

Co., 25 R. I. 565; s. c. 57 Atl. Rep. 374. The law does not presume that mental pain will result from an attack of chills and fever: *Houston &c. R. Co. v. Reasonover* (Tex. Civ. App.), 81 S. W. Rep. 329; *Houston &c. R. Co. v. Simpson* (Tex. Civ. App.), 81 S. W. Rep. 353. Testimony of plaintiff showing his conduct for some time subsequent to the date of the injury, giving the length of time he worked at his shop, when he went home, and why he did so, and the amount of pain and suffering he sustained during such time, was admissible as showing the effect of injuries sustained by him: *Missouri &c. R. Co. v. Moody*, 35 Tex. Civ. App. 46; s. c. 79 S. W. Rep. 856. Mental suffering, naturally attending physical pain, prolonged by failure of a physician to discover a serious dislocation of a patient's shoulder and fracture of an arm, when the dislocation and fracture could have been ascertained by the exercise of ordinary care, is a proper element of damage, in an action against the physician for malpractice: *Manser v. Collins*, 69 Kan. 290; s. c. 76 Pac. Rep. 851.

¹³⁶ *Chicago Union Traction Co. v. Lawrence*, 211 Ill. 373; s. c. 71 N. E. Rep. 1024; aff'g s. c. 113 Ill. App. 269.

¹³⁷ Where serious physical injury is shown, the jury may infer mental suffering without any direct proof thereof: *Houston &c. R. Co. v. Simpson* (Tex. Civ. App.), 81 S. W. Rep.

§ 7318. **Recovery may be had for Future Suffering.**¹³⁸—The allowance for future pain should be strictly confined to such suffering as is reasonably certain to result from the injuries, excluding all that is purely speculative, contingent or probable.¹³⁹ It is not necessary that this future pain should continue permanently.¹⁴⁰ There is authority that evidence showing an injury from which future pain and suffering will inevitably result warrants a court in submitting such future suffering as an element of damages, though no demand therefor is made in the complaint.¹⁴¹

§ 7320. **Mental Anguish.**¹⁴²—The law has laid down no fixed rule for the measure of damages for mental anguish apart from physical

353; *Galveston City R. Co. v. Chapman*, 35 Tex. Civ. App. 551; s. c. 80 S. W. Rep. 856.

¹³⁸ The plaintiff in an action for injuries is entitled to recover for such future pain of body or anguish of mind as will reasonably result from the injuries inflicted: *Chicago v. Davies*, 110 Ill. App. 427; *Cotant v. Boone Suburban R. Co.*, 125 Iowa 46; s. c. 99 N. W. Rep. 115; *Fuchs v. St. Louis Transit Co.*, 111 Mo. App. 574; s. c. 86 S. W. Rep. 458; *Schwend v. St. Louis Transit Co.*, 105 Mo. App. 534; s. c. 80 S. W. Rep. 40; *Hallum v. Omro*, 122 Wis. 337; s. c. 99 N. W. Rep. 1051.

¹³⁹ *Waddell v. Metropolitan St. R. Co.*, 113 Mo. App. 680; s. c. 88 S. W. Rep. 765; *Chicago & C. R. Co. v. Ullrich*, 213 Ill. 170; s. c. 72 N. E. Rep. 815.

¹⁴⁰ *Haxton v. Kansas City*, 190 Mo. 53; s. c. 88 S. W. Rep. 714.

¹⁴¹ *Gallamore v. Olympia*, 34 Wash. 379; s. c. 75 Pac. Rep. 978. See also *Jordan v. Cedar Rapids & C. R. Co.*, 124 Iowa 177; s. c. 99 N. W. Rep. 693; *Beattie v. Detroit*, 137 Mich. 319; s. c. 100 N. W. Rep. 574; 11 Det. Leg. N. 310; *Missouri & C. R. Co. v. Nesbit*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 891 (reasonably certain that future suffering would result from accident in which the plaintiff lost a portion of one limb and foot on other limb); *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415; s. c. 81 Pac. Rep. 869 (future suffering a reasonable certainty where hand of the plaintiff was mangled).

¹⁴² That damages for mental anguish may be recovered, see generally: *Nashville & C. R. v. Miller*,

120 Ga. 453; s. c. 47 S. E. Rep. 959; *O'Donnell v. St. Louis Transit Co.*, 107 Mo. App. 34; s. c. 80 S. W. Rep. 315 (ejection from street car); *Waechter v. St. Louis & C. R. R. Co.*, 113 Mo. App. 270; s. c. 88 S. W. Rep. 147; *Runyan v. Central R. Co.*, 65 N. J. L. 228; s. c. 47 Atl. Rep. 422 (indignity at being refused admission to car); *Gillespie v. Brooklyn Heights R. Co.*, 178 N. Y. 347; s. c. 70 N. E. Rep. 857; rev'g s. c. 81 N. Y. Supp. 1127 (humiliation due to insulting language of conductor recoverable but not injury to character); *Bowers v. Western Union Tel. Co.*, 135 N. C. 504; s. c. 47 S. E. Rep. 597; *Houston & C. R. Co. v. White* (Tex. Civ. App.), 61 S. W. Rep. 436 (recovery allowed though no direct evidence as to extent of damages); *International & C. R. Co. v. Anchonda* (Tex. Civ. App.), 75 S. W. Rep. 557; *Davis v. Tacoma R. & C. Co.*, 35 Wash. 203; s. c. 77 Pac. Rep. 209. In actions for personal injuries, the pain and suffering, for which compensation is allowed, is not confined to mere physical aches, but includes mental anguish, the sense of loss and burden, the inconvenience and the embarrassment resulting from the injury: *Rice v. Council Bluffs*, 124 Iowa 639; s. c. 100 N. W. Rep. 506. That these damages are recoverable only where physical injury is shown, see: *Cole v. Gray*, 70 Kan. 705; s. c. 79 Pac. Rep. 654; *Kansas City & C. R. Co. v. Dalton*, 65 Kan. 661; s. c. 70 Pac. Rep. 645; *Pullman Co. v. Kelly*, 86 Miss. 87; s. c. 38 South. Rep. 317; *Miller v. Baltimore & C. R. Co.*, 89 App. Div. (N. Y.) 457; s. c. 85 N. Y. Supp. 883; *Smith v. Wilmington*

suffering, and much must be left to the jury in considering this element under proper instructions.¹⁴³ The term does not cover "disappointment and regret,"¹⁴⁴ mortification and distress of mind due to contemplation of a crippled condition and its effect on the esteem of the injured person's fellows,¹⁴⁵ or distress resulting from a realization of a physical inability properly to care for those dependent on him for support and education.¹⁴⁶ The rule allowing these damages intends that the person to be charged therewith shall have some notice that this species of injury will result from his negligent act.¹⁴⁷

§ 7323. **Peril and Fright.**¹⁴⁸—In a case where a female passenger was carried beyond her station, and the train stopped near the next station, and she walked at night and without escort through the town to the house of a friend, it was held that she could not show that she was frightened by hearing loud voices of negro men who were walking behind her, unless it also appeared that the locality was one in which such occasion for fright was likely to occur, and that the carrier had notice of this fact.¹⁴⁹

§ 7327. **Expenditures Incurred for Medical Attendance a Proper Element of Damages.**¹⁵⁰

&c. R. Co., 130 N. C. 304; s. c. 41 S. E. Rep. 481. But see *contra*: Barnes v. Western Union Tel. Co., 27 Nev. 438; s. c. 76 Pac. Rep. 931; 65 L. R. A. 666; Davis v. Tacoma R. &c. Co., 35 Wash. 203; s. c. 77 Pac. Rep. 209; International &c. R. Co. v. Anchonda (Tex. Civ. App.), 68 S. W. Rep. 743.

¹⁴³ Powell v. Nevada &c. R., — Nev. —; s. c. 78 Pac. Rep. 978.

¹⁴⁴ Hancock v. Western Union Tel. Co., 137 N. C. 497; s. c. 49 S. E. Rep. 952.

¹⁴⁵ Southern Pac. Co. v. Hetzer, 135 Fed. Rep. 272; s. c. 68 C. C. A. 26.

¹⁴⁶ Maynard v. Oregon R. &c. Co., — Ore. —; s. c. 78 Pac. Rep. 983.

¹⁴⁷ International &c. R. Co. v. Anchonda (Tex. Civ. App.), 68 S. W. Rep. 743; International &c. R. Co. v. Sammon, 35 Tex. Civ. App. 96; s. c. 79 S. W. Rep. 854.

¹⁴⁸ That there can be no recovery for injuries due to fright unless accompanied by physical injury, see: Stewart v. Arkansas Southern R. Co., 112 La. 764; s. c. 36 South. Rep. 676; Howe v. Chicago &c. R. Co., 139 Mich. 638; s. c. 103 N. W. Rep. 185; 12 Det. Leg. N. 36 (recovery allowed for fright but not for humiliation caused by fall of plaintiff

into a privy vault due to collapse of floor); Fleming v. Lobel, — N. J. L. —; s. c. 59 Atl. Rep. 28; Lofink v. Interborough Rapid Transit Co., 102 App. Div. (N. Y.) 275; s. c. 92 N. Y. Supp. 386; Newton v. New York &c. R. Co., 106 App. Div. (N. Y.) 415; s. c. 94 N. Y. Supp. 825. Under a statute providing that in an action for death, caused by an injury complained of, damages for mental and physical pain suffered by deceased in consequence of the injury may be recovered, it has been held that the administrator of a person killed in a collision at a railroad crossing by reason of defendant's negligence in failing to slacken the speed of the train may recover for the fright or mental suffering of the deceased preceding the injury caused by such negligence, if any, but not for fright due to deceased's own acts in driving on the track: Yeaton v. Boston &c. R. Co., 73 N. H. 285; s. c. 61 Atl. Rep. 522.

¹⁴⁹ Central of Georgia R. Co. v. Dorsey, 116 Ga. 719; s. c. 42 S. E. Rep. 1024.

¹⁵⁰ That the plaintiff can recover his reasonable expenditures for medical services, medicine and attendance, see: Jones v. New York &c. R.

§ 7329. **Expenditures for Attendance must have been Reasonable in Amount.**¹⁵¹—The recovery cannot exceed the amount charged. In the rare event that the charge made is less than the reasonable value of the services the recovery cannot exceed the amount of the charge.¹⁵²

§ 7331. **Gratuitous Medical and Nursing Services.**¹⁵³—It is the holding of one case that an injured person may recover the reasonable value of nursing given him by a widowed daughter, who lived with him, although there was no express contract between the father and daughter that she should be compensated.¹⁵⁴

§ 7333. **Necessity of Evidence of Amount of Medical Expenses.**¹⁵⁵

Co., 99 App. Div. (N. Y.) 1; 90 N. Y. Supp. 422; *Willet v. Johnson*, 13 Okl. 563; s. c. 76 Pac. Rep. 174 (plaintiff can testify as to expenses incurred); *Berg v. United States Leather Co.*, 125 Wis. 262; s. c. 104 N. W. Rep. 60. That plaintiff having pleaded the cost of medical attendance may recover for same, though the bills have not yet been paid, see: *Indianapolis St. R. Co. v. Haverstick*, 35 Ind. App. 281; s. c. 74 N. E. 34; *Nelson v. Metropolitan St. R. Co.*, 113 Mo. App. 659; s. c. 88 S. W. Rep. 781; *Wilbur v. Southwest Missouri Electric R. Co.*, 110 Mo. App. 689; s. c. 85 S. W. Rep. 671; *Western Union Tel. Co. v. Norton* (Tex. Civ. App.), 62 S. W. Rep. 1081 (no recovery unless incurring of such expenses is alleged and proved). In a case where personal injuries caused a webbing of the fingers down to the first joint it was held that the cost of a surgical operation to improve the appearance of the hand by dividing the fingers again was properly allowed: *Busch v. Robinson*, — Ore. —; s. c. 81 Pac. Rep. 237.

¹⁵¹ See generally: *Chicago City R. Co. v. Miller*, 111 Ill. App. 446; *Goodson v. New York City R. Co.*, 94 N. Y. Supp. 10; *Polacci v. Interurban St. R. Co.*, 90 N. Y. Supp. 341 (reasonable value of medicines must be proved); *Dallas Consol. Electric St. R. Co. v. Ison*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 408; *Galveston & C. R. Co. v. Perry*, 36 Tex. Civ. App. 414; s. c. 82 S. W. Rep. 343; *International & C. R. Co. v. Sampson* (Tex. Civ. App.) 64 S. W. Rep. 692; *St. Louis & C. R. Co. v. Haynes*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 934. Evidence as to the amount of the bills of physicians is inadmissible

in the absence of evidence as to the value of their services or that the bills had been paid: *Klingaman v. Fish & Hunter Co.*, — S. D. —; s. c. 102 N. W. Rep. 601.

¹⁵² *Nelson v. Metropolitan St. R. Co.*, 113 Mo. App. 659; s. c. 88 S. W. Rep. 781.

¹⁵³ There can be no recovery for a physician's services where the physician called to attend the injured person testified that he did not make any charge on his books for the services, and it did not appear from the evidence that he was paid for his services, or that he intended to make any charge for the same: *Malott v. Woods*, 109 Ill. App. 512.

¹⁵⁴ *Kaiser v. St. Louis Transit Co.*, 108 Mo. App. 708; s. c. 84 S. W. Rep. 199.

¹⁵⁵ *American Car & C. Co. v. Clark*, 32 Ind. App. 644; s. c. 70 N. E. Rep. 828 (in the absence of evidence as to medical and nursing expenses it is improper to instruct the jury that they may take these expenses into consideration in awarding damages); *Cudahy Packing Co. v. Broadbent*, 70 Kan. 535; s. c. 79 Pac. Rep. 126. Testimony of plaintiff in a personal injury case, "I expect I have spent something near \$30," for medicine, is not too vague and uncertain to be admissible: *Texas Portland Cement & C. Co. v. Ross*, 35 Tex. Civ. App. 597; s. c. 81 S. W. Rep. 94. A recovery for money expended for medicine should not be allowed when the evidence fails to show the amount expended therefor, and evidence of the value of medical treatment furnished by a physician is not sufficient to show the value of the medicine, since it is a matter of common knowledge that medicines

§ 7334. **Expenses of Nursing.**¹⁵⁶

§ 7337. **Pleading Such Expenses.**—The plaintiff may prove that he has paid an amount in excess of that pleaded, but his recovery will be limited to the amount claimed in his pleading.¹⁵⁷

§ 7341. **Action by Husband for Injuries to Wife.**¹⁵⁸—Though a wife receiving personal injuries is able to earn money in an independent business, these earnings cannot be allowed to set off the damages which her husband may have recovered, or which she may recover under an assignment from him of his right of action for damages for a deprivation of her services, and for expenses incurred for medical attendance, etc.¹⁵⁹ Under the Missouri married woman's statute a married woman who runs a boarding house is entitled to the profits thereof; and in case of injuries to her, rendering her unable to pursue her vocation, the right to recover the damages thus sustained, including the consequent expense of servant hire, belongs to the wife, and not to the husband, and the latter's recovery in this respect is the value only of his wife's services in the work performed for the family.¹⁶⁰

§ 7344. **Where the Injury is to a Minor Child.**¹⁶¹—The recovery by the parent of a minor may include whatever pecuniary benefit there was a reasonable expectation he would receive from his child after he reached his majority. The recovery is not strictly limited to the loss of services prior to that time.¹⁶²

are procured from drug stores on prescriptions and not furnished by the physician: *Knight v. Kansas City*, 113 Mo. App. 561; s. c. 87 S. W. Rep. 1192.

¹⁵⁶ *Lawson v. Seattle & C. R. Co.*, 34 Wash. 500; s. c. 76 Pac. Rep. 71 (no recovery for services of wife in nursing husband where there is no evidence of the value of such services). The amount allowed for services of a nurse is the reasonable value of nursing by a person of ordinary and untrained skill where it is not shown that the person performing the services was an expert nurse: *MacDonald v. St. Louis Transit Co.*, 108 Mo. App. 374; s. c. 83 S. W. Rep. 1001.

¹⁵⁷ *Texas Portland Cement & C. Co. v. Ross*, 35 Tex. Civ. App. 597; s. c. 81 S. W. Rep. 94.

¹⁵⁸ That the husband can recover for injuries to his wife such compensation as the jury deems a money equivalent for the loss of her serv-

ices, assistance, and companionship to him by reason of the injury, see: *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 414; s. c. 61 N. E. Rep. 936; *Hutcheis v. Cedar Rapids & C. Co.*, 128 Iowa 279; s. c. 103 N. W. 779.

¹⁵⁹ *Hutcheis v. Cedar Rapids & C. R. Co.*, 128 Iowa 279; s. c. 103 N. W. Rep. 779.

¹⁶⁰ *Nelson v. Metropolitan St. R. Co.*, 113 Mo. App. 659; s. c. 88 S. W. Rep. 781.

¹⁶¹ A parent is entitled to recover for injury to his child's clothing and for the loss of his services and for medical attendance directly due to the wrongful act of another: *Shoemaker v. Jackson*, 128 Iowa 488; s. c. 104 N. W. Rep. 503. The fact of minority must be shown by the parent: *Dundon v. Interurban St. R. Co.*, 87 N. Y. Supp. 460.

¹⁶² *Gulf & C. R. Co. v. Hall*, 34 Tex. Civ. App. 535; s. c. 80 S. W. Rep. 133.

§ 7348. Discretion of the Court in Setting Aside Verdicts for Excessiveness or Inadequacy.¹⁶³

§ 7350. Amount as Determined by Pleadings and Estimates of Witnesses.¹⁶⁴—Where the plaintiff announces that he claims nothing for a certain element of damages, a charge by the court authorizing a recovery for this element is erroneous, and a verdict of such size as to indicate that it was allowed by the jury calls for a new trial.¹⁶⁵

§ 7351. Where Property is Injured.¹⁶⁶

§ 7352. Injuries to the Person.¹⁶⁷—A verdict in a personal injury case is not excessive merely because the amount allowed invested at five per cent interest will produce a larger income than that which the injured person was capable of earning before receiving his injury.¹⁶⁸

§ 7358. Double Damages.—An instruction was open to this objection which allowed a recovery for inability to pursue the course in life which the plaintiff might have pursued but for his injuries, and also for a diminished capacity to labor and earn money.¹⁶⁹ Another instruction was held to permit the assessment of double damages for the same element which told the jury that they should assess compensatory damages for physical and mental suffering endured, and which the plaintiff would likely endure in the future, for the probable effect, if any, of the alleged injuries in the future on his health, and for any impairment of his ability to pursue, after he was twenty-one years of age, the course of life he might have done but for his injuries, if any, and for his probable decreased mental and physical capacity to labor after he became of age.¹⁷⁰ And this was the effect of another in-

¹⁶³ Courts will set aside verdicts the result of passion, or prejudice, or some improper influence, and out of all proportion to the injuries received: *Jones v. New York & C. R. Co.*, 99 App. Div. (N. Y.) 1; s. c. 90 N. Y. Supp. 422; *Houston & C. R. Co. v. Batchler*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 902.

¹⁶⁴ It is no objection to a verdict that it exceeds the plaintiff's estimate of damages where it is sufficiently supported by other evidence: *Einolf v. Thompson*, 95 Minn. 230; s. c. 103 N. W. Rep. 1026; 104 N. W. Rep. 290, 547; *Borneman v. Chicago & C. R. Co.*, — S. D. —; s. c. 104 N. W. Rep. 208.

¹⁶⁵ *Southern R. Co. v. Clariday*, 120 Ga. 465; s. c. 47 S. E. Rep. 901.

¹⁶⁶ Plaintiff is not entitled to testify that his damages amount to a certain gross sum; the determina-

tion of the gross damage apart from its elements is for the jury exclusively: *Berg v. Humptulips Boom & C. Imp. Co.*, 38 Wash. 342; s. c. 80 Pac. Rep. 528.

¹⁶⁷ That damages for personal injuries should be estimated solely on the basis of compensation, see: *Waechter v. St. Louis & C. R. Co.*, 113 Mo. App. 270; s. c. 88 S. W. Rep. 147; *Denver & C. R. Co. v. Scott*, — Colo. —; s. c. 81 Pac. Rep. 763.

¹⁶⁸ *Indiana & C. R. Co. v. Otstot*, 212 Ill. 429; s. c. 72 N. E. Rep. 387; aff'g s. c. 113 Ill. App. 37.

¹⁶⁹ *Missouri & C. R. Co. v. Nesbit*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 891.

¹⁷⁰ *International & C. R. Co. v. Butcher*, 98 Tex. 462; s. c. 84 S. W. Rep. 1052; rev'g s. c. 81 S. W. Rep. 819.

struction to the jury: to assess the damages at such sum as would fairly compensate the plaintiff for the impairment of his health, for the physical injuries he suffered, for such physical and mental suffering as resulted, for the expenses of medical treatment and for the impairment of his ability to earn a living.¹⁷¹ But the rule was held not violated by an instruction that in estimating the plaintiff's damages the jury should consider mental and physical pain and suffering, if any, endured by the plaintiff resulting from his injuries, if any, time necessarily lost by the plaintiff, if any, and authorizing an allowance of such a sum as the jury might believe from the evidence would be fair compensation for the injury.¹⁷²

§ 7359. **Statutory Double Damages.**—Under the Connecticut treble damage act, allowing the driver of a vehicle "for the conveyance of persons," to recover treble damages for injuries caused by the failure of the driver of a like vehicle meeting him to turn to the right, as he had done, the plaintiff must show both by the complaint and the evidence, that the defendant was driving a vehicle "for the conveyance of persons;" the mere description of the vehicle as a wagon or team is not sufficient.¹⁷³

§ 7360. **Reduction of Verdicts by the Court—Remittitur.**¹⁷⁴—Thus in a case where the jury, in a personal injury action, returned a general verdict for the plaintiff, though the reasonableness of the amount claimed for medical services was not proved, the verdict was allowed to stand on the plaintiff's remittitur of the amount claimed for medical services.¹⁷⁵

§ 7363. **Whether Damages are Excessive Depends on Facts in Particular Cases—Illustrative Cases.**¹⁷⁶

¹⁷¹ *Galveston &c. R. Co. v. Perry*, 36 Tex. Civ. App. 414; s. c. 82 S. W. Rep. 343.

¹⁷² *San Antonio Traction Co. v. Sanchez*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 849. See also *International &c. R. Co. v. Tisdale*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 1063.

¹⁷³ *Rowell v. Crothers*, 75 Conn. 124; s. c. 52 Atl. Rep. 818.

¹⁷⁴ That trial courts have the power to correct an error of excess in the verdict by requiring a remittitur, see: *Chicago &c. R. Co. v. Rhodes*, 35 Tex. Civ. App. 432; s. c. 80 S. W. Rep. 869; *St. Louis &c. R. Co. v. Haynes*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 934; *Lynch v. Burns* (Tex. Civ. App.), 79 S. W. Rep. 1084.

¹⁷⁵ *International &c. R. Co. v. Sampson* (Tex. Civ. App.), 64 S. W. Rep. 692.

¹⁷⁶ *Verdicts held not excessive—Head and face*: \$8,500 (boy—fourteen years old—loss of one eye—sight of other eye impaired—bones of face and skull injured—part of bone covering skull removed); *Wysocki v. Wisconsin Lakes Ice &c. Cartage Co.*, 121 Wis. 96; s. c. 98 N. W. Rep. 950; \$7,500 (young man—medical student—one eye destroyed—unable to read with other eye—intense suffering—intended career destroyed), *Louisville v. Keher*, 117 Ky. 841; s. c. 79 S. W. Rep. 270; 25 Ky. L. Rep. 2003; \$5,000 (loss of eye), *Cleveland &c. R. Co. v. Tehan*, 26 Ohio Cir. Ct. R. 457; \$5,000 (total blindness of one eye

and other eye affected), *Georgia &c. R. Co. v. Lasseter*, 122 Ga. 679; s. c. 51 S. E. Rep. 15; \$2,500 (fractured skull—possibility of epilepsy or insanity in future), *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185; \$2,250 (woman—twenty-five years old—nose broken—face disfigured—breathing impaired), *Kentucky &c. Bridge &c. Co. v. Shrader*, 80 S. W. Rep. 1094; s. c. 26 Ky. L. Rep. 206; \$2,500 (loss of one eye), *Orscheln v. Scott*, 106 Mo. App. 583; s. c. 80 S. W. Rep. 982; \$900 (lip cut through to teeth—teeth loosened—cut requiring stitches), *Chicago &c. Electric R. Co. v. Herbert*, 115 Ill. App. 248; \$900 (married woman—face burned and blistered—eye closed—back wrenched and strained), *Citizens' R. Co. v. Jones* (Tex. Civ. App.), 81 S. W. Rep. 558; \$500 (injuries to eye), *Palmer Transfer Co. v. Eaves*, 85 S. W. Rep. 750; s. c. 27 Ky. L. Rep. 573. *Shoulder*: \$2,500 (injuries to shoulder blade), *Chicago &c. R. Co. v. Barrett*, 35 Tex. Civ. App. 366; s. c. 80 S. W. Rep. 660; \$2,500 (woman—seventy-one years old—shoulder dislocated—arm fractured—nerves injured—unable to lift hand above shoulder—confined to bed five or six weeks—medical expenses \$75), *Rice v. Council Bluffs*, 124 Iowa 639; s. c. 100 N. W. Rep. 506; \$200 (man—earning \$20 to \$25 a week—shoulder dislocated—bruises on head and body—unable to work for three weeks—medical expenses \$40), *Tanzer v. New York City R. Co.*, 46 Misc. (N. Y.) 86; s. c. 91 N. Y. Supp. 334. *Arm*: \$11,500 (locomotive engineer—thirty-four years old—expectancy of thirty-two and a half years—earning \$125 to \$150 a month—left arm practically lost—incapacitated for his employment), *Southern Kansas R. Co. v. Sage* (Tex. Civ. App.), 80 S. W. Rep. 1038; \$8,000 (structural iron worker earning \$9 a day—deprived of use of arm), *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399; s. c. 73 N. E. Rep. 787; aff'g s. c. 115 Ill. App. 209; \$7,500 (man—twenty-six years old—left arm), *Smith v. Fordyce*, 190 Mo. 1; s. c. 88 S. W. Rep. 679; \$4,000 (electric shock—partial paralysis of arm and hand), *South Covington &c. R. Co. v. Smith*, 86 S. W. Rep. 970; s. c. 27 Ky. L. Rep. 811; \$2,500 (left arm broken—mus-

cles badly bruised—pain suffered more than twenty months after accident), *Dutro v. Metropolitan St. R. Co.*, 111 Mo. App. 258; s. c. 86 S. W. Rep. 915; \$2,500 (man—fifty-three years old—permanent injury to arm and hand—collar bone broken), *Clarke v. Philadelphia &c. Coal &c. Co.*, 92 Minn. 418; s. c. 100 N. W. Rep. 231; \$2,000 (woman—sixty years old—elbow—suffered over a year), *Louisville Gas Co. v. Page*, 86 S. W. Rep. 1112; 27 Ky. L. Rep. 885; \$1,500 (child twelve years old—fracture and dislocation of elbow), *Willis v. St. Joseph R. &c. Co.*, 111 Mo. App. 580; s. c. 86 S. W. Rep. 567. *Hand*: \$10,000 (child four and a half years old—loss of one hand and part of arm—other arm and hand rendered almost useless), *South Covington &c. R. Co. v. Weber*, 82 S. W. Rep. 986; s. c. 26 Ky. L. Rep. 922; \$3,000 (boy—healthy and strong—eighteen years of age—earning \$15 a week—loss of three fingers on one hand and two fingers on other hand—other fingers bruised and cut—unable to resume regular employment—impairment capacity to labor), *Gammel-Statesman Pub. Co. v. Monfort* (Tex. Civ. App.), 81 S. W. Rep. 1029; \$1,250 (laborer—twenty-eight years old—loss of three fingers—other fingers on same hand rendered useless—impairment of capacity to labor), *Chicago &c. R. Co. v. Bell*, 111 Ill. App. 280; \$1,500 (seaman—permanently crippled in right hand), *The Sarnia*, 137 Fed. Rep. 952. *Fingers*: \$3,250 (young man—twenty years old—loss of left thumb and right index finger), *Bernier v. St. Paul Gaslight Co.*, 92 Minn. 214; s. c. 99 N. W. Rep. 778; \$2,500 (two fingers cut off), *Texarkana Table &c. Co. v. Webb*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 782; \$2,000 (boy—ten years old—loss of thumb—other painful injuries to hand and arm), *Vanesler v. Moser Cigar &c. Co.*, 108 Mo. App. 621; s. c. 84 S. W. Rep. 201. *Back*: \$7,500 (rupture of ligaments connecting spine and hip—permanent injuries to back, spine and pelvic organs), *Longan v. Weltmer*, 180 Mo. 322; s. c. 79 S. W. Rep. 655; 64 L. R. A. 969; \$1,999 (strong man—twenty-six years old—injury to back—unable to work for four months), *Texas &c. R. Co. v. Watts*, 36 Tex. Civ. App. 29; s. c. 81 S. W.

Rep. 326; \$10,000 (injury to spinal cord—blood expectoration), *Oberg v. Northern Pac. R. Co.*, 136 Fed. Rep. 981; \$2,500 (man—thirty-eight years old—earning \$160 a month—spine—kidneys—bladder and heart affected), *International &c. R. Co. v. Vandalingham*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 847; \$2,000 (man—thirty-two years old—side mashed—back and leg bruised—confined to room five or six weeks), *St. Louis &c. R. Co. of Texas v. Harkey*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 506; \$1,500 (muscles of back sprained—permanent stoop—nerves affected), *Ray v. Manhattan Light &c. Co.*, 92 Minn. 101; s. c. 99 N. W. Rep. 782; \$750 (back and hip), *Illinois Cent. R. Co. v. Colly*, 86 S. W. Rep. 536; s. c. 27 Ky. L. Rep. 730. *Rib*: \$10,000 (two ribs broken—hand—arm—and leg cut—back wrenched—shoulder dislocated—arm broken—great mental and physical pain), *Yazoo &c. R. Co. v. Grant*, 86 Miss. 565; s. c. 38 South. Rep. 502; \$3,000 (three ribs dislocated—heart and spine affected—bowels injured), *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1; s. c. 84 S. W. Rep. 26; \$2,500 (fracture of rib—dislocation of collar bone—bruises—loss of eleven weeks' time), *Waechter v. St. Louis &c. R. Co.*, 113 Mo. App. 270; s. c. 88 S. W. Rep. 147; \$2,200 (bruises to back and sides—two broken ribs and wrench of spinal cord), *Missouri &c. R. Co. v. Hay*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 954; \$750 (fracture of rib—injury to back, side and heart—one hand rendered partially useless), *San Antonio Traction Co. v. Sanchez*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 849. *Heart*: \$6,000 (man—injury in junction of hip with spine—palpitation of heart—circulation impaired—great pain), *Galveston &c. R. Co. v. Fry*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 664; \$250 (messenger boy—thirteen years old—kicked by conductor over heart—severe pain), *McNamara v. St. Louis Transit Co.*, 182 Mo. 676; s. c. 81 S. W. Rep. 880. *Leg*: \$20,000 (young man not twenty-one—both legs amputated—wound in back), *Scullin v. Wabash R. Co.*, 184 Mo. 695; s. c. 83 S. W. Rep. 760; \$19,500 (foreman switching crew—twenty-six years old—earning from \$90 to \$140 a month—leg crushed—ampu-

tated a few inches below hip—intense suffering), *Texarkana &c. R. Co. v. Toliver*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 375; \$12,000 (young man—nineteen years old—earning \$60 a month—loss of left leg—eyesight greatly impaired), *Galveston &c. R. Co. v. McAdams*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 1076; \$10,000 (engineer—leg broken in two places—head of humerus broken off—teeth knocked out—tongue cut—one arm disabled—confinement to bed), *Southern R. Co. v. Sittasen*, — Ind. App. —; s. c. 74 N. E. Rep. 898; \$9,000 (steel-worker—fracture of tibia, both wrists, and skull—unconscious two weeks—on crutches three months—unable to work six months—both wrists and leg permanently deformed), *Welk v. Jackson Architectural Ironworks*, 98 App. Div. (N. Y.) 247; s. c. 90 N. Y. Supp. 541; \$8,800 (young woman—twenty-one years old—leg broken—ankle wrenched—on crutches for a year—leg shortened—pain during life probable—nerves shattered), *Central Texas &c. R. Co. v. Gibson*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 862; \$8,000 (man—sixty years old—earning from \$1.10 to \$1.25 a day—loss of leg—shoulder broken—arm weakened and diminished), *Indiana &c. R. Co. v. Otstot*, 212 Ill. 429; s. c. 72 N. E. Rep. 387; aff'g s. c. 113 Ill. App. 37; \$7,500 (oblique fracture of left knee—extreme suffering—loss of fifty-five pounds in weight), *Cleveland &c. R. Co. v. Miller*, 165 Ind. 381; s. c. 74 N. E. Rep. 509; \$7,500 (healthy man—twenty-one years old—earning \$60 a month—leg broken, shortened an inch, causing limp—unable to lie on back or right side—virility destroyed), *International &c. R. Co. v. Reeves*, 35 Tex. Civ. App. 162; s. c. 79 S. W. Rep. 1099; \$4,200 (married woman—hip, knee and ankle injured—muscles wasted—leg shrunken—crutches necessary), *San Antonio &c. R. Co. v. Jackson*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 445; \$4,000 (boy—thirteen years old—both legs scalded—burns nine months healing—scars contracted down on blood vessels, interfering with circulation), *Houston &c. R. Co. v. Bulger*, 35 Tex. Civ. App. 478; s. c. 80 S. W. Rep. 557; \$3,500 (transverse fracture of knee cap—

confinement to room for eight weeks), *Cicero v. Bartelme*, 114 Ill. App. 9; s. c. aff'd, 212 Ill. 256; 72 N. E. Rep. 437; \$3,000 (oblique break of largest bone in left leg—confinement ten months), *Conner v. Nevada*, 188 Mo. 148; s. c. 86 S. W. Rep. 256; \$3,000 (fracture of hip—confinement to bed for seven weeks), *Neves v. Green*, 111 Mo. App. 634; s. c. 86 S. W. Rep. 508; \$3,000 (woman—leg permanently shortened, with stiff joint), *Bente v. Metropolitan St. R. Co.*, 90 App. Div. (N. Y.) 213; s. c. 86 N. Y. Supp. 85; s. c. aff'd, 180 N. Y. 519; 72 N. E. Rep. 1139; \$2,500 (girl—nine years old—hip dislocated and permanently weakened), *Lorenz v. New Orleans*, 114 La. 802; s. c. 38 South. Rep. 566; \$2,000 (fracture of neck of femur—leg shortened a quarter of an inch—never be able to walk naturally—in hospital seven weeks—actual expenses \$205), *Leonard v. Union R. Co.*, 98 App. Div. (N. Y.) 204; s. c. 90 N. Y. Supp. 574; \$2,000 (boy—four years old—leg fractured—shortened an inch—compelled to wear extra thick sole and heel to overcome tendency of curvature of spine—severe scalp wound), *Cameron v. Duluth-Superior Traction Co.*, 94 Minn. 104; s. c. 102 N. W. Rep. 208; \$2,000 (boy—nine years old—femoral artery severed—aneurism necessitating operation and tying up artery—pain and suffering for three years—crutches necessary), *Euting v. Chicago & C. R. Co.*, 120 Wis. 651; s. c. 98 N. W. Rep. 944; \$1,750 (longshoreman—fifty-six years old—fracture of thigh bone—confinement in hospital—walking on crutches), *The City of San Antonio*, 135 Fed. Rep. 879; \$1,500 (young man—eighteen years old—well developed—weighing two hundred pounds—wound two inches deep and eight inches long on under side of leg—confinement to bed a month—pain for a year), *Chicago & C. R. Co. v. Pulliam*, 111 Ill. App. 305; \$1,250 (injuries to foot and hip—fracture of three ribs), *Texas & C. R. Co. v. Leakey*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 1168; \$665 (man—poor and blind—assisted wife in laundry work—leg swollen and inflamed—abscess causing pain and sleeplessness—medical bills \$100), *Hill v. Glenwood*, 124 Iowa 479; s. c. 100

N. W. Rep. 522. *Ankle*: \$5,000 (sprain of left ankle—two ligaments ruptured—back bone injured causing nervous disorders—loss of employment), *Haxton v. Kansas City*, 190 Mo. 53; s. c. 88 S. W. Rep. 714; \$2,500 (fractured ankle), *Miller v. New York*, 104 App. Div. (N. Y.) 33; s. c. 93 N. Y. Supp. 227; \$2,000 (sprained ankle—dislocated shoulder—intense pain), *Norton v. Kramer*, 180 Mo. 536; s. c. 79 S. W. Rep. 699; \$1,500 (pain and suffering—loss of use of ankle probably permanent—unskillful treatment by physician), *Miller v. Minturn*, 73 Ark. 183; s. c. 83 S. W. Rep. 918. *Foot*: \$15,000 (freight brakeman—back, head, foot and ankle injured—club foot as result of injury—crutches necessary—unable to resume regular employment), *International & C. R. Co. v. Brandon*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 272; \$3,500 (woman—permanent injury to foot—confinement to hospital several months—two operations necessary), *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597; s. c. 81 S. W. Rep. 1112; \$6,000 (foot crushed—amputation of toes necessary), *Rapp v. St. Louis Transit Co.*, 190 Mo. 144; s. c. 88 S. W. Rep. 865; \$5,000 (a negro brakeman—twenty-four years old—strong, healthy and industrious, supporting wife and two children—earning \$1.50 a day—foot amputated), *Southern R. Co. v. Oliver*, 102 Va. 710; s. c. 47 S. E. Rep. 852; \$1,350 (carpenter—foot severely injured—may interfere with capacity to labor), *Young v. O'Brien*, 36 Wash. 570; s. c. 79 Pac. Rep. 211. *Nervous System*: \$9,000 (young woman—eighteen years old—tailor—earning \$10 a week—leg, arm and body strained and bruised—female disease aggravated—operation necessary—lame—nerves shattered—unable to control hands—expectancy of forty-two years), *Michigan City v. Phillips*, 163 Ind. 449; s. c. 71 N. E. Rep. 205; aff'g s. c. 69 N. E. Rep. 700; \$6,375 (traumatic neurosis), *Chicago & C. R. Co. v. Jones*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 445; \$5,500 (fall injuring head and neck—neurasthenia), *Wood v. Metropolitan St. R. Co.*, 181 Mo. 433; s. c. 81 S. W. Rep. 152; \$3,000 (married woman—nervous system permanently injured—unable to perform household du-

ties), *Houston Transfer Co. v. Renard* (Tex. Civ. App.), 79 S. W. Rep. 838. *Physical Wreck*: \$30,000 (man—fifty-four years old—earning \$100 to \$125 a month—injuries to back and spine—concussion of spinal cord—legs totally paralyzed—eyesight and digestion affected—unable to sleep), *Texas & C. R. Co. v. Kelly*, 34 Tex. Civ. App. 21; s. c. 80 S. W. Rep. 1073; \$9,000 (pain in back and head—confined to bed several weeks—eyes swollen—head packed in ice—lockjaw for eight weeks—hair fell out—hemorrhages—one leg shortened—eyesight and hearing impaired), *Graham v. Joseph H. Bauland Co.*, 97 App. Div. (N. Y.) 141; s. c. 89 N. Y. Supp. 595; \$6,000 (man—concussion of brain—muscles of right arm atrophied—mental faculties impaired—dull and distracted), *Powell v. Nevada & C. R.*, — Nev. —; s. c. 78 Pac. Rep. 978; \$3,000 (strong man reduced to physical wreck—hearing partially destroyed—eyesight impaired—physical pain and mental anguish), *Holden v. Missouri R. Co.*, 108 Mo. App. 665; s. c. 84 S. W. Rep. 133; \$1,500 (man—forty-eight years old—earning capacity diminished \$750 a year—medical bills \$100—injuries to back, spine, head and neck—sexual power destroyed—physical and mental suffering—insomnia—unable to do any kind of labor), *St. Louis & C. R. Co. v. Kennemore* (Tex. Civ. App.), 81 S. W. Rep. 802. *Injuries Peculiar to Women*: \$5,000 (miscarriage), *Berger v. St. Paul City R. Co.*, 95 Minn. 84; s. c. 103 N. W. Rep. 724; \$1,700 (miscarriage—confined to bed several weeks). *McCaughy v. Jenckes Spinning Co.*, 26 R. I. 426; s. c. 59 Atl. Rep. 110; \$500 (injury to spine—nerves—and derangement of female functions), *Lofink v. Interborough Rapid Transit Co.*, 106 App. Div. (N. Y.) 202; s. c. 94 N. Y. Supp. 150. *Bite of Dog*: \$450 (boy—fourteen years old—bitten on leg by dog—severe pain—flesh cut—lame for several days—nervous system affected), *Murray v. Hulbert*, 77 Conn. 713; s. c. 58 Atl. Rep. 3; \$3,000 (bite of dog—blood poisoning—confinement to room—wound—running sore), *Grisom v. Hofius*, 39 Wash. 51; s. c. 80 Pac. Rep. 1002. *Temporary Injuries*: \$1,158.35 (injuries compelling use of crutches for more than a year),

Maxfield v. Maine Cent. R. Co., 100 Me. 79; s. c. 60 Atl. Rep. 710; \$1,000 (injuries from which suffering for more than a year resulted), *Macon R. & C. Co. v. Strever*, 123 Ga. 279; s. c. 51 S. E. Rep. 342; \$1,000 (woman—thirty-five years old—confined to bed three months—pain for nearly a year), *McNamara v. St. Louis Transit Co.*, 106 Mo. App. 349; s. c. 80 S. W. Rep. 303; \$1,000 (married woman—bruises on head—much pain—confined to bed six weeks—disabled from performing household duties for long time—injuries to pelvic organs), *Duncan v. Grand Rapids*, 121 Wis. 626; s. c. 99 N. W. Rep. 317; \$200 (bruises and injuries causing loss of sleep), *Cincinnati & C. R. Co. v. Leonard*, 35 Ind. App. 263; s. c. 73 N. E. Rep. 932. *Permanent Injuries*: \$15,000 (mail clerk—thirty-two years old—earning \$1,100 a year—several bones broken confined to cot four weeks—leg in plaster cast ten weeks—much pain—face disfigured—one leg shortened—loss of sense of smell—difficulty in breathing—\$324 for medical bills—unable to resume regular employment), *Jones v. New York & C. R. Co.*, 99 App. Div. (N. Y.) 1; s. c. 90 N. Y. Supp. 422; \$13,500 (railroad fireman—twenty-five years old—earning \$95 to \$100 a month—spinal and nerve affection—mind weakened—wholly unable to perform manual labor), *San Antonio & C. R. Co. v. Hahl*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 27; \$10,500 (man—earning \$100 a month—permanently and wholly disabled), *Galveston & C. R. Co. v. Roth*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 1112; \$8,500 (woman—seamstress—healthy—partially paralyzed—injuries probably permanent—unable to sew), *Wilmette v. Brachle*, 110 Ill. App. 356; s. c. aff'd, 209 Ill. 621; 71 N. E. Rep. 41; \$7,500 (woman—permanent injury to wrist—lame—partially paralyzed—impairment of speech—earning capacity reduced from \$1.25 or \$1.50 a day to \$.25 or \$.50 a day), *Chicago v. Bush*, 111 Ill. App. 638; \$5,000 (woman—strong and healthy—laceration of cervix—much suffering—future pain probable—weight reduced twenty pounds—injuries probably permanent), *Small v. Kansas City*, 185 Mo. 291; s. c. 84 S. W. Rep. 901; \$5,000 (man—twenty-four years old

—earning \$75 to \$100 a month—bruises about head and body—permanent injury to foot and ankle—bowels injured—unable to resume employment), *International &c. R. Co. v. Walters* (Tex. Civ. App.), 80 S. W. Rep. 668; \$4,000 (woman—intense pain for seven months—back, spine and hip injured—hemorrhages of lungs—left leg and hip smaller and less firm than right), *Louisville R. Co. v. De Gore*, 84 S. W. Rep. 326; s. c. 27 Ky. L. Rep. 54; \$3,258 (man—strong and vigorous—forty-five years old—painful and severe injuries, probably permanent—mind and body affected), *Spires v. Middlesex &c. Electric Light &c. Co.*, 70 N. J. L. 355; s. c. 57 Atl. Rep. 424; \$3,000 (woman—confined to bed nine months—hernia—intestines protrude from rupture—unable to take exercise), *Chicago v. Harris*, 113 Ill. App. 633; \$3,000 (sailor—healthy and strong—collar bone injured unable to swing his hand while walking without pain—indications of tuberculosis or neuralgia, either of which would shorten his life—unable to resume employment as sailor—earning capacity diminished), *Paaauhau Sugar Plantation Co. v. Palapala*, 127 Fed. Rep. 920; s. c. 62 C. C. A. 552; \$2,810 (married woman—forty-one years old—serious and permanent injuries), *Evans v. Iowa City*, 125 Iowa 202; s. c. 100 N. W. Rep. 1112; \$2,100 (nurse fifty-five years old), *Deland v. Cameron*, 112 Mo. App. 704; s. c. 87 S. W. Rep. 597; \$2,000 (woman—fifty-nine years old—curvature of the spine—floating kidney—permanent), *Olson v. Chicago &c. R. Co.*, 94 Minn. 241; s. c. 102 N. W. Rep. 449; \$2,000 (man—earning \$1,600 to \$1,700 a year—partially paralyzed—earning capacity diminished), *Joliet v. Le Pla*, 109 Ill. App. 336; \$2,000 (married woman—scalp wound—skull crushed a little—abscess from wound in thigh—muscle destroyed causing pain and difficulty in walking—aneurism below right hip joint weakening leg—one ear nearly torn off), *Pittsburg &c. R. Co. v. Smith*, 110 Ill. App. 154. *Assaults on Passengers*: \$1,000 (assault by conductor—kicked in the mouth and face—teeth knocked out), *O'Donnel v. St. Louis Transit Co.*, 107 Mo. App. 34; s. c. 80 S. W. Rep. 315; \$1,000 (boy—sixteen years old—struck and

cursed by conductor while trying to get his ticket from his pocket—accused of trying to beat the road), *Missouri &c. R. Co. v. Gaines*, 35 Tex. Civ. App. 257; s. c. 79 S. W. Rep. 1104. *Ejection*: \$500 (woman—twenty-five years old—put off train with young man companion five miles from station—compelled to walk the track and trestles in night, arriving home at day break—mortified, fatigued and frightened), *Louisville &c. R. Co. v. Covetts*, 82 S. W. Rep. 975; s. c. 26 Ky. L. Rep. 934. *Earning Capacity*: \$4,000 (man—fifty-four years old—active and energetic—income reduced from \$1,000 to \$360—severe, painful and permanent injuries), *Jordan v. Cedar Rapids &c. R. Co.*, 124 Iowa 177; s. c. 99 N. W. Rep. 693; \$2,000 (laborer—fifty-one years old—earning from \$600 to \$900 a year—permanently paralyzed—burden on family for support and medical attendance), *Felsch v. Babb*, — Neb. —; s. c. 101 N. W. Rep. 1011; \$1,750 (coal miner—earning \$2 a day—permanent and serious injuries—impairment capacity to labor), *Spring Valley Coal Co. v. Robizas*, 111 Ill. App. 49.

Verdicts held Excessive: \$150 (delay in transportation—no evidence as to value of time lost—physical discomfort), *International &c. R. Co. v. Harder*, 36 Tex. Civ. App. 151; s. c. 81 S. W. Rep. 356; \$250 (passenger delayed for a night—pecuniary loss of \$22.50), *Southern R. Co. v. Marshall*, 111 Ky. 560; s. c. 64 S. W. Rep. 418; 23 Ky. L. Rep. 813; \$750 (woman mistaken for disreputable person—asked to leave public resort—profuse apologies—little evidence of actual damages), *Davis v. Tacoma R. &c. Co.*, 35 Wash. 203; s. c. 77 Pac. Rep. 209; \$1,000 (cut on face over eye—several stitches taken—healed in a week—no evidence of medical bills), *Central Texas &c. R. Co. v. Gibson*, 35 Tex. Civ. App. 66; s. c. 79 S. W. Rep. 351; \$1,500 (boy ten years old—scalp wounds—discharge from ear—dizziness—pains in back—kept from school six weeks—reduced to \$500), *Baldwin v. Thompson*, 70 N. J. L. 447; s. c. 57 Atl. Rep. 331; \$3,000 (woman—fracture of fibula—temporary lameness—left arm and side strained—recovery slow—temporarily incapacitated

from performing usual duties), West Chicago St. R. Co. v. Dean, 112 Ill. App. 10; \$3,500 (girl—sixteen years old—nearly recovered at time of trial—not entitled to exemplary damages, loss of time, or medical expenses—reduced to \$1,750), Porter v. Delaware &c. R. Co., 134 Fed. Rep. 155; \$5,500 (woman passenger on street car—slight temporary injuries), Taylor v. Grand Ave. R. Co., 185 Mo. 239; s. c. 84 S. W. Rep. 873; \$5,500 (woman—twenty-three years old—weight reduced from 183 pounds to 140 pounds—partially helpless two months after accident), Wadleigh v. Duluth St. R. Co., 92 Minn. 415; s. c. 100 N. W. Rep. 104; \$6,000 (boy—ten years old—testimony as to possible insanity speculative), Fleming v. Lobel, — N. J. L. —; s. c. 59 Atl. Rep. 28; \$6,000 (fracture of ulna—dislocation of radius—movement of arm impaired—earning \$700 before accident—\$2 a day after accident—reduced to \$4,000), Bailey v. Cascade Timber Co., 35 Wash. 295; s. c. 77 Pac. Rep. 377; \$6,000 (shock—no bones broken nor loss of limb or organ), MacGregor v. Rhode Island Co., 27 R. I. 85; s. c. 60 Atl. Rep. 761; \$7,225 (ankle sprained—ligaments torn—bone broken—permanent injury—able to walk and attend to household duties), H. B. Phillips Co. v. Pruitt, 82 S. W. Rep. 628; s. c. 26 Ky. L. Rep. 831; \$8,040 (woman—fall on sidewalk—permanently disabled—reduced to \$5,000), Gallamore v. Olympia, 34 Wash. 379; s. c. 75 Pac. Rep. 978; \$9,000 (man thirty-six years of age—three fingers amputated—earning \$75 a month—capacity to perform manual labor impaired—reduced to \$7,500), International &c. R. Co. v. Shaughnessy (Tex. Civ. App.), 81 S. W. Rep. 1026; \$9,000 (man—right leg smaller than left—muscles atrophied—unable to perform manual labor), Watson v. Brightwell (Ky.), 82 S. W. Rep. 454; \$9,500 (man—forty-five years old—engaged in office work—leg broken—recovery rapid—able to work—knee joint loosened), Rueping v. Chicago &c. R. Co., 123 Wis. 319; s. c. 101 N. W. Rep. 710; \$9,500 (laborer—thirty-nine years old—wages \$1.50 a day—eyesight destroyed—reduced to \$8,000), Peterson v. Roessler &c.

Chemical Co., 131 Fed. Rep. 156; \$10,000 (ugly scar on face—left arm partially paralyzed—great pain); South Omaha v. Sutcliffe, — Neb. —; s. c. 101 N. W. Rep. 997; \$10,000 (cross-eyed from effects of accident—vision for practical purposes unimpaired), Smith v. Day, 136 Fed. Rep. 964; \$12,000 (loss of left arm—pain and suffering), Struble v. Burlington &c. R. Co., 128 Iowa 158; s. c. 103 N. W. Rep. 142; \$20,000 (man sixty-two years old—left leg crushed—amputated below knee—chronic tendency to ulcerate—difficult to wear artificial leg—crutches necessary—spirits depressed—reduced to \$10,000); Newcomb v. New York &c. R. Co., 182 Mo. 687; s. c. 81 S. W. Rep. 1069; \$20,000 (amputation of one leg and injury to other hip—fracture of collar bone and shoulder blade—confinement to hospital), Ricker v. Central R. Co., — N. J. L. —; s. c. 61 Atl. Rep. 89; \$23,400 (injuries resulting in diabetes and paralysis of both legs), Reynolds v. St. Louis Transit Co., 189 Mo. 408; s. c. 88 S. W. Rep. 50; \$25,000 (injury to chest in collision—trained nurse necessary—unable to attend regular business for nearly three years—reduced to \$20,000), Smith v. Metropolitan St. R. Co., 92 App. Div. (N. Y.) 213; s. c. 86 N. Y. Supp. 1087; \$35,000 (engineer—forty-five years old—both legs amputated below the knees—future suffering probable—reduced to \$20,000), Markey v. Louisiana &c. R. Co., 185 Mo. 348; s. c. 84 S. W. Rep. 61; \$49,850 (injuries to spine—contusion on head), Denver &c. R. Co. v. Scott, — Colo. —; s. c. 81 Pac. Rep. 763.

Verdicts held inadequate: \$1 (injury to old person compelling use of artificial aid in walking), Fischer v. St. Louis, 189 Mo. 567; s. c. 88 S. W. Rep. 82; \$200 (woman—medical expenses \$200—loss of income more than \$200), Hill v. Union R. Co., 25 R. I. 565; s. c. 57 Atl. Rep. 374.

Verdicts held not inadequate: \$500 (man—keeper of billiard hall—curbstone hay broker—no regular vocation—forty years old—hand torn and crushed—scalp wound—shoulder bruised—fingers stiff—motion of wrist impaired—physician's bill \$100), Palmer v. Cedar Rapids &c. R. Co., 124 Iowa 424; s. c. 100 N.

W. Rep. 336; \$4,000 (girl eleven years old—one leg two inches shorter than other—opening in skull covered merely by skin and membrane—danger to life—choking sensations in throat—permanent injuries—might develope into nervous disorders or epilepsy), St. Louis &c. R. Co. v. Bolton (Tex. Civ. App), 81 S. W. Rep. 123.

TITLE TWENTY-NINE.

RELEASE OF DAMAGES.

[§§ 7370-7384.]

§ 7370. **Consideration for Release of Damages.**—A contract of employment is generally held a sufficient consideration for a release,¹ but it must be a definite contract. An agreement merely to employ a person, negligently injured, for such time and in such capacity as may be satisfactory to the employer, and not longer or otherwise, is lacking in definiteness and is void,² and this though employment is actually given for a short time.³ In one case, a contract providing that in consideration of regular wages during disability, necessary nurse hire and all doctor's bills resulting from the disability, and re-employment when recovered, the plaintiff released the defendant from liability for the injury, was held to constitute a contract binding on both parties, though signed and acknowledged by the plaintiff alone, and though it did not in terms contain a promise by the defendant to pay the consideration specified.⁴ Mere inadequacy of consideration alone, without fraud, is not sufficient to avoid a release.⁵

§ 7371. **Scope of Release.**—Under the rule that general words in a release are limited and restrained to the particular words in the recital, impaired mental powers and partial loss of sight resulting from injuries received in a railway collision have been held not covered by a release which, after enumerating the injuries sustained by releasor, as bruises of his body, right leg, and right arm, and a scalp wound, recites that "to maintain amicable and pleasant relations and avoid all controversy in respect to said matter," and for a monetary con-

¹ *Bowers v. Detroit Southern R. Co.*, 26 Ohio Cir. Ct. R. 518.

² *Gulf & C. R. Co. v. Minter*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 477; *Illinois Cent. R. Co. v. Keebler*, 84 S. W. Rep. 1167; s. c. 27 Ky. L. Rep. 305 (plaintiff discharged a day after re-employment on a fictitious charge). But see; *Forbs v. St. Louis & C. R. Co.*, 107 Mo. App. 661; s. c. 82 S. W. Rep. 562.

³ *Missouri & C. R. Co. v. Smith*, 98 Tex. 47; s. c. 81 S. W. Rep. 22.

⁴ *American Quarries Co. v. Lay*, — Ind. App. —; s. c. 73 N. E. Rep. 608.

Hartley v. Chicago & C. R. Co., 214 Ill. 78; s. c. 73 N. E. Rep. 398; *Mattoon Gaslight & C. Co. v. Dolan*, 111 Ill. App. 333; *Quincy Horse R. & C. Co. v. Omer*, 109 Ill. App. 238; *Illinois Cent. R. Co. v. Heath*, 80 S. W. Rep. 502; s. c. 26 Ky. L. Rep. 19.

sideration, the injured person releases the railroad company from all claims of any kind and character whatever arising from the injuries and damage sustained in the manner or upon the occasion aforesaid and the result of these injuries.⁶ The words "during disability" in a contract releasing the defendant from liability for an injury in consideration of wages "during disability," necessary nurse hire and doctor bills resulting from present disability, and employment on recovery, have been held not to limit the right to wages simply to the time that the services of a nurse and doctor are required.⁷

§ 7372. Mental Capacity and Non-Consent of Releasor.—The rule vitiating a release executed by one incapacitated through mental infirmity or otherwise to make a contract⁸ is not affected by the fact that the person procuring the release was not aware of this incapacity.⁹ The jury, in determining the question of mental incapacity, may take into consideration the state of the health of the person executing the release, since incapacity may proceed from any enfeebled condition of the mind and body.¹⁰

§ 7373. Fraud as a Ground for Rescinding a Release.¹¹—It may be said generally that it is essential to the validity of a release that good faith should be exercised by the person procuring its execution, and that the releasor should be in possession of a full understanding of his legal rights at the time his signature is affixed.¹² Releases have been set aside on the ground of fraud:—Where the execution of a release for the wrongful death of a son was obtained from a father while he was prostrated with grief over his son's death;¹³ where its execution was procured on a promise of employment, which the wrongdoer, at the

⁶ *Texas & P. Ry. Co. v. Dashiell*, 198 U. S. 521; s. c. 25 Sup. Ct. Rep. 737; 49 L. Ed. 1150. But see: *Quebe v. Gulf & C. R. Co.*, 98 Tex. 6; s. c. 81 S. W. Rep. 20, where a contract of settlement which recited that the injured person's throat and breast were injured "by falling on a peg," and that he released the defendant from all claims and demands arising from contract or tort, was held to cover an injury to plaintiff's sight.

⁷ *American Quarries Co. v. Lay*, — Ind. App. —; s. c. 73 N. E. Rep. 608.

⁸ *State, ex rel., Cardwell v. Stuart*, 111 Mo. App. 478; s. c. 86 S. W. Rep. 471.

⁹ *Johnson v. Gulf & C. R. Co.*, 36 Tex. Civ. App. 487; s. c. 81 S. W. Rep. 1197.

¹⁰ *Johnson v. Gulf & C. R. Co.*, 36 Tex. Civ. App. 487; s. c. 81 S. W. Rep. 1197.

¹¹ That the release may be impeached for fraud, see: *Fleming v. Brooklyn Heights R. Co.*, 95 App. Div. (N. Y.) 110; s. c. 88 N. Y. Supp. 732; *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439; s. c. 77 Pac. Rep. 727.

¹² *Kansas City & C. R. Co. v. Chiles*, 86 Miss. 361; s. c. 38 South. Rep. 498. The release may be set aside on proof that the mind of the releasor was overpersuaded and the execution of the release fraudulently obtained: *Chicago & C. R. Co. v. Jennings*, 114 Ill. App. 622.

¹³ *Erickson v. Northwest Paper Co.*, 95 Minn. 356; s. c. 104 N. W. Rep. 291.

time, had no intention of performing;¹⁴ and where the release was executed in reliance on representations minimizing the extent of the injuries, made by physicians¹⁵ or servants¹⁶ in the employ of the defendant. Where the release is fraudulently obtained the releasor may avoid it on this ground, though he accepted employment under the contract.¹⁷ Where the person executing the release knows, or might know the exact nature of the writing he is asked to sign, he cannot invoke his own neglect to ascertain its nature to impeach it unless he was clearly misled by the fraud of the other party.¹⁸

§ 7378. **Mistake as a Ground for Rescission.**¹⁹—Where the contract releases the defendant from all liability for injuries resulting from a specific accident it cannot be avoided because a new form of injury thereafter develops, on the theory that the releasor, being without knowledge of this form of injury, could not have intended to include it.²⁰

§ 7379. **Return of Consideration or Offer to Return as a Prerequisite of Rescission.**²¹

§ 7381. **When Release of One Joint Tort-Feasor Releases All.**²²—Where a release of one joint tort-feasor expressly reserves the right to

¹⁴ *Rapid Transit R. Co. v. Smith*, — Tex. —; s. c. 86 S. W. Rep. 322; rev'g s. c. 82 S. W. Rep. 788.

¹⁵ *International &c. R. Co. v. Shuford*, 36 Tex. Civ. App. 251; s. c. 81 S. W. Rep. 1189.

¹⁶ *Central of Georgia R. Co. v. Goodwin*, 120 Ga. 83; s. c. 47 S. E. Rep. 641; *Fleming v. Brooklyn Heights R. Co.*, 95 App. Div. (N. Y.) 110; s. c. 88 N. Y. Supp. 732; *International &c. R. Co. v. Shuford*, 36 Tex. Civ. App. 251; s. c. 81 S. W. Rep. 1189.

¹⁷ *Coles v. Union Terminal R. Co.*, 124 Iowa 48; s. c. 99 N. W. Rep. 108; *Bjorklund v. Seattle Elec. Co.*, 35 Wash. 439; s. c. 77 Pac. Rep. 727.

¹⁸ *Hartley v. Chicago &c. R. Co.*, 214 Ill. 78; s. c. 73 N. E. Rep. 398; *Rutherford v. Rutherford*, 55 W. Va. 56; s. c. 47 S. E. Rep. 240; *Chicago &c. R. Co. v. Williams*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 248.

¹⁹ Relief on this ground can be granted only in a court of equity: *Chicago &c. R. Co. v. Jennings*, 114 Ill. App. 622.

²⁰ *Quebe v. Gulf &c. R. Co.*, 98 Tex. 6; s. c. 81 S. W. Rep. 20; aff'g s. c. 77 S. W. Rep. 442.

²¹ That it is not necessary to return consideration, or offer to return it as a pre-requisite to rescission on the ground of fraud, see: *St. Louis &c. R. Co. v. Brown*, 73 Ark. 42; s. c. 83 S. W. Rep. 332; *Sargent Co. v. Baublis*, 215 Ill. 428; s. c. 74 N. E. Rep. 455; *Spring Valley Coal Co. v. Buzis*, 213 Ill. 341; s. c. 72 N. E. Rep. 1060; *Quincy Horse R. &c. Co. v. Omer*, 109 Ill. App. 238; *Jaques v. Sioux City Traction Co.*, 124 Iowa 257; s. c. 99 N. W. Rep. 1069; *Glisson v. Paducah R. &c. Co.*, 87 S. W. Rep. 305; s. c. 27 Ky. L. Rep. 965; *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439; s. c. 77 Pac. Rep. 727. Where plaintiff in his petition tenders the amount received it is not necessary that he should bring the money into court and actually tender it to the defendant: *International &c. R. Co. v. Shuford*, 36 Tex. Civ. App. 251; s. c. 81 S. W. Rep. 1189.

²² That full satisfaction received from one of several joint tortfeasors releases all the wrongdoers, see: *Bailey v. Delta Electric Light &c. Co.*, 86 Miss. 634; s. c. 38 South. Rep. 354. That a covenant not to sue one joint tortfeasor does

pursue others than the one released it is not regarded as a technical release, but in the nature of a covenant not to sue, and the other joint tort-feasors are not discharged.²³

§ 7383. Pleadings Relating to Releases.—The Missouri statute requiring the issue of fraud in the execution of a release to be submitted to the jury is held to deal solely with a remedy and not with a right, and hence applies to actions pending at the time of its passage.²⁴ A reply asking the cancellation of a release for fraud, which alleged that it was signed by the releasor in reliance on alleged false and fraudulent representations that the instrument was nothing more than a receipt for a specific sum, has been held insufficient on the ground that the averment was not equivalent to an allegation that the plaintiff would not have signed the instrument had he known that it was something more than a simple receipt.²⁵ The replication must aver facts from which it may be inferred that the signature was obtained by fraud and without the negligence of the signer.²⁶

§ 7384. Evidence Relating to Releases.—There is a presumption that a release is supported by a good consideration in the absence of evidence to the contrary,²⁷ and this imposes upon the plaintiff the burden of proof of establishing his allegations of fraud.²⁸ "It is a universal rule that when fraud is alleged, a broad and liberal latitude should be given the party alleging it, in establishing every fact and circumstance connected with its alleged perpetration. The mental and physical condition of the party and all representations and inducements held out to him by the adverse party should be carefully examined into, and all testimony directly connected with the transaction should be admitted."²⁹

not release others, see: *Robertson v. Trammell*, 98 Tex. 364; s. c. 83 S. W. 1098.

²³ *Louisville &c. Mail Co. v. Barnes*, 117 Ky. 860; s. c. 79 S. W. Rep. 261; 25 Ky. L. Rep. 2036; 64 L. R. A. 574; *Hirschfeld v. Alsberg*, 47 Misc. (N. Y.) 141; s. c. 93 N. Y. Supp. 617; *Walsh v. Hanan*, 93 App. Div. (N. Y.) 580; s. c. 87 N. Y. Supp. 930; rev'g s. c. 66 N. Y. Supp. 1066. That a partial satisfaction by one joint tort feasor does not operate as a release of others, see, generally: *Bailey v. Delta Electric Light &c. Co.*, 86 Miss. 634; s. c. 38 South. Rep. 354; *Robertson v. Trammell*, 98 Tex. 364; s. c. 83 S. W. Rep. 1098; *Nagle v. Hake*, 123 Wis. 256; s. c. 101 N. W. Rep. 409. That other joint tort feasors after-

wards sued are entitled to have the amount so paid deducted from the entire amount to which the injured person was entitled, see: *Robertson v. Trammell*, 98 Tex. 364; s. c. 83 S. W. Rep. 1098.

²⁴ *State, ex rel., Cardwell v. Stuart*, 111 Mo. App. 478; s. c. 86 S. W. Rep. 471.

²⁵ *Miller v. Mutual Reserve Fund Life Ass'n*, 113 Ill. App. 481.

²⁶ *Miller v. Mutual Reserve Fund Life Ass'n*, 113 Ill. App. 481.

²⁷ *Adams v. Hopkins*, 144 Cal. 19; s. c. 77 Pac. Rep. 712.

²⁸ *Chicago &c. R. Co. v. Jennings*, 114 Ill. App. 622; *St. Louis &c. R. Co. v. Erlinger*, 112 Ill. App. 506.

²⁹ *Oldham, J., in New Omaha &c. Electric Light Co. v. Rombold*, — Neb. —; s. c. 102 N. W. Rep. 475.

TITLE THIRTY.

PROCEDURE.

[§§ 7420-7923.]

PART ONE.

QUESTIONS OF LAW AND FACT.¹

PART TWO.

PARTIES TO ACTIONS FOR NEGLIGENCE.

[§§ 7420-7440.]

§ 7420. Right of Action against Common Carrier of Goods is Presumptively in Consignee.²

§ 7426. Parties Plaintiff in Other Cases.—The legal owner of property injured by the negligence of another is the only necessary plaintiff in an action for the injury, though others may have a remote interest in the property, as, for example, an interest in the prospective profits from the operation of a mill destroyed by the alleged negligent act.³ So the mortgagor of personalty, if still in possession, may maintain an action for injury to such property although the mortgage is past due.⁴ Under a provision of the New York consolidation act, making owners of buildings liable for injuries to firemen caused by neglecting to close hoistways, trapdoors, etc., at the close of the day, and empowering the officers of the fire department to institute the action, the action cannot be brought by the injured fireman in his own behalf, but it must be brought by the officers of the fire department, as provided by the statute.⁵

¹ The principles under this head are so abundantly illustrated and supported in the main title that the insertion at this point of a multitude of recent citations to the same effect and announcing no new rules would serve no useful purpose, and would, at most, only amount to an affectation of learning and industry. These considerations are deemed sufficient to justify their omission.

² See generally in support: *Bank of Irwin v. American Express Co.*,

127 Iowa 1; s. c. 102 N. W. Rep. 107; *Weber v. Chicago & C. R. Co.*, 69 Kan. 611; s. c. 77 Pac. Rep. 533.

³ *Conner v. Missouri Pac. R. Co.*, 181 Mo. 397; s. c. 81 S. W. Rep. 145; *Texas & C. R. Co. v. Andrews* (Tex. Civ. App.), 80 S. W. Rep. 390 (joint owners of stock injured in transit may join in suit for damages).

⁴ *Huss v. Wabash R. Co.*, 84 Mo. App. 111.

⁵ *Eckes v. Stetler*, 98 App. Div. (N. Y.) 76; s. c. 90 N. Y. Supp. 473.

§ 7435. **Joint Tort-Ffeasor as Party Defendant.**—Two or more persons, although acting independently, whose negligence concurs in causing an injury to a third person, are regarded as joint tort-feasors, and may be joined as defendants in an action for such injury at the plaintiff's election.⁶ And where the injury results from the neglect to perform a common duty resting on two or more persons, though there may be no concert of action between them, the injured party may sue all persons jointly owing the common duty.⁷ The fact of including a superfluous defendant will not prevent the plaintiff from obtaining such relief as he shows he is entitled to against the proper defendant.⁸

§ 7437. **Actions against Both Master and Servant.**⁹

§ 7438. **Parties Defendant in Actions for Injuries Resulting from the Construction or Operation of Railroads.**—The purchaser of a railroad, under a decree providing that the purchaser at the sale should take the property subject to all liabilities incurred by the receiver, is properly joined as defendant in an action for the death of a passenger while the road was operated by the receiver.¹⁰ There can be no recovery against different railroad companies for an injury, unless there was some community of fault between them in the acts which occasioned the injury.¹¹

§ 7439. **Liability as between Street Railroad Companies and Other Persons.**—Similarly an action will not lie against a street railroad company and a municipal corporation to recover for injuries caused by an alleged unsafe condition of a highway and the tracks thereon, in the absence of evidence showing any concert of action between the street railroad company and the municipality.¹²

§ 7440. **Liability as between Municipal Corporations and Other Persons.**—A Massachusetts case is authority that a private corporation, through whose negligence a highway becomes defective and a

⁶ *Graves v. City & Sub. Teleg. Ass'n*, 132 Fed. Rep. 387.

⁷ *Birch v. Charleston Light & Co.*, 113 Ill. App. 229.

⁸ *Acme Bedford Stone Co. v. McPhetridge*, 35 Ind. App. 79; s. c. 73 N. E. Rep. 838.

⁹ The joinder was held proper in these cases: *McHugh v. Northern Pac. R. Co.*, 32 Wash. 30; s. c. 72 Pac. Rep. 450 (railroad company and engineer running train into handcar and injuring plaintiff); *Morrison v. Northern Pac. R. Co.*, 34 Wash. 70;

s. c. 74 Pac. Rep. 1064 (railroad company and conductor); *Howe v. Northern Pac. R. Co.*, 30 Wash. 569; s. c. 70 Pac. Rep. 1100 (railroad company and division superintendent and division train dispatcher).

¹⁰ *Denver & C. R. Co. v. Gunning*, 33 Colo. 280; s. c. 80 Pac. Rep. 727.

¹¹ *Sturzebecker v. Inland Traction Co.*, 211 Pa. 156; s. c. 60 Atl. Rep. 583.

¹² *Goodman v. Coal Tp.*, 206 Pa. 621; s. c. 56 Atl. Rep. 65.

city which negligently suffers the highway to remain in this condition are not joint tort-feasors. The action against the corporation is a common-law action, while that against the municipality is statutory. Furthermore, the liability of the private corporation is primary, while that of the municipality is secondary.¹³ Elsewhere it is held that the court may require the property owner to be impleaded where the plea of the municipality shows that the property owner was primarily liable for a sidewalk defect.¹⁴

¹³ *Mooney v. Edison Elec. Illuminating Light Co.*, 185 Mass. 547; s. c. 151; s. c. 81 S. W. Rep. 518.
¹⁴ *San Antonio v. Talerico*, 98 Tex. 70 N. E. Rep. 933.

PART THREE.

PLEADINGS.

[§§ 7446-7617.]

§ 7446. Pleadings must State Facts, and Not Conclusions of Law.¹

§ 7446a. **Pleading the Evidence.**—It is elementary that the complaint should set up the facts constituting the negligence complained of and not the evidence from which it may be inferred.² The rate of speed at which a vehicle causing injuries complained of was driven is a matter of evidence, under the rule, and need not be pleaded.³

§ 7447. **Particularity of Averment of Negligence.**⁴—An allegation that the plaintiff is unable to ascertain the particular acts of negligence causing the injury, and that on account of the manner in which the injury was inflicted such acts were matters more particularly within the knowledge of the defendant has been held not to present a sufficient excuse for failing to specify the particulars of the negligence relied on.⁵ Neither can general averments of negligence be aided by the maxim *res ipsa loquitur*.⁶ It must be alleged that the defendant owed a legal duty to the plaintiff, the failure to discharge which

¹ In an action for injuries to an intending passenger an allegation in the complaint that he was a passenger pleads a mere conclusion of law, where the existence of the relation is at issue: *Fremont &c. R. Co. v. Hagblad*, — Neb. —; s. c. 101 N. W. Rep. 1033.

² *Davis v. Smith*, 26 R. I. 129; s. c. 58 Atl. Rep. 630.

³ *Lachenbruch v. Cushman*, 87 N. Y. Supp. 476.

⁴ A complaint is defective which fails to set forth the particulars in which defendant was negligent: *Russell v. Central of Georgia R. Co.*, 119 Ga. 705; s. c. 46 S. E. Rep. 858; *Chicago &c. R. Co. v. Clinebell*, — Neb. —; s. c. 99 N. W. Rep. 837; *Fremont &c. R. Co. v. Hagblad*, — Neb. —; s. c. 101 N. W. Rep. 1033. The rule under this head does not

require the pleader to recite all the facts which may tend to show negligence. An averment that the act was injurious to plaintiff, with a general allegation of negligence in the performance of the act, has been held sufficient: *Southern Indiana R. Co. v. Messick*, 35 Ind. App. 676; s. c. 74 N. E. Rep. 1097. It is not necessary to catalogue every subordinate result flowing from an injury in order to introduce proof of such results: *Cudahy Packing Co. v. Broadbent*, 70 Kan. 535; s. c. 79 Pac. Rep. 126.

⁵ *Hudgins v. Coca Cola Bottling Co.*, 122 Ga. 695; s. c. 50 S. E. Rep. 974.

⁶ *Hudgins v. Coca Cola Bottling Co.*, 122 Ga. 695; s. c. 50 S. E. Rep. 974.

caused the injury,⁷ and the facts showing the existence of such duty should be set out.⁸

§ 7450. **Matters Necessarily Inferred.**—Where the duty is imposed and defined by statute a complaint for a negligent breach of the duty need not specially plead it.⁹ In an action against a railroad company for damages for an assault on a passenger by the conductor, the complaint need not set out the insulting language of the conductor toward the passenger, leading up to the assault, as this is a matter going merely in aggravation or extenuation of the damages recoverable.¹⁰

§ 7451. **Alternative Averments.**—Where the complaint has a double aspect—as for example, where based on both ordinary negligence and willful negligence—which renders it uncertain, the cause should not be submitted to the jury upon both aspects.¹¹ An allegation that the injuries were caused by negligence on the part of the defendant, its servants or agents, is not open to the objection that it charges negligence alternatively against the defendant, or its servants or its agents. Such an averment merely charges negligence against the defendant acting through its servants or agents.¹²

§ 7452. **Control as between General and Special Allegations of Negligence.**¹³

§ 7455. **Forms of Action—"Trespass" and "Case."**¹⁴

⁷ Whitten v. Nevada Power & Co., 132 Fed. Rep. 782; Pittsburgh R. Co. v. Lighthaiser, 163 Ind. 247; s. c. 71 N. E. Rep. 218, 660; St. Joseph Ice Co. v. Bertch, 33 Ind. App. 491; s. c. 71 N. E. Rep. 56; Hortenstine v. Virginia-Carolina R. Co., 102 Va. 914; s. c. 47 S. E. Rep. 996.

⁸ Muncie Pulp Co. v. Davis, 162 Ind. 558; s. c. 70 N. E. Rep. 875.

⁹ Adams Exp. Co. v. Aldridge, 20 Colo. App. 74; s. c. 77 Pac. Rep. 6.

¹⁰ Houston & Co. R. Co. v. Batchler, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 902.

¹¹ Rideout v. Winnebago Traction Co., 123 Wis. 297; s. c. 101 N. W. Rep. 672.

¹² Eagle & Co. Mills v. Herron, 119 Ga. 389; s. c. 46 S. E. Rep. 405.

¹³ That specific allegations control, see: Palmer Brick Co. v. Chenall, 119 Ga. 837; s. c. 47 S. E. Rep. 329; Chicago & Co. R. Co. v. Wheeler, 70 Kan. 755; s. c. 79 Pac. Rep. 673.

¹⁴ An allegation that defendant,

through its servants or agents in charge of a train, wantonly or intentionally inflicted on plaintiff the injuries set out in the complaint, by wantonly or intentionally allowing the train to run against plaintiff without characterizing the act as negligent, states a case in trespass: Central of Georgia R. Co. v. Freeman, 140 Ala. 581; s. c. 37 South. Rep. 387. A count charging that defendant railroad company wantonly and intentionally caused or allowed a railroad train to run against the plaintiff's vehicle, involves the actual participation of the defendant in running the train and not merely his responsibility for the act of a servant, and is in trespass, and not in case, and proof of actual participation in the negligent act by the defendant is essential to a recovery: Birmingham Belt R. Co. v. Gerganous, 142 Ala. 238; s. c. 37 South. Rep. 929.

§ 7457. Proximate Cause.¹⁵

§ 7465. "Willful" and "Gross" Negligence.—An allegation that the engine and cars causing the plaintiff's injury could have been stopped within the space of a foot, and that those in charge of the engine could have seen the plaintiff had they been on the lookout, was held insufficient to charge a willful injury, there being no allegation that the defendant's employes did see the plaintiff or that they knew he was on the track at the time.¹⁶ In Wisconsin, under an allegation of willful negligence there can be no recovery on proof of mere negligence.¹⁷ In Illinois the other view is taken and a charge of willful, wanton or reckless negligence is held to include ordinary negligence which can be shown under the pleading.¹⁸

§ 7466. Averment that Injury could have been Avoided by the Use of Due Care by Defendant after Discovery of Plaintiff's Peril.—The issue of discovered peril must be raised by the pleadings.¹⁹ Where, however, as a matter of law, the specific negligence alleged is not the proximate cause of the injury, the complaint is not helped, as against general demurrer, by a general allegation that the defendant ought to have foreseen the danger and averted it.²⁰

§ 7467. Joinder of Causes of Action.²¹

¹⁵ That the negligence alleged was the proximate cause of the injury suffered was held sufficiently set forth by an allegation which enumerated several alleged acts of negligence and then alleged "that said acts of negligence were the direct and proximate cause of the death of decedent," and "that all of said acts contributed thereto:" *International &c. R. Co. v. Glover*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 515. But a complaint in an action for injuries to a street railway employé while riding on a car, which averred that the car was old and dangerous, which was known to the company and unknown to the employé, was held defective for failing to show that the condition of the car was the proximate cause of the injury: *Indianapolis &c. Rapid Transit Co. v. Andis*, 33 Ind. App. 625; s. c. 72 N. E. Rep. 145.

¹⁶ *Van Winkle v. New York &c. R. Co.*, 34 Ind. App. 476; s. c. 73 N. E. Rep. 157.

¹⁷ *Turtenwald v. Wisconsin Lakes Ice &c. Co.*, 121 Wis. 65; s. c. 98 N. W. Rep. 948; *Wilson v. Chippewa*

Valley Electric R. Co., 120 Wis. 636; s. c. 98 N. W. Rep. 536.

¹⁸ *Chicago City R. Co. v. O'Donnell*, 208 Ill. 267; s. c. 69 N. E. Rep. 882; aff'g s. c. 109 Ill. App. 616.

¹⁹ *Hawkins v. Missouri &c. R. Co.*, 36 Tex. Civ. App. 633; s. c. 83 S. W. Rep. 52.

²⁰ *Prokop v. Gulf &c. R. Co.*, 34 Tex. Civ. App. 520; s. c. 79 S. W. Rep. 101.

²¹ A count at common law for negligent injuries to one on the premises of another by invitation may be joined in the complaint with counts under an employers' liability act: *Sloss Iron &c. Co. v. Tilson*, 141 Ala. 152; s. c. 37 South. Rep. 427. An employé at work in an elevator shaft, and injured by the negligent operation of the elevator by a third person, may join his cause of action against the third person with one against the master based on his failure to furnish him a safe place for work: *Lynch v. Elektron Mfg. Co.*, 94 App. Div. (N. Y.) 408; s. c. 88 N. Y. Supp. 70. Since negligence and willfulness cannot concur in a single act, and evidence tending to show

§ 7470. **Pleading Ordinances.**—The question of the reasonableness of an ordinance must be raised by the pleadings.²² A complaint in an action based on the negligence of a railroad company in obstructing a street in violation of an ordinance must allege that the street obstruction extended over the railroad company's right of way.²³ One pleading an ordinance must allege that the ordinance was in force at the time of the injury.²⁴

§ 7471. **Averting One Kind of Negligence and Recovering on Another—Variance.**²⁵—The variance between the allegation and the proof has been held fatal in these cases:—Where it was alleged that the plaintiff's vehicle was struck by the defendant's engine and he was thrown out and injured, and the evidence tended to show that the car struck the vehicle but that he was not thrown out, but the horse ran away and it was then that the plaintiff was thrown out and injured;²⁶ where it was alleged that the plaintiff's injuries were caused by the sudden starting of a train while the plaintiff was in the act of alighting, and the proof showed that he was injured while he was attempting to alight from a slowly moving train;²⁷ where the plaintiff alleged that he was injured by being put to work without warning as to the danger of the employment, and the evidence tended to show

one would disprove the other, causes of action based on these grounds cannot be joined: *Boyd v. St. Louis Transit Co.*, 108 Mo. App. 303; s. c. 83 S. W. Rep. 287.

²² *Missouri & C. R. Co. v. Matherly*, 35 Tex. Civ. App. 604; s. c. 81 S. W. Rep. 589.

²³ *Eakins v. Chicago & C. R. Co.*, 126 Iowa 324; s. c. 102 N. W. Rep. 104.

²⁴ *Southern R. Co. v. Jones*, 33 Ind. App. 333; s. c. 71 N. E. Rep. 275.

²⁵ That plaintiff is confined to proof of the acts of negligence alleged in his petition or complaint, see: *Hudgins v. Coca Cola Bottling Co.*, 122 Ga. 695; s. c. 50 S. E. Rep. 974; *Chicago City R. Co. v. Bruley*, 215 Ill. 464; s. c. 74 N. E. Rep. 441; *Missouri Pac. R. Co. v. Griffith*, 69 Kan. 130; s. c. 76 Pac. Rep. 436; *Aston v. St. Louis Transit Co.*, 105 Mo. App. 226; s. c. 79 S. W. Rep. 999; *McGinn v. United States Finishing Co.*, 27 R. I. 58; s. c. 60 Atl. Rep. 677. An allegation that the motorman's failure to use any care to control the car which caused plaintiff's injury, is broad enough to let in evidence as to the excessive speed

of the car: *Fry v. St. Louis Transit Co.*, 111 Mo. App. 324; s. c. 85 S. W. Rep. 960. Under an allegation that defendant negligently employed deceased in a dangerous place and in a dangerous occupation in that it required him to start certain machinery when it stopped, in discharging which duty deceased necessarily came into proximity with the cogwheels which caused his death, plaintiff may show that the work of starting the machinery was beyond the scope of deceased's employment: *Virginia Iron & C. Co. v. Tomlinson*, 104 Va. 249; s. c. 51 S. E. Rep. 362. Under an averment that plaintiff's injuries are permanent and will leave him in a crippled condition for life, evidence of impairment of earning capacity is admissible: *Terre Haute Electric Co. v. Watson*, 33 Ind. App. 124; s. c. 70 N. E. Rep. 993.

²⁶ *Wabash R. Co. v. Billings*, 212 Ill. 37; s. c. 72 N. E. Rep. 2; rev'g s. c. 105 Ill. App. 111.

²⁷ *Bond v. Chicago & C. R. Co.*, 110 Mo. App. 131; s. c. 84 S. W. Rep. 124..

that he was injured by a defective appliance;²⁸ where the plaintiff alleged negligence on the part of a railroad conductor and also on the part of the railroad company, and his proof showed that the injuries were caused by the negligence of servants other than the conductor.²⁹ The variance, if any, was held immaterial in a case where the plaintiff alleged that his injuries were caused by the defendant's failure to provide and maintain a reasonably safe place for work, which was sufficiently sustained by proof, and the variance related merely to the details of the accident;³⁰ and similarly where it was alleged that the plaintiff was injured while riding in a wagon and the proof showed that she was riding in a two-wheeled vehicle.³¹

§ 7474. Proof of All Acts of Negligence Charged Not Required.³²

—There is authority that where the plaintiff relies on several different acts of negligence he may recover if the jurors agree that there was negligence, though they do not agree as to the grounds thereof.³³ But where the complaint charges several acts of negligence jointly, as proximate causes of the injury, proof of all these acts is required to entitle the plaintiff to recover.³⁴

§ 7482. Amendment of Defective Pleadings.³⁵

§ 7493. Injuries at Railroad Crossings.—A statement that the defendant's locomotive and cars were run over the plaintiff and his team, and that his injuries were caused wholly through the negligence and fault of the defendant in the operation of said locomotive and cars, without any fault or negligence on the plaintiff's part, has been held a sufficient allegation of negligence in the absence of a motion to make more specific.³⁶ Causal connection between the defendant's neg-

²⁸ *Moyer v. Ramsay-Brisbane Stone Co.*, 119 Ga. 734; s. c. 46 S. E. Rep. 844.

²⁹ *Richey v. Southern R. Co.*, 69 S. C. 387; s. c. 48 S. E. Rep. 285.

³⁰ *Nord v. Boston &c. Copper &c. Min. Co.*, 30 Mont. 48; s. c. 75 Pac. Rep. 681.

³¹ *Luce v. Hassam*, 76 Vt. 450; s. c. 58 Atl. Rep. 725.

³² See generally: *Savannah &c. R. Co. v. Evans*, 121 Ga. 391; s. c. 49 S. E. Rep. 308; *Chicago &c. R. Co. v. Rains*, 203 Ill. 417; s. c. 67 N. E. Rep. 840; *Southern Indiana R. Co. v. Hoggatt*, 35 Ind. App. 348; s. c. 73 N. E. Rep. 1096; *Indianapolis St. R. Co. v. Slifer*, 35 Ind. App. 700; s. c. 74 N. E. Rep. 19; *rev'g s. c. 72 N. E. Rep. 1055*; *Dutro v. Metropolitan St. R. Co.*, 111 Mo. App. 258; s. c. 86 S. W. Rep. 915.

³³ *Holden v. Missouri R. Co.*, 108 Mo. App. 665; s. c. 84 S. W. Rep. 133.

³⁴ *Ratteree v. Galveston &c. R. Co.*, 36 Tex. Civ. App. 197; s. c. 81 S. W. Rep. 566.

³⁵ That the complaint may be amended to conform to the proof, see: *Dorff v. Brooklyn Heights R. Co.*, 95 App. Div. (N. Y.) 82; s. c. 88 N. Y. Supp. 463; *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597; s. c. 81 S. W. Rep. 1112. Generally a new and distinct cause of action is not added to a complaint by an amendment which contains additional matter descriptive of the same wrong pleaded in the original petition or complaint and which does not plead any other or different wrong: *Columbus v. Anglin*, 120 Ga. 785; s. c. 48 S. E. Rep. 318.

³⁶ *Baltimore &c. R. Co. v. Reyn-*

ligence and the plaintiff's injuries has been held sufficiently shown by an allegation that while the plaintiff was unavoidably delayed on a crossing by the conduct of her horse, the defendant negligently ran a train over the track without giving the statutory signals, whereby the plaintiff was deceived and caught on the crossing and her horse killed and she injured.³⁷ An allegation charging negligence, carelessness, and recklessness in the management and operation of the train whereby the plaintiff was run over and injured, has been held such notice to the defendant that the manner of operating the train would be brought in question on the trial as to dispense with a statement of particular acts of negligence on the part of those in charge of the train.³⁸

§ 7495. Willful and Wanton Injuries at Railroad Crossings.—A complaint under this head was held sufficient which alleged that the defendant ran a train backwards in a violent manner, without notice or warning, or lights or signals, which fact constituted willfulness and recklessness.³⁹

§ 7496. Injuries to Animals.⁴⁰

§ 7509. Right of Passenger on Train should be Averred.⁴¹

§ 7510. Injuries Received in Boarding and Alighting from Train.—Negligence on the part of the conductor was held sufficiently charged by an allegation that the defendant's street car stopped at a regular stopping place, when the plaintiff and other passengers began to leave the car by the rear platform, and that the conductor could have seen, and did see the condition of such passengers until they stepped off the car; and that while the plaintiff was in the act of stepping from the lower step the car suddenly started with a violent jerk, and that the conductor, without regard to the plaintiff's condition, negligently signaled the car to be started.⁴² Another complaint alleging that the plaintiff was a passenger on a street car, and signaled to stop the car, and that while the car was stopped in pursuance

olds, 33 Ind. App. 219; s. c. 71 N. E. Rep. 250.

³⁷ *Greenawaldt v. Lake Shore & C. R. Co.*, 165 Ind. 219; s. c. 74 N. E. Rep. 1081.

³⁸ *Louisville & C. R. Co. v. Dick*, 78 S. W. Rep. 914; s. c. 25 Ky. L. Rep. 1831.

³⁹ *Bolin v. Southern R. Co.*, 65 S. C. 222; s. c. 43 S. E. Rep. 665.

⁴⁰ *Gulf & C. R. Co. v. Anson* (Tex. Civ. App.), 82 S. W. Rep. 785 (gen-

eral allegation of negligence insufficient).

⁴¹ Status as a passenger was not sufficiently shown by an allegation that an assault was committed "while plaintiff was engaged in or about becoming a passenger on said car." *Birmingham R. & C. Co. v. Mason*, 137 Ala. 342; s. c. 34 South. Rep. 207.

⁴² *Union Traction Co. v. Siceloff*, 34 Ind. App. 511; s. c. 72 N. E. Rep. 266.

of her signal and the plaintiff was alighting, the defendant's servants negligently caused the car to be started forward with a sudden jerk, causing the plaintiff to fall, was held sufficient after verdict, although it did not allege, in express terms, that the car did not stop a reasonable time to allow the plaintiff to alight, or that the conductor knew or should have known that the plaintiff was alighting.⁴³

§ 7512. Passengers Injured while Riding on Platform.⁴⁴

§ 7518. Carriers of Goods.⁴⁵—The plaintiff, in an action for loss or injury to the subject of shipment, is not required to plead or prove the written contract under which his shipment was made; this, if relied on by the defendant, is a matter of defense and must be raised by answer.⁴⁶

§ 7519. Carriers of Animals.⁴⁷—A cause of action is sufficiently set up in a complaint, which alleged the relation of shipper and carrier, delivery by the plaintiff to the defendant of the animals in good condition for transportation, the duty safely to carry and deliver, and the loss of a part by death and injury to the rest in transit by the negligence of the carrier.⁴⁸ The existence of defects in the car responsible for injuries, must be pleaded.⁴⁹ One suing for damages both for fall in the market caused by delay in transportation and for depreciation in the value of the animals caused by the defend-

⁴³ *McKinstry v. St. Louis Transit Co.*, 108 Mo. App. 12; s. c. 82 S. W. Rep. 1108.

⁴⁴ An allegation in a declaration for injuries caused by falling from a rapidly moving train, that the passenger, standing at the door opening on to the platform, became unconscious by reason of the foul air, and fell from the train while it was running at a high rate of speed, was held a sufficient averment that the speed of the train caused the passenger to fall therefrom: *Morgan v. Lake Shore &c. R. Co.*, 138 Mich. 626; s. c. 101 N. W. Rep. 336; 11 Det. Leg. N. 713.

⁴⁵ That a shipper may, at his election, sue either on the contract or in tort for injuries to shipment, see: *Eckert v. Pennsylvania R. Co.*, 211 Pa. 267; s. c. 60 Atl. Rep. 781. A declaration alleging the consideration, the promise, the breach, and the giving of the notice of loss required by the bill of lading, states a cause of action in assumpsit upon the contract of carriage: *Chesapeake &c. R. Co. v. F. W. Stock &*

Sons, 104 Va. 97; s. c. 51 S. E. Rep. 161.

⁴⁶ *Empire State Cattle Co. v. Atchison &c. R. Co.*, 129 Fed Rep. 480. But see *Chicago &c. R. Co. v. Reymann*, — Ind. —; s. c. 73 N. E. Rep. 587.

⁴⁷ Under an allegation that injuries to horses were caused by the carrier's improper and rough manner of handling them, plaintiff may not show that part of the injuries were caused by the failure of the carrier to furnish proper troughs in which to water the horses: *Texas &c. R. Co. v. Stephens*, — Tex Civ. App. —; s. c. 86 S. W. Rep. 933. Where the causes of the injuries are specifically averred but do not include improper bedding as one of the causes, evidence that improper bedding was a cause of injury is inadmissible: *Gulf &c. R. Co. v. Wright*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 191.

⁴⁸ *Smith v. Great Northern R. Co.*, 92 Minn. 11; s. c. 99 N. W. Rep. 47.

⁴⁹ *Moore v. Baltimore &c. R. Co.*, 103 Va. 189; s. c. 48 S. E. Rep. 887.

ant's negligence in any particular, must separately state the amount of damages he claims for each cause.⁵⁰ An allegation that the defendant, through its "carelessness and negligence," placed the plaintiff's stock in certain yards, and wrongfully exposed them to infection, is sufficient to raise the issue of the defendant's knowledge, actual or imputed, that the yards were infected.⁵¹

§ 7522. Complaint should Allege Existence of Relation of Master and Servant.⁵²

§ 7523. Generally as to Allegations of Duty.—A complaint, otherwise sufficient, is not vitiated by an allegation overstating the duty of the defendant as to the care he should have exercised for an employé's safety.⁵³ The complaint must show that the plaintiff was at the time of receiving his injury performing a duty he owed his employer.⁵⁴ Facts must be alleged from which it can be said that it was the employer's duty to apprehend the occurrence of the accident causing the injuries in question.⁵⁵

§ 7525. Particularity and Certainty of Averment—Illustrations.⁵⁶

⁵⁰ *Texas &c. R. Co. v. Farrington*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 889.

⁵¹ *Dorr Cattle Co. v. Chicago &c. R. Co.*, 128 Iowa 359; s. c. 103 N. W. Rep. 1003.

⁵² *Logan v. Central Iron &c. Co.*, 139 Ala. 548; s. c. 36 South. Rep. 729 (example of complaint defective for failure to charge that injured servant was an employé of defendant at time of receiving injuries). An allegation that defendant was engaged in operating a foundry and that plaintiff was employed in this business as a laborer and was directed by defendant to use a certain appliance, while using which he was injured, was held sufficient, after verdict, as an allegation that the relation of master and servant existed between the parties: *Sargent Co. v. Baublis*, 215 Ill. 428; s. c. 74 N. E. Rep. 455. An allegation in a complaint for injuries to a railroad bridge builder, that while returning home from his work on a railroad velocipede furnished by the railroad company for this purpose, and which he was using at the instance of the railroad company when he was run down, was held not to show that he was at the time of his injury an employé in the service of the railroad company: *Wabash R. Co. v.*

Erb, 36 Ind. App. 650; s. c. 73 N. E. Rep. 939.

⁵³ *Henne v. J. T. Steeb Shipping Co.*, 37 Wash. 331; s. c. 79 Pac. Rep. 938.

⁵⁴ *Mackey v. Northern Mill Co.*, 210 Ill. 115; s. c. 71 N. E. Rep. 448; aff'g s. c. 99 Ill. App. 57.

⁵⁵ *Pittsburgh &c. R. Co. v. Lightheiser*, 163 Ind. 247; s. c. 71 N. E. Rep. 218, 660.

⁵⁶ That complaints or declarations claiming damages for the negligence of the master are subject to demurrer where they contain only general allegations of negligence, see *Palmer Brick Co. v. Chenall*, 119 Ga. 837; s. c. 47 S. E. Rep. 329. That complaint must show, by direct averment of facts, some causal connection between the negligent act and the injury, see: *South Bend Chilled Plow Co. v. Cissne*, 35 Ind. App. 373; s. c. 74 N. E. Rep. 282. A complaint under a statute making the operator of a mine liable for any injury occasioned by a failure to comply with the statute, having alleged that plaintiff was employed by defendant and that plaintiff was injured by a fall of rock while working in the mine, is sufficient without requiring plaintiff to make the complaint more specific by stating the particular kind of work upon which

§ 7527. **Allegation as to Safety of Place for Work.**—A declaration was sustained, in each count of which it was alleged that the defendant had failed to perform the duty which it owed to the deceased to keep its premises in reasonably safe repair, and stated in what respect the duty existed, and wherein the defendant had failed to perform it, and either charged that the defendant had notice of the unsafe condition or set out facts from which it was necessarily to be inferred that the defendant had this knowledge, and in all the counts it was alleged that the injured person was without fault.⁵⁷ The complaint should show that the injured person was under a duty to be at the place where his injuries were received.⁵⁸

§ 7528. **Defective Appliances Furnished Employé.**—The complaint should clearly state in what respect the machine or appliance furnished was not reasonably safe and in what particulars the master failed to exercise reasonable care in ordering the servant to work upon or use the same, and that the unsafe character of the machine or appliance caused the injury.⁵⁹ If the plaintiff claims that certain other appliances could have been used with less danger he must allege that they were practicable for use.⁶⁰

he was engaged and the manner in which he was performing the work at the time of the injury: *Diamond Block Coal Co. v. Cuthbertson*, — Ind. —; s. c. 73 N. E. Rep. 818; aff'g s. c. 73 N. E. Rep. 132; 67 N. E. Rep. 558. A complaint for injuries to a railroad brakeman need not state the name of the conductor in charge of the train on which he was working, nor the number of the car, nor any specific description of it: *Texas Cent. R. Co. v. Powell*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 21. A complaint withstood the objection that it was wanting in particularity which charged that it was defendant's duty to use ordinary care to furnish plaintiff with a reasonably safe saw, that defendant was informed of its defective condition and promised to fix it, but directed plaintiff to continue his work, and failed to fix it as promised, by reason of which plaintiff was injured: *Virginia & C. Wheel Co. v. Harris*, 103 Va. 708; s. c. 49 S. E. Rep. 991. A complaint in an action for injuries to a railroad brakeman by coming in contact with a telegraph pole near the track, that alleged that the pole stood so near the track that it was highly dangerous

to defendant's servants in operating its cars, was held sufficient, though it made no reference to the person or corporation who originally placed the pole: *Illinois Terminal R. Co. v. Thompson*, 210 Ill. 226; s. c. 71 N. E. 328; aff'g s. c. 121 Ill. App. 463. A complaint under an employer's liability act, making the master liable when the injury is caused by the negligence of any person having control of any engine or train upon a railway, is insufficient where it does not allege that the engine causing the injury was on a railway at the time: *Sloss-Sheffield Steel & Co. v. Mobley*, 139 Ala. 425; s. c. 36 South Rep. 181.

⁵⁷ *Virginia Portland Cement Co. v. Luck*, 103 Va. 427; s. c. 49 S. E. Rep. 577.

⁵⁸ *South Bend Chilled Plow Co. v. Cissne*, 35 Ind. App. 373; s. c. 74 N. E. Rep. 282.

⁵⁹ *Anderson v. United States Rubber Co.*, 78 Conn. 48; s. c. 60 Atl. Rep. 1057. See also *Sargent Co. v. Baublis*, 215 Ill. 428; s. c. 74 N. E. Rep. 455; *Terre Haute Electric Co. v. Kiely*, 35 Ind. App. 180; s. c. 72 N. E. Rep. 658.

⁶⁰ *Pittsburgh & C. R. Co. v. Lightheiser*, 163 Ind. 247; s. c. 71 N. E.

§ 7529. **Master's Knowledge of the Existence of the Defect.**⁶¹

§ 7531. **Servant's Want of Knowledge of Defect.**⁶²

§ 7532. **Failure to Safeguard Dangerous Machinery.**—In an action based on the employer's failure to safeguard machinery as required by statute, it is not necessary to allege that the plaintiff had no knowledge of the uncovered condition of the machinery and the dangers resulting therefrom.⁶³ Where the machinery to be safeguarded is particularly specified in the statute, the plaintiff need not allege that the machine was dangerous;⁶⁴ neither is it required that the plaintiff should make special reference to the statute.⁶⁵ Thus a complaint alleging that the machine was dangerous because the knives were unguarded, and that it was practicable to guard them, that the defendant negligently failed so to do, and that the plaintiff's injury was caused by such negligence, has been held to charge a cause of action under a statute requiring the master to guard dangerous machinery and not at common law.⁶⁶

Rep. 218, 660; American Car & Co. v. Clark, 32 Ind. App. 644; s. c. 70 N. E. Rep. 828.

⁶¹ That the plaintiff must allege that the defendant had actual or constructive knowledge of the defect causing the injury, see: Southern Bell Tel. & Co. v. Starnes, 122 Ga. 602; s. c. 50 S. E. Rep. 343; Chamberlain v. Waymire, 32 Ind. App. 442; s. c. 68 N. E. Rep. 306; 70 N. E. Rep. 81; Cleveland & Co. R. Co. v. Lindsay, 33 Ind. App. 404; s. c. 70 N. E. Rep. 283, 998; Malott v. Sample, 164 Ind. 645; s. c. 74 N. E. Rep. 245; rev'g s. c. 73 N. E. Rep. 1135; Mueller v. La Prella Shoe Co., 109 Mo. App. 506; s. c. 84 S. W. Rep. 1010. But see *contra*: Owens v. Lehigh Valley Coal Co., 115 Ill. App. 142. An allegation that the master knew or ought to have known of the defects and dangers in an appliance is equivalent to a charge of constructive notice: Babcock Bros. Lumber Co. v. Johnson, 120 Ga. 1030; s. c. 48 S. E. Rep. 438.

⁶² That the plaintiff must aver and prove that he was not aware of the danger causing the injury, see: Baltimore & Co. R. Co. v. Hunsucker, 33 Ind. App. 27; s. c. 70 N. E. Rep. 556; Cleveland & Co. R. Co. v. Lindsay, 33 Ind. App. 404; s. c. 70 N. E. Rep. 283, 998; George Doyle & Co. v. Hawkins, — Ind. App. —; s. c. 73 N. E. Rep. 200; Willie v. East Tennessee

Coal Co., 84 S. W. Rep. 1166; s. c. 27 Ky. L. Rep. 335; Dalton v. Rhode Island Co., 25 R. I. 574; s. c. 57 Atl. Rep. 383. A complaint having alleged that plaintiff had no knowledge of the danger, it is not required that it should also allege that he had no means or opportunity of acquiring this knowledge: Diamond Block Coal Co. v. Cuthbertson, — Ind. —; s. c. 73 N. E. Rep. 818; aff'g s. c. 73 N. E. Rep. 132; 67 N. E. Rep. 558. The general allegation of lack of knowledge includes constructive as well as actual notice: George Doyle & Co. v. Hawkins, — Ind. App. —; s. c. 73 N. E. Rep. 200. The failure to allege want of knowledge is not cured by a mere allegation that the plaintiff at the time of receiving his injuries was utterly oblivious of the threatened danger, and without reason to anticipate it: Fortin v. Manville Co., 128 Fed. Rep. 642.

⁶³ Indiana Mfg. Co. v. Wells, 31 Ind. App. 460; s. c. 68 N. E. Rep. 319; Nickey v. Dougan, 34 Ind. App. 601; s. c. 73 N. E. Rep. 288.

⁶⁴ La Porte Carriage Co. v. Sullender, — Ind. App. —; s. c. 71 N. E. Rep. 922.

⁶⁵ Nickey v. Dougan, 34 Ind. App. 601; s. c. 73 N. E. Rep. 288.

⁶⁶ M. S. Huey Co. v. Johnston, 164 Ind. 489; s. c. 73 N. E. Rep. 996.

§ 7533. **Failure to Warn Servant of Dangers.**—A mere allegation that it was the master's duty to warn an employé, which had not been done, is insufficient; the facts showing the necessity for giving such warning must be set out.⁶⁷ An allegation that a foreman directing a laborer to perform a certain service "knew" that it would be attended with danger means that the foreman should have known of such danger and not necessarily that he had actual knowledge thereof.⁶⁸

§ 7534. **Youthful and Inexperienced Servants.**—A complaint was held sufficient which alleged that the plaintiff had not been warned of the danger of the work, and by reason of his tender age was unable to appreciate the same, or to act on warnings that might have been given as to what was necessary to protect himself while working in moving machinery.⁶⁹

§ 7535. **Injury where Set to Work at a Different Employment.**—The complaint should show wherein the new service is more dangerous than the service for which the injured employé was hired;⁷⁰ and that the employer knew of the servant's incapacity or immaturity.⁷¹

§ 7537. **Fellow Servants.**⁷²—A general allegation that an injury was inflicted by the defendant is construed as an allegation that it was inflicted by a servant in the employ of the defendant.⁷³ The complaint should show that the servant causing the injury was in the line of his duty at the time of committing the acts charged.⁷⁴

§ 7538. **Incompetency of Fellow Servants.**—The incompetency of the servant causing the injury,⁷⁵ and the injured servant's want of knowledge of this fact, should be definitely averred.⁷⁶ A general charge of incompetency was held sufficiently averred by an allegation that the defendant was negligent in the employment of a proper person to attend to the duties of engineer, in that the defendant em-

⁶⁷ Fortin v. Manville Co., 128 Fed. Rep. 642.

⁶⁸ Southern R. Co. v. Blevins, 130 Fed. Rep. 688.

⁶⁹ Canton Cotton Mills v. Edwards, 120 Ga. 447; s. c. 47 S. E. Rep. 937.

⁷⁰ Ballew v. Broach & McCurry, 121 Ga. 421; s. c. 49 S. E. Rep. 297; Cleveland & C. R. Co. v. Tehan, 26 Ohio Cir. Ct. R. 457.

⁷¹ O'Connor v. Atchison & C. R. Co., 137 Fed. Rep. 503.

⁷² That the complaint should show that the employé causing the injury was not a fellow servant, see: Pittsburgh & C. R. Co. v. Lighthouse, 163 Ind. 247; s. c. 71 N. E. Rep. 218, 660.

That the fellow-servant doctrine is a matter of defense to be raised by the answer, see: Duff v. Willamette Iron & C., 45 Or. 479; s. c. 78 Pac. Rep. 363, 668.

⁷³ Fortin v. Manville Co., 128 Fed. Rep. 642.

⁷⁴ Cleveland & C. R. Co. v. Pierce, 34 Ind. App. 188; s. c. 72 N. E. Rep. 604.

⁷⁵ Cleveland & C. R. Co. v. Tehan, 26 Ohio Cir. Ct. R. 457.

⁷⁶ Indianapolis & C. Co. v. Foreman, 162 Ind. 85; s. c. 69 N. E. Rep. 669; Indianapolis & C. Transit Co. v. Andis, 33 Ind. App. 625; s. c. 72 N. E. Rep. 145.

ployed one who was negligent and incompetent in the discharge of his duties by not giving the warning signals when starting the engine, and setting out at least two instances when the engineer started the engine without giving the signals.⁷⁷ An allegation that the plaintiff was without any knowledge of the careless and reckless conduct of "said motorman in operating said car" which caused his injuries, was held not equivalent to an allegation that the plaintiff at and before the time of his injury had no knowledge of the recklessness and incompetency of the motorman.⁷⁸ It seems unnecessary to allege that the master had knowledge of the incompetency of one acting as his vice-principal in order to let in proof that the injury occurred by the negligence and incompetency of such vice-principal.⁷⁹

§ 7539. Insufficiency of Force.⁸⁰

§ 7540. **Assumption of Risk.**—The defendant is not everywhere required to set up by answer that the risk on account of which the injury occurred was an assumed one, in order to receive the benefits of that defense,⁸¹ and this is particularly the case where the evidence discloses an assumed risk.⁸² Again the defense may appear on the face of the complaint. Thus, an allegation in the complaint that "the defects and dangers from the operation of the machine were not so apparent and imminent as to justify a reasonably prudent man from attempting to use it when peremptorily ordered so to do by his foreman, and that the plaintiff knew of the defect, but used the appliance as he had previously safely used it, was held to show on its face that the plaintiff assumed the risk.⁸³ Assumption of risk has been held sufficiently pleaded by allegations that the dangers which resulted in the injuries of the employé were incident to his occupation

⁷⁷ Conover v. Neher-Ross Co., 38 Wash. 172; s. c. 80 Pac. Rep. 281.

⁷⁸ Indianapolis &c. Co. v. Foreman, 162 Ind. 85; s. c. 69 N. E. Rep. 669.

⁷⁹ Harris v. Balfour Quarry Co., 137 N. C. 204; s. c. 49 S. E. Rep. 95. But see Greeley v. Foster, 32 Colo. 292; s. c. 75 Pac. Rep. 351, where it is held that it was improper to admit evidence of the incompetency of the vice-principal where such incompetency was not set out in the complaint.

⁸⁰ Allegation that defendant negligently failed to provide a sufficient number of men to unload a car with safety, whereby plaintiff was injured by reason of material falling on him, was held sufficient to withstand a demurrer on the ground

that it failed to allege that it was defendant's duty to provide any more men, and what number of men defendant furnished and what number of men it was necessary to furnish: Alabama &c. R. Co. v. Vail, 142 Ala. 134; s. c. 38 South. Rep. 124.

⁸¹ American Car &c. Co. v. Clark, 32 Ind. App. 644; s. c. 70 N. E. Rep. 828.

⁸² Greeley v. Foster, 32 Colo. 292; s. c. 75 Pac. Rep. 351; Iowa Gold Min. Co. v. Diefenthaler, 32 Colo. 391; s. c. 76 Pac. Rep. 981; White v. Lewiston &c. R. Co., 94 App. Div. (N. Y.) 4; s. c. 87 N. Y. Supp. 901.

⁸³ Smith v. Armour & Co., — Tex. Civ. App. —; s. c. 84 S. W. Rep. 675.

and the service for which he was employed;⁸⁴ that the plaintiff had knowledge of the condition of the machine and remained at work for an unreasonable length of time;⁸⁵ that the plaintiff when doing the work knew, or could have known the kind of material used in the scaffold on which he was working;⁸⁶ that the plaintiff knew at the time he entered the defendant's employment, and at the time of the accident, that an unusual, heavy and continuous rainfall had rendered the defendant's roadbed defective, and that the same might get out of line, though the defendant exercised the greatest care to maintain the same, and that the plaintiff's injury was one of the risks he voluntarily assumed.⁸⁷ A plea setting up both assumption of risk and contributory negligence is bad for duplicity as the defenses are inconsistent—the former resting in contract, and the latter in tort.⁸⁸

§ 7544. **Injuries in Mines.**—An allegation that a mine was in an unsafe and dangerous condition, by reason of the carelessness and negligence of the defendant, has been held sufficient without an allegation that the defendant knew of its unsafe and dangerous condition.⁸⁹ The knowledge of an injured miner of the dangerous condition of the mine is admitted by an allegation in his complaint showing that he was sent into the mine to make the place secure.⁹⁰ An allegation that the plaintiff was under fourteen years of age, and that the defendant had notice of that fact and wrongfully employed him to work in the mine, has been held sufficient, as showing a willful violation of the Illinois Miners' Act.⁹¹ In that State a count for negligence may be joined with a count for a violation of the Mines and Miners' Act, forbidding the employment of children under fourteen years of age, when both are based on the same facts.⁹²

§ 7557. **Averting Notice of the Defect in Street which Caused the Injury.**—Where the plaintiff sets forth facts sufficient to charge a city with constructive notice of a defect it is not necessary to charge directly that the city had such notice.⁹³ Under this rule notice was

⁸⁴ *Adams v. San Antonio &c. R. Co.*, 34 Tex. Civ. App. 413; s. c. 79 S. W. Rep. 79.

⁸⁵ *Going v. Alabama Steel &c. Co.*, 141 Ala. 537; s. c. 37 South. Rep. 784.

⁸⁶ *Charping v. Toxaway Mills*, 70 S. C. 470; s. c. 50 S. E. Rep. 186.

⁸⁷ *Price v. St. Louis &c. R. Co.*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 858.

⁸⁸ *Kansas City &c. R. Co. v. Thornhill*, 141 Ala. 215; s. c. 37 South. Rep. 412.

⁸⁹ *Wilson v. Alpine Coal Co.*, 118 Ky. 463; s. c. 81 S. W. Rep. 278; 26 Ky. L. Rep. 337.

⁹⁰ *Indiana &c. Coal Co. v. Batey*, 34 Ind. App. 16; s. c. 71 N. E. Rep. 191.

⁹¹ *Marquette Third Vein Coal Co. v. Dielie*, 208 Ill. 116; s. c. 70 N. E. Rep. 17.

⁹² *Marquette Third Vein Coal Co. v. Dielie*, 208 Ill. 116; s. c. 70 N. E. Rep. 17.

⁹³ *Gallamore v. Olympia*, 34 Wash. 379; s. c. 75 Pac. Rep. 978.

sufficiently averred by an allegation that a defect in a street had been left unprotected for two weeks, so that the city knew thereof, but failed to remedy it.⁹⁴

§ 7559. Describing the Defect which Caused the Injury.⁹⁵

§ 7561. Averring that Defect was Proximate Cause of Injury.—A complaint in an action against a city for injuries occasioned by falling off the side of an elevated sidewalk along which no barriers were maintained, should show a causal relation between the absence of the guards and the injury by alleging that had guards been maintained the plaintiff would not have fallen.⁹⁶

§ 7563. Failure to Aver Special Injury by Maintenance of Public Nuisance.—One injured by falling into a defectively covered coal hole in a sidewalk, need not specially allege that the maintenance of the hole constituted a nuisance, to entitle him to recover on that theory.⁹⁷

§ 7568. Allegation of Service of Claim or Notice of Intent to Sue.⁹⁸

§ 7570. Illustrations of Sufficient Petitions in Highway Cases.—The streets of a city are presumed to be public streets in the absence of a showing to the contrary, hence it is unnecessary for a pleader who has stated that the injury was due to a defect in a city street to add that this street was a public street.⁹⁹ A complaint alleging that "at the time of the commission of the grievances hereinafter alleged,"

⁹⁴ *Huntington v. Lusch*, 33 Ind. App. 476; s. c. 70 N. E. Rep. 402.

⁹⁵ A complaint in an action for injuries caused by falling into a hole in the sidewalk, which stated that a cross-plank in the sidewalk was broken and depressed at the center to the ground, was held sufficient, and it was not necessary to allege the depth of the hole: *Lyon v. Grand Rapids*, 121 Wis. 609; s. c. 99 N. W. Rep. 311. A complaint was held to describe the defect which caused the injury with sufficient definiteness which alleged that defendant city had constructed a ditch along the west side of a named dedicated street of the city, and had constructed a plank bridge across such street; that the bridge was defective in the manner specified; and though it was the duty of the city to maintain a light at a street intersection near the bridge, and had caused a light to be put there, it had

failed to keep it burning; and that the city had notice of the dangerous condition of the bridge and sidewalk, and the fact that the light was not kept burning; and that because of such failure plaintiff, while walking over the bridge on a dark night, and using due diligence, fell into the ditch and received the injuries complained of: *McCauley v. Greenville*, — Miss. —; s. c. 37 South. Rep. 818.

⁹⁶ *Hammond v. Winslow*, 33 Ind. App. 92; s. c. 70 N. E. Rep. 819.

⁹⁷ *Berger v. Content*, 47 Misc. (N. Y.) 390; s. c. 94 N. Y. Supp. 12.

⁹⁸ An allegation that the statutory notice was served on the city is sufficient to support the admission of evidence showing service of the notice on the mayor of the city: *Burnette v. St. Joseph*, 112 Mo. App. 668; s. c. 87 S. W. Rep. 589.

⁹⁹ *Gallamore v. Olympia*, 34 Wash. 379; s. c. 75 Pac. Rep. 978.

and then setting out a defective condition of sidewalk as the cause of the injury, has been held sufficiently explicit to show that the sidewalk was defective on the day the plaintiff was injured, where the only date thereafter alleged was the date of the injury.¹⁰⁰

§ 7572. Variance between Pleading and Proof—Illustrations.¹⁰¹

§ 7579. Liability of Landlord.—Under the rule that the tenant takes the premises as he finds them, an allegation that it was the duty of the landlord to put the premises in repair is insufficient without an allegation of such facts as would show the existence of the duty.¹⁰² A landlord retaining possession and control of a portion of the premises is liable to his tenant for damages resulting from negligence in the care of the premises so occupied by the landlord, and a tenant basing his right to recover on this ground must show in his complaint that the injuries came from the portion of the premises occupied and controlled by the landlord.¹⁰³ A tenant suing his landlord for the death of a child from diphtheria, owing to the infection of the leased premises, must allege that the child contracted the disease in the house, or that the fault of the defendant directly caused its death.¹⁰⁴ A mere allegation that at some time, not alleged to be recent, a death from diphtheria occurred in the house, is not equivalent to an allegation that the house was infected when rented by the tenant.¹⁰⁵

§ 7582. Places Attractive to Children.—The complaint in an action for injuries to a child playing around machinery must allege either that there was an actual invitation to children to play about

¹⁰⁰ *Hammond v. Winslow*, 33 Ind. App. 92; s. c. 70 N. E. Rep. 819.

¹⁰¹ Under a code provision that no variance between the pleading and proof shall be regarded as material which does not mislead a party to his prejudice, a variance in an action for sidewalk injuries between an allegation that the injury occurred on the south side of a named street and evidence that it was on the north side of the same street, was held immaterial: *Covington v. Miles*, 82 S. W. Rep. 281; s. c. 26 Ky. L. Rep. 609.

¹⁰² *Cummings v. Ayer*, 188 Mass. 292; s. c. 74 N. E. Rep. 336; *Lyon v. Buerman*, 70 N. J. L. 620; s. c. 67 Atl. Rep. 1009.

¹⁰³ *Franklin v. Tracey*, 117 Ky. 267; s. c. 77 S. W. Rep. 1113; 78 S. W. Rep. 1112; 25 Ky. L. Rep. 1409, 1909; 63 L. R. A. 649. A complaint alleging that the defendant reserved to

himself the control of the roof and ceilings in the building and apartment occupied by plaintiff, and that by reason of the landlord's negligence in permitting the roof of such building and the ceiling of the premises occupied by plaintiff to be and remain in a dangerous condition, the plaster in the ceiling in one of the rooms fell and struck plaintiff on the head, causing the injuries complained of, was held to state a cause of action, though it did not show how the defective condition of the roof caused the ceiling to fall, as this was a matter of proof and need not be pleaded: *Golob v. Painsky*, 178 N. Y. 458; s. c. 70 N. E. Rep. 973; rev'g s. c. 81 N. Y. Supp. 1127.

¹⁰⁴ *Davis v. Smith*, 26 R. I. 129; s. c. 58 Atl. Rep. 630.

¹⁰⁵ *Davis v. Smith*, 26 R. I. 129; s. c. 58 Atl. Rep. 630.

the machinery, or that it was so especially and unusually attractive to children that it constituted an implied invitation. A bare allegation that the defendant knew that the machinery did attract children is insufficient.¹⁰⁶

§ 7587. Injuries on Highways.¹⁰⁷

§ 7588. **Negligence of Street Railroad Companies.**—The particular acts of negligence in the operation of the car relied on should be set out by the pleader.¹⁰⁸ Where the plaintiff alleges negligence in operating a car at a careless rate of speed, it devolves on him to show that the speed was not only excessive but that it was negligent.¹⁰⁹

§ 7589. Injury to Child on Track of Street Railroad.¹¹⁰

§ 7594. **Dangerous Agencies—Gas Explosions.**—A declaration in an action against a city for death caused by gas escaping from one of the city's mains into the house occupied by the deceased, otherwise stating a cause of action against the city, is not defective because it fails to state which particular main was defective.¹¹¹

§ 7600. **Particularity of Averment of Injuries Suffered.**—The rule requires that the complaint or declaration should clearly and definitely set out the injuries received. It is not required that the

¹⁰⁶ Driscoll v. Clark, 32 Mont. 172, 192; s. c. 80 Pac. Rep. 1, 373.

¹⁰⁷ In an action for injuries due to a collision between a coasting sled on which plaintiff was riding and a vehicle standing at the side of the street, an allegation that the defendant "knew, and could by the exercise of ordinary care have known" of the use of the street for coasting, was held to mean that the defendant could by ordinary care have known of the fact and not that he had actual knowledge: Reusch v. Licking Rolling Mill Co., 118 Ky. 369; s. c. 80 S. W. Rep. 1168; 26 Ky. L. Rep. 249. A complaint in an action for injuries to a bicyclist by colliding with a vehicle has been held sufficient which alleged that defendant's servant while driving along the street in the performance of his master's business, so negligently managed the horse and wagon that by reason thereof the wagon struck plaintiff while riding on a bicycle, causing bodily injuries, and a motion was overruled which asked plaintiff to state in what the negligence consisted, and in what manner the horse and wagon were neg-

ligently driven: Adams Exp. Co. v. Aldridge, 20 Colo. App. 74; s. c. 77 Pac. Rep. 6.

¹⁰⁸ Sommers v. St. Louis Transit Co., 108 Mo. App. 319; s. c. 83 S. W. Rep. 268; Chicago City R. Co. v. Barker, 209 Ill. 321; s. c. 70 N. E. Rep. 624.

¹⁰⁹ Holden v. Missouri R. Co., 108 Mo. App. 665; s. c. 84 S. W. Rep. 133.

¹¹⁰ Under the Kansas practice a petition in an action by parents for the death of a minor child, run over by a street car, which avers that the child came to his death by the employés of the defendant "carelessly, negligently, recklessly and wantonly running said car upon and over" the body of the child, instantly killing him, is sufficient in its allegation to sustain a verdict for damages, notwithstanding a special finding that the injury was not inflicted through "reckless and wanton neglect of the defendant's employés in charge of the car." Southwest Missouri Electric R. Co. v. Fry, 71 Kan. 736; s. c. 81 Pac. Rep. 462.

¹¹¹ Richmond v. Gay, 103 Va. 320; s. c. 49 S. E. Rep. 482.

injury should be described in all its seriousness.¹¹² If for any reason the nature and character of the injury cannot be stated the complaint should allege this fact.¹¹³ If the pleader specifies particular injuries resulting from the principal injury his proof will be limited to the specific injuries.¹¹⁴ The plaintiff is not required to prove all the elements of damage alleged by him to entitle him to a recovery for those proved.¹¹⁵

§ 7601. **General and Special Damages.**¹¹⁶—In the following cases the damages sought to be proved were held the natural and necessary result of the injury alleged, and evidence to establish the same was held admissible under the rule without special averment:—Injury to the use of the hand, under an allegation of injury to the arm;¹¹⁷ injury to the hands and wrist, under an allegation that the plaintiff had sustained “bodily injuries;”¹¹⁸ heart trouble or neuralgia under an allegation that the accident caused certain injuries and “otherwise producing serious and lasting internal injury to” the plaintiff;¹¹⁹ uterine trouble, under an allegation of severe injury to the person as the result of which the plaintiff was made sick, sore and disabled;¹²⁰ injury to kidneys, under an allegation of internal injuries;¹²¹ susceptibility to lung diseases, under an allegation of injury to the

¹¹² *Hansell-Elcock Foundry Co. v. Clark*, 115 Ill. App. 209; s. c. aff’d, 214 Ill. 399; 73 N. E. 787; *Barnett & Record Co. v. Schlapka*, 110 Ill. App. 672; s. c. aff’d, 208 Ill. 426; 70 N. E. 343. A complaint was held to state the injuries with sufficient particularity which alleged that plaintiff fell with great force and struck his back and spine on some ties, by reason of which he was seriously and permanently cut, bruised and wounded internally and externally on his back, spine, legs, hips and head; that his kidneys and bladder, together with the nerves and muscles controlling the same were seriously injured and affected; that he is a cripple for life, is confined to his bed and unable to walk without assistance; and he believes that his injuries are serious and permanent: *El Paso & C. R. Co. v. Vizard*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 457.

¹¹³ *Dallas Consol. Electric St. R. Co. v. Ison*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 408.

¹¹⁴ *Arnold v. Maryville*, 110 Mo. App. 254; s. c. 85 S. W. Rep. 107.

¹¹⁵ *Williams v. Houston Electric*

Co., — Tex. Civ. App. —; s. c. 85 S. W. Rep. 1160.

¹¹⁶ That damages which do not necessarily result from the defendant’s wrongful act must be specially pleaded, see: *Eisele v. Oddie*, 128 Fed. Rep. 941; *Baries v. Louisville Electric Light Co.*, 118 Ky. 830; s. c. 80 S. W. Rep. 814; 85 S. W. Rep. 1186; 25 Ky. L. Rep. 2303; *South Omaha v. Sutcliffe*, — Neb. —; s. c. 101 N. W. Rep. 997; *Wilkins v. Nasau Newspaper Delivery Exp. Co.*, 98 App. Div. (N. Y.) 130; s. c. 90 N. Y. Supp. 678; *Wells, Fargo & Co. Exp. v. Boyle*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 164.

¹¹⁷ *Comstock v. Georgetown Tp.*, 137 Mich. 541; s. c. 100 N. W. Rep. 788; 11 Det. Leg. N. 379.

¹¹⁸ *Eureka v. Neville*, 70 Kan. 893; s. c. 79 Pac. Rep. 162.

¹¹⁹ *Rice v. Wallowa Co.*, — Or. —; s. c. 81 Pac. Rep. 358.

¹²⁰ *Loftink v. Interborough Rapid Transit Co.*, 106 App. Div. (N. Y.) 502; s. c. 94 N. Y. Supp. 150.

¹²¹ *Fuchs v. St. Louis Transit Co.*, 111 Mo. App. 574; s. c. 86 S. W. Rep. 458.

lungs;¹²² shortening of one leg and injury to thigh bone, under an allegation that the plaintiff's power of locomotion has been greatly impaired by reason of the injuries, that he suffers constant pain in his back and hips, and that on account of the injuries he received his hip, knee and ankle joints are greatly stiffened;¹²³ injury to the brain under an allegation of injuries to the head;¹²⁴ impairment of memory under an allegation that the plaintiff was injured and disabled physically, mentally, internally and permanently;¹²⁵ impairment of hearing and sight under an allegation that the plaintiff was seriously and permanently bruised and injured;¹²⁶ injury to mouth under allegation that the plaintiff's face was cut and bruised.¹²⁷ On the other hand recent cases are encountered which hold that injuries from fright or nervous shock are not recoverable under general allegations of physical injury;¹²⁸ that damages for impaired vision are not recoverable under an allegation of nervous affection;¹²⁹ that locomotor ataxia is not covered by an allegation that the plaintiff's nervous system has received a severe shock;¹³⁰ that damages for injury to eyes and eyesight are not recoverable under an allegation of injury to the head, spine and nerves;¹³¹ that a functional female trouble, manifesting itself over two months after the injury, is not covered by an allegation of injury to the face and a nervous shock produced by the blow;¹³² that undue menstruation is not covered by an allegation that a woman was seriously wounded, bruised and contused about her head and body, suffered a severe shock, and was made sore and sick, and had since suffered from dizzy spells.¹³³ Recent cases hold that damages due to mere aggravation of previously received injuries,¹³⁴ damages as to the particular trade in which the plaintiff was skilled,¹³⁵ and mis-

¹²² *St. Louis &c. R. Co. v. Rea*, — Tex. —; s. c. 87 S. W. Rep. 324; rev'g s. c. 84 S. W. Rep. 428.

¹²³ *Southern Pac. Co. v. Martin*, 98 Tex. 322; s. c. 83 S. W. Rep. 675; rev'g s. c. 81 S. W. Rep. 77.

¹²⁴ *Fleming v. Tuttle*, 98 App. Div. (N. Y.) 222; s. c. 90 N. Y. Supp. 661.

¹²⁵ *Nichols v. Oregon Short Line R. Co.*, 28 Utah 319; s. c. 78 Pac. Rep. 866.

¹²⁶ *Graham v. Joseph H. Bauland Co.*, 97 App. Div. (N. Y.) 141; s. c. 89 N. Y. Supp. 595.

¹²⁷ *Comstock v. Georgetown Tp.*, 137 Mich. 541; s. c. 100 N. W. Rep. 788; 11 Det. Leg. N. 379.

¹²⁸ *Adcock v. Oregon R. &c. Co.*, 45 Or. 173; s. c. 77 Pac. Rep. 78.

¹²⁹ *Union Pac. R. Co. v. Hammerlund*, 70 Kan. 888; s. c. 79 Pac. Rep. 152.

¹³⁰ *Wilkins v. Nassau &c. Exp. Co.*, 98 App. Div. (N. Y.) 130; s. c. 90 N. Y. Supp. 678.

¹³¹ *Wells, Fargo & Co. Exp. v. Boyle*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 164.

¹³² *Thompson v. St. Louis &c. R. Co.*, 111 Mo. App. 465; s. c. 86 S. W. Rep. 465.

¹³³ *Farnham v. Interurban St. R. Co.*, 94 N. Y. Supp. 364.

¹³⁴ *Maynard v. Oregon R. &c. Co.*, — Or. —; s. c. 78 Pac. Rep. 983; *Comstock v. Georgetown Tp.*, 137 Mich. 541; s. c. 100 N. W. Rep. 788; 11 Det. Leg. N. 379. But see *Atlantic &c. R. Co. v. Douglas*, 119 Ga. 658; s. c. 46 S. E. Rep. 867.

¹³⁵ *Dallas Consol. Electric St. R. Co. v. Hardy*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 1053.

carriages,¹³⁶ are special damages and must be specially pleaded to entitle the plaintiff to a recovery therefor. Where special damages for the failure promptly to deliver freight are claimed the pleader must allege that the carrier knew of the use to which the freight was to be put and that special injury would result from delay, and that it contracted to transport the freight with reference to such damages.¹³⁷

§ 7602. **Permanency of the Injury.**¹³⁸—Permanency of the injury has been held sufficiently averred by such allegations as these:—That the plaintiff suffered serious bodily injury and pain, and will continue to suffer pain and bodily injury;¹³⁹ that the plaintiff was thrown down and her back was terribly strained as the result of said fall, and her whole physical and nervous system was permanently injured thereby;¹⁴⁰ that the plaintiff was severely bruised on the body and limbs, causing severe and permanent internal injuries, and also causing injuries to her nervous system.¹⁴¹

§ 7603. **Loss of Time and Earnings.**¹⁴²

§ 7604. **Impairment of Earning Power.**—An allegation that the plaintiff “during all this time has been absolutely unable to perform any labor, and is disqualified from performing his ordinary vocations of life,” has been held sufficiently explicit to allow the admission of evidence to show his occupation and his loss of time and earnings.¹⁴³

¹³⁶ Florence v. Snook, 20 Colo. App. 356; s. c. 78 Pac. Rep. 994.

¹³⁷ Wesner & White Mfg. Co. v. Atlantic Coast Line R. Co., 71 S. C. 211; s. c. 50 S. E. Rep. 789.

¹³⁸ That the fact of the permanency of the injuries must be pleaded unless the description of the injuries shows that they are necessarily permanent, see: Wallace v. New York City R. Co., 92 N. Y. Supp. 766; MacGregor v. Rhode Island Co., 27 R. I. 85; s. c. 60 Atl. Rep. 761.

¹³⁹ Casey v. American Bridge Co., 95 Minn. 11; s. c. 103 N. W. Rep. 623, 624.

¹⁴⁰ Deland v. Cameron, 112 Mo. App. 704; s. c. 87 S. W. Rep. 597.

¹⁴¹ Fuchs v. St. Louis Transit Co., 111 Mo. App. 574; s. c. 86 S. W. Rep. 458.

¹⁴² That loss of time and earnings must be specially pleaded and proved, see: Zongker v. People's Union Mercantile Co., 110 Mo. App. 382; s. c. 86 S. W. Rep. 486. An allegation that plaintiff, owing to his injuries, had become greatly incapacitated from performing any kind of manual labor, has been held to

amount to an allegation of loss of time from work and labor: International & C. R. Co. v. Shaughnessy (Tex. Civ. App.), 81 S. W. Rep. 1026. An allegation that plaintiff had been wholly incapacitated from performing any work since the day of his injury, and had therefore lost much time and would lose much more time from work, and that at the time of his injury he was receiving \$1.50 a day and had been unable because of his injuries to perform any labor up to the time of the trial, was held sufficient to support a recovery for lost earnings: Zongker v. People's Union Mercantile Co., 110 Mo. App. 382; s. c. 86 S. W. Rep. 486. An allegation that plaintiff, a servant, was prior to his disability earning \$100 a month, was held to amount to an allegation that this sum was the reasonable value of his time: Galveston & C. R. Co. v. Roth, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 1112.

¹⁴³ Wilbur v. Southwest Missouri Electric R. Co., 110 Mo. App. 689; s. c. 85 S. W. Rep. 671.

But a mere allegation that the plaintiff's injuries have greatly and permanently impaired his capacity to earn money was held too general.¹⁴⁴ In a case where damages were claimed for decreased earning capacity and the declaration alleged that the plaintiff before the injury was capable of earning one hundred dollars a month, it was held that evidence that but for the injury he could earn one hundred fifty dollars a month was admissible to show that he was at least capable of earning the amount alleged in the complaint.¹⁴⁵

§ 7605. **Loss of Wife's Services.**¹⁴⁶

§ 7606. **Pain and Suffering.**¹⁴⁷

§ 7607. **Cost of Cure.**—Nursing and doctor's bills,¹⁴⁸ and their reasonableness,¹⁴⁹ must be specially pleaded. In Missouri there can be no recovery for these items in the absence of proof that the bills were paid.¹⁵⁰ An allegation that the plaintiff had incurred and paid expenses for medicine, and medical and surgical treatment of his injuries in a specified sum, has been held not to cover the item of the wife's services as a nurse while attending her injured husband.¹⁵¹

§ 7609. **Exemplary Damages.**—Exemplary damages in addition to compensatory damages are not recoverable unless willful injury is alleged and proved.¹⁵² An allegation characterizing the act by which the plaintiff was injured as reckless, is held in South Carolina the equivalent of characterizing it as willful, so as to justify the allowance of exemplary damages.¹⁵³

¹⁴⁴ Dallas Consol. Electric St. R. Co. v. Hardy, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 1053.

¹⁴⁵ City Electric R. Co. v. Smith, 121 Ga. 663; s. c. 49 S. E. Rep. 724.

¹⁴⁶ An allegation that an injured wife was the keeper of a fashionable boarding-house and had long furnished plaintiff, her husband, with support, was held after default, fairly to imply that the husband's support came from her keeping the boarding-house and that her services in that business were valuable to him: Comstock v. Connecticut R. & Co., 77 Conn. 65; s. c. 58 Atl. Rep. 465.

¹⁴⁷ That evidence of mental anguish is admissible under allegations that plaintiff suffered, and will continue to suffer great pain, see: Nashville & C. R. v. Miller, 120 Ga. 453; s. c. 47 S. E. Rep. 959. But see Lodwick Lumber Co. v. Taylor, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 358, where it is held that damages

for mental suffering and time lost resulting from injuries which are not of such a character that such damages would naturally result therefrom, must be specially alleged in order to be recovered.

¹⁴⁸ Stowe v. La Conner Trading & Co., 39 Wash. 27; s. c. 80 Pac. Rep. 856; 81 Pac. Rep. 97.

¹⁴⁹ Missouri & C. R. Co. v. Smith, — Tex. Civ. App. —; s. c. 82 S. W. Rep. 787.

¹⁵⁰ Stanley v. Chicago & C. R. Co., 112 Mo. App. 601; s. c. 87 S. W. Rep. 112; Nelson v. Metropolitan St. R. Co., 113 Mo. App. 659; s. c. 88 S. W. Rep. 781.

¹⁵¹ Stowe v. La Conner Trading & Transportation Co., 39 Wash. 27; s. c. 80 Pac. Rep. 856; 81 Pac. Rep. 97.

¹⁵² Duke v. Postal Telegraph Cable Co., 71 S. C. 95; s. c. 50 S. E. Rep. 675.

¹⁵³ Pickett v. Southern R. Co., 69 S. C. 445; s. c. 48 S. E. Rep. 466.

§ 7610. Injuries to Property.¹⁵⁴

§ 7613. **Matters of Defense Generally.**—The act of God, when relied on as a defense, must be specially pleaded.¹⁵⁵ It has been held that one sued for injuries to adjoining property caused by the negligent conduct of his business cannot set up as a defense that the plaintiff held his property by a deed from the defendant's predecessor in title, who had conducted the same business in a like manner on the premises, and that the plaintiff, by reason of taking his title in this way, had assumed the risk of injury from this method of conducting the business.¹⁵⁶

§ 7614. **Defense of "Not Guilty."**—Under the Alabama code, the plea of not guilty puts in issue all the material allegations of the complaint.¹⁵⁷ The plea of not guilty in an action against a railroad company for negligent operation, impliedly concedes that the defendant is a corporation, and was operating the road mentioned in the declaration, and that the operatives in charge of the train were its servants.¹⁵⁸

§ 7615. **General Denial.**¹⁵⁹

¹⁵⁴ Under an allegation that the market value of a horse injured by defendant was \$500, evidence is inadmissible that the horse had no market value, but that it had an intrinsic value to that amount for the special purpose for which he had been trained: *Gulf & C. R. Co. v. Cooper*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 301. Damages to plaintiff, alleged to be due to the fact that he was required to sell his cattle for less than he would have otherwise obtained, because after the destruction of his hay by defendant he had no money to buy fodder for them, cannot be recovered unless specially pleaded: *Berg v. Humptulips Boom & C. Imp. Co.*, 38 Wash. 342; s. c. 80 Pac. Rep. 528.

¹⁵⁵ *Orient Ins. Co. v. Northern Pac. R. Co.*, 31 Mont. 502; s. c. 78 Pac. Rep. 1036; *Chicago & C. R. Co. v. Shaw*, 63 Neb. 380; s. c. 88 N. W. Rep. 508.

¹⁵⁶ *Brown Store Co. v. Chattahoochee Lumber Co.*, 121 Ga. 809; s. c. 49 S. E. Rep. 839.

¹⁵⁷ *Sloss-Sheffield Steel & C. Co. v. Mobley*, 139 Ala. 425; s. c. 36 South. Rep. 181.

¹⁵⁸ *Chicago & C. R. Co. v. Schmitz*, 211 Ill. 446; 71 N. E. Rep. 1050; aff'g s. c. 113 Ill. App. 295.

¹⁵⁹ A general denial of a complaint, alleging that defendant received goods for carriage, but never delivered them to the consignee, nor returned them to plaintiff, puts in issue both the delivery of the goods to the defendant and its non-delivery of them: *Brooks v. Delaware & C. R. Co.*, 88 N. Y. Supp. 961. Under a general denial to a complaint for the death of a wife, alleged to have been caused by the failure of the railroad company to keep the car warm, defendant may show that the wife, at the time she sustained the injuries, had a disease which would have caused her death as soon as she did die, independent of the injuries: *Hardin v. St. Louis R. Co.*, — Tex. Civ. App. —; s. c. 88 S. W. 440. Under a code provision that affirmative matter in avoidance shall not be proved under the general issue unless defendant gives notice thereof in writing, a railroad company, sued for personal injuries, which did not give such notice, cannot show that the injured person was travelling on a pass issued by defendant at his request, which pass provided that the person accepting it should not hold the company liable for any damage to

§ 7616. **Inconsistent Defenses.**—The pleas of not guilty and contributory negligence, do not admit negligence, and the case may be tried upon either or both defenses.¹⁶⁰

§ 7617. **Pleading Contributory Negligence.**—In a jurisdiction where contributory negligence must be pleaded in the answer to be available as a defense, the fact that the plaintiff alleges his freedom from fault does not change the rule, so as to allow the defendant to raise the issue under a general denial. Here the allegation of freedom from fault is regarded as surplusage.¹⁶¹ A plea is too general which merely avers that the injury occurred from the plaintiff's own carelessness and negligence.¹⁶² In a case of injuries to a section hand, alleged to have been caused by the negligent direction of the foreman to remove a hand-car from the track in front of an approaching train, it was held that a plea that the plaintiff undertook to remove the car from the track, well knowing that the train was so close that it could not have been stopped before it struck the car, presented a false issue, since there was no pretense that the train could have been stopped, but the question was whether there was such probability or possibility of removing the car before the train reached that point as justified the attempt to remove it.¹⁶³ Under a code provision requiring allegations to be liberally construed, with a view to substantial justice between the parties, an answer charging the "plaintiff" with contributory negligence will be construed as charging this negligence to the father, where the action was brought by the father as administrator of the estate of a child killed in the accident.¹⁶⁴

his person or property: *Yazoo & C. R. Co. v. Grant*, 86 Miss. 565; s. c. 38 South. Rep. 502. A street railroad company sued for injuries to a bicycle rider by the spreading of the slot in the track, was allowed to show, under the general denial, that it was not responsible for the spreading of the slot: *Griffin v. Interurban St. R. Co.*, 46 Misc. (N. Y.) 328; s. c. 94 N. Y. Supp. 854.

¹⁶⁰ *Louisville & C. R. Co. v. Pearce*, 142 Ala. 680; s. c. 39 South Rep. 72. See also *Jackson v. Natchez & C. R.*

Co., 114 La. 981; s. c. 38 South. Rep. 701.

¹⁶¹ *Orient Ins. Co. v. Northern Pac. R. Co.*, 31 Mont. 502; s. c. 78 Pac. Rep. 1036.

¹⁶² *Newport & C. Turnpike Co. v. Pirmann*, 82 S. W. Rep. 976; s. c. 26 Ky. L. Rep. 933.

¹⁶³ *Kansas City & C. R. Co. v. Thornhill*, 141 Ala. 215; s. c. 37 South. Rep. 412.

¹⁶⁴ *Davis v. Seaboard Air Line R. Co.*, 136 N. C. 115; s. c. 48 S. E. Rep. 591.

PART FOUR.

EVIDENCE.

[§§ 7631-7892.]

§ 7631. **Judicial Knowledge of Incidents of the Operation of Street Railways.**—Courts will take judicial notice of the construction of ordinary street cars;¹ and that it is more dangerous to stand on the running board of an electric street car than to occupy a seat in the car or a place on the platform.²

§ 7632. **Judicial Knowledge of the Incidents of Railway Operation or Travel.**—Judicial notice is taken of the fact that no locomotive can be so constructed that some sparks will not escape therefrom.³ It is also a matter of judicial notice that railroad companies require conductors to eject persons unprovided with tickets, or who will not or cannot pay fare.⁴

§ 7635. **Presumption from the Happening of the Accident—Res Ipsa Loquitur.**—It may be said generally, that when an unusual and unexpected accident happens, caused by an instrumentality in the exclusive management, possession or control of the defendant, the accident speaks for itself and its mere occurrence is *prima facie* proof of negligence sufficient to place on the defendant the duty of showing that it was not caused by his negligence.⁵ The rule is always applied with caution.⁶ Properly speaking, it is not the injury but the manner and circumstances of the injury that justify the application of the maxim.⁷ The doctrine applies only when the thing shown speaks of the negligence of the defendant and not merely of the happening of the accident.⁸

¹ Kleffman v. Dry Dock &c. R. Co., 104 App. Div. (N. Y.) 416; s. c. 93 N. Y. Supp. 741.

² Bridges v. Jackson Electric R. &c. Co., 86 Miss. 584; s. c. 38 South. Rep. 788.

³ White v. New York &c. R. Co., 90 App. Div. (N. Y.) 356; s. c. 85 N. Y. Supp. 497; s. c. aff'd, 181 N. Y. 577; 74 N. E. Rep. 1126.

⁴ Galveston &c. R. Co. v. Scott, 34 Tex. Civ. App. 501; s. c. 79 S. W. Rep. 642.

⁵ Chicago City R. Co. v. Eick, 111 Ill. App. 452. See also Lee v. St. Louis &c. R. Co., 12 Mo. App. 372; s. c. 87 S. W. Rep. 12.

⁶ Kight v. Metropolitan R. Co., 21 App. (D. C.) 494.

⁷ Kohner v. Capital Traction Co., 22 App. (D. C.) 181; s. c. 62 L. R. A. 875; Libby, McNeill & Libby v. Banks, 209 Ill. 109; s. c. 70 N. E. Rep. 599; aff'g s. c. 110 Ill. App. 530.

⁸ Paynter v. Bridgeton &c. T. Co., 67 N. J. L. 619; s. c. 52 Atl. Rep. 367.

§ 7637. This Subject, how Connected with that of the Burden of Proof.—The *res ipsa loquitur* doctrine does not dispense with the requirement that the party alleging negligence must prove that fact. It only relates to the mode of proving it. The fact of the accident furnishes merely some evidence on that question, and in that sense lightens the plaintiff's burden.⁹

§ 7639. In Other Cases Not Resting in Contract, the Evidence must Raise a Presumption of a Want of Ordinary or Reasonable Care.¹⁰

§ 7649. Cases Holding that the Rule of Res Ipsa Loquitur Does Apply in Actions by a Servant against his Master for Injury from Negligence of Master.—The supreme court of Georgia, recognizing the rarity with which the principle may be invoked in this relation holds that it is applicable in suits by a servant for injuries caused by his master's negligence only where the matter of the occurrence, or the attendant circumstances are such that the jury could reasonably infer that the occurrence could not have taken place unless the master was lacking in diligence as to instrumentalities, place of work, or fellow servants.¹¹ The maxim was held to apply in a case where no explanation was given as to the cause of the fall of a brick arch on an employé, under such circumstances that the jury could infer negligence on the part of the owner either in its original construction, or in its subsequent maintenance.¹²

§ 7650. Evidentiary Facts which have been held to Call for the Application of this Maxim.¹³

§ 7651. Cases which Deny the Application of the Rule of Res Ipsa Loquitur.¹⁴—Recent decisions are authority that the presumption

⁹ *Stewart v. Van Deventer Carpet Co.*, 138 N. C. 60; s. c. 50 S. E. Rep. 562.

¹⁰ That the mere happening of the accident alone is not proof of negligence, see: *Louisville & C. R. Co. v. Lewis*, 141 Ala. 466; s. c. 37 South. Rep. 587; *Atlanta R. & C. Co. v. Johnson*, 120 Ga. 908; s. c. 48 S. E. Rep. 389; *Whitcomb v. Detroit Electric R. Co.*, 125 Mich. 572; s. c. 84 N. W. Rep. 1072; 7 Det. Leg. N. 58; *Coffey v. Carthage*, 186 Mo. 573; s. c. 85 S. W. Rep. 532; *Brock v. St. Louis Transit Co.*, 107 Mo. App. 109; s. c. 81 S. W. Rep. 219; *Deckerd v. Wabash R. Co.*, 111 Mo. App. 117; s. c. 85 S. W. Rep. 982; *Venbuur v. Lafayette Worsted Mills*, 27 R. I. 89; s. c.

60 Atl. Rep. 770; *Texas & C. R. Co. v. Shoemaker*, 98 Tex. 451; s. c. 84 S. W. Rep. 1049; rev'g s. c. 81 S. W. Rep. 1019.

¹¹ *Palmer Brick Co. v. Chenall*, 119 Ga. 837; s. c. 47 S. E. Rep. 329.

¹² *Chenall v. Palmer Brick Co.*, 117 Ga. 106; s. c. 43 S. E. Rep. 443.

¹³ *Gorman v. Milliken*, 42 Misc. (N. Y.) 336; s. c. 86 N. Y. Supp. 699 (fall of a derrick); *Johnson v. Metropolitan St. R. Co.*, 104 Mo. App. 588; s. c. 78 S. W. Rep. 275 (employé struck by falling crowbar).

¹⁴ That the mere occurrence of an accident resulting in a servant's injury does not raise a presumption of negligence against his master, see: *Greeley v. Foster*, 32 Colo. 292; s. c.

of negligence does not arise from the mere fact of injury to servants caused by explosions,¹⁵ the derailment of cars,¹⁶ and the fall of elevators,¹⁷ stagings,¹⁸ telegraph poles,¹⁹ and packages from store shelves.²⁰

§ 7656. Presumption from Failure to Produce Testimony.²¹

§ 7658. Fact that No Previous Accidents have Occurred.²²

§ 7659. Ownership of Thing Causing the Injury.—The plaintiff has the burden of proof of the ownership of the instrumentality causing the injury.²³ But great strictness is not demanded. Evidence of reputation is sometimes held sufficient.²⁴ Ownership may be established by evidence that the engine,²⁵ or vehicle²⁶ causing the injuries bore the defendant's name, though in the case of the former it was run upon a track belonging to another company.²⁷ Plainly such evidence is strengthened by proof that the defendant sent its physicians to make an examination as to the extent of the plaintiff's injuries.²⁸ Proof of ownership is not required where it is expressly admitted by

75 Pac. Rep. 351; Fuller v. Ann Arbor R. Co., 141 Mich. 66; s. c. 104 N. W. Rep. 414; 12 Det. Leg. N. 348; Caldwell v. Missouri Pac. R. Co., 181 Mo. 455; s. c. 80 S. W. Rep. 897; Glasscock v. Swofford Bros. Dry Goods Co., 106 Mo. App. 657; s. c. 80 S. W. Rep. 364; rev'g s. c. 74 S. W. Rep. 1039; Glasscock v. Swofford Bros. Dry Goods Co., 106 Mo. App. 657; s. c. 80 S. W. Rep. 364; East Tennessee & C. R. Co. v. Linda-mood, 111 Tenn. 457; s. c. 78 S. W. Rep. 99; Moore Lime Co. v. Johnston, 103 Va. 84; s. c. 48 S. E. Rep. 557; Towle v. Stimson Mill Co., 33 Wash. 305; s. c. 74 Pac. Rep. 471.

¹⁵ Omaha Packing Co. v. Murray, 112 Ill. App. 233; Dullnig v. G. A. Duerler Mfg. Co., — Tex. —; s. c. 87 S. W. Rep. 332; aff'g s. c. 83 S. W. Rep. 889.

¹⁶ Chicago & C. R. Co. v. O'Brien, 132 Fed. Rep. 593; s. c. 67 C. C. A. 421.

¹⁷ Dronney v. Doherty, 186 Mass. 205; s. c. 71 N. E. Rep. 547; Womble v. Merchants' Grocery Co., 135 N. C. 474; s. c. 47 S. E. Rep. 493; McGinnis v. Kerr, 204 Pa. 615; s. c. 54 Atl. Rep. 479.

¹⁸ Bergman v. Altman, 127 Iowa 693; s. c. 104 N. W. Rep. 280.

¹⁹ Kellogg v. Denver City Tramway Co., 18 Colo. App. 475; s. c. 72 Pac. Rep. 609.

²⁰ Hofnauer v. R. H. White Co., 186 Mass. 47; s. c. 70 N. E. Rep. 1038.

²¹ Indianapolis St. R. Co. v. Dar-nell, 32 Ind. App. 687; s. c. 68 N. E. Rep. 609 (failure of defendant to give evidence in a street railroad collision case authorized jury to draw inference of carelessness rather than a pure accident).

²² That operation without previous accident does not conclusively show freedom from negligence, see: Mobile & C. R. Co. v. Vallowe, 115 Ill. App. 621; s. c. aff'd, 214 Ill. 124; 73 N. E. 416; Anderson v. City & Sub. R. Co., 42 Or. 505; s. c. 71 Pac. Rep. 659 (street railroads).

²³ Indianapolis St. R. Co. v. Lawn, 30 Ind. App. 515; s. c. 66 N. E. Rep. 508.

²⁴ Chicago & C. R. Co. v. Schmitz, 211 Ill. 446; s. c. 71 N. E. Rep. 1050; aff'g s. c. 113 Ill. App. 295.

²⁵ East St. Louis Connecting R. Co. v. Altgen, 210 Ill. 213; s. c. 71 N. E. Rep. 377; aff'g s. c. 112 Ill. App. 471.

²⁶ Vonderhorst Brewing Co. v. Am-rhine, 98 Md. 406; s. c. 56 Atl. Rep. 833.

²⁷ East St. Louis Connecting R. Co. v. Altgen, 210 Ill. 213; s. c. 71 N. E. Rep. 377; aff'g s. c. 112 Ill. App. 471.

²⁸ Chicago City R. Co. v. Carroll, 206 Ill. 318; s. c. 68 N. E. Rep. 1087; aff'g s. c. 102 Ill. App. 202.

the defendant's answer.²⁹ Where the defendant's ownership of a vehicle causing the plaintiff's injury is shown, then the defendant has the burden of proving that the negligent driver was not his servant or agent.³⁰

§ 7666. **Unsafe Premises.**³¹

§ 7667. **Falling Objects Generally.**³²

§ 7668. **Fall of Electric Wires.**³³

§ 7669. **Fall of Elevator.**—In jurisdictions where an elevator owner is regarded as a common carrier, the happening of an accident to a passenger by the fall of the elevator raises *prima facie* the presumption of negligence on such owner's part,³⁴ and this presumption is strengthened by evidence of insufficient inspection of the elevator.³⁵

§ 7672. **Presumption of Right-Acting in Crossing Accidents.**³⁶

§ 7680. **Injuries to Passengers.**³⁷

²⁹ Allen v. Palmer, 101 App. Div. (N. Y.) 15; s. c. 91 N. Y. Supp. 731.

³⁰ Vonderhorst Brewing Co. v. Amrhine, 98 Md. 406; s. c. 56 Atl. Rep. 833.

³¹ The presumption of negligence was held to have arisen in these cases: Weber v. Lieberman, 47 Misc. (N. Y.) 593; s. c. 94 N. Y. Supp. 460 (defective grating in front of show window); Graham v. Joseph H. Bauland Co., 97 App. Div. (N. Y.) 141; s. c. 89 N. Y. Supp. 595 (feather duster left on stairway by clerk and customer fell over same); Kahn v. Burette, 42 Misc. (N. Y.) 541; 85 N. Y. Supp. 1047 (water falling from rooms occupied by upper tenant). No presumption of negligence in these cases: Tiborsky v. Chicago & C. R. Co., 124 Wis. 243; s. c. 102 N. W. Rep. 549 (pedestrian colliding with truck in night-time).

³² That there is a presumption of negligence in such cases, see: Gorman v. Milliken, 102 App. Div. (N. Y.) 617; s. c. 92 N. Y. Supp. 1126; aff'g s. c. 42 Misc. Rep. 336; 86 N. Y. Supp. 699 (falling derrick); Klitze v. Webb, 120 Wis. 254; s. c. 97 N. W. Rep. 901 (falling door). That there is no such presumption where the cause of the fall is shown by defendant see: Parsons v. Hecla Ironworks, 186 Mass 221; s. c. 71 N. E. Rep. 572. That the fall of the object did not conclusively prove neg-

ligence, see: Crowley v. Rochester Fireworks Co., 95 App. Div. (N. Y.) 13; s. c. 88 N. Y. Supp. 483 (stick from sky rocket); McDonough v. James Reilly Repair & C. Co., 45 Misc. (N. Y.) 334; s. c. 90 N. Y. Supp. 358 (machinist's battering ram); Laforrest v. O'Driscoll, 26 R. I. 547; s. c. 59 Atl. Rep. 923 (fall of lumber from loaded car).

³³ Negligence presumed, see: Crowe v. Nanticoke Light Co., 209 Pa. 580; s. c. 58 Atl. Rep. 1071.

³⁴ Fox v. Philadelphia, 208 Pa. 127; s. c. 57 Atl. Rep. 356; 65 L. R. A. 214.

³⁵ Bogendoerfer v. Jacobs, 97 App. Div. (N. Y.) 355; s. c. 89 N. Y. Supp. 1051.

³⁶ That plaintiff has the burden of proving freedom from contributory negligence, see: Coleman v. New York & C. R. Co., 98 App. Div. (N. Y.) 349; s. c. 90 N. Y. Supp. 264. The presumption of right-acting by a traveller killed at a crossing is balanced by the presumption that the train operatives likewise performed their duties: Stewart v. North Carolina R. Co., 136 N. C. 385; s. c. 48 S. E. Rep. 793.

³⁷ That negligence of carrier is presumed see: Chicago U. T. Co. v. Newmiller, 215 Ill. 383; s. c. 74 N. E. Rep. 410; aff'g s. c. 116 Ill. App. 625; McCord v. Atlanta & C. R. Co., 134 N. C. 53; s. c. 45 S. E. Rep. 1031.

§ 7681. **Master's Knowledge of Dangers of Service.**—In the absence of contrary evidence there is a presumption that a master had knowledge of defects in machinery operated by a servant,³⁸ and that the servant was ignorant of these defects or dangers.³⁹

§ 7682. **Competency and Habits of Fellow Servants.**—The servant has the burden of proving the master negligent in the selection of an unfit fellow employé and continuing him in his service.⁴⁰

§ 7686. **Explosions.**⁴¹

§ 7695. **Burden of Proof Generally.**⁴²

§ 7696. **Contributory Negligence.**⁴³—Contributory negligence is

(passenger's arm struck by suspended mail pouch); *International &c. R. Co. v. Thompson*, 34 Tex. Civ. App. 67; s. c. 77 S. W. Rep. 439 (derailment); *Williams v. Spokane Falls &c. R. Co.*, 39 Wash. 77; s. c. 80 Pac. Rep. 1100.

³⁸ *Brinkmeier v. Missouri Pac. R. Co.*, 69 Kan. 738; s. c. 77 Pac. Rep. 586.

³⁹ *Pressed Steel Car Co. v. Herath*, 110 Ill. App. 596.

⁴⁰ *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23; s. c. 45 S. E. Rep. 740; *W. R. Trigg Co. v. Lindsay*, 101 Va. 193; s. c. 43 S. E. Rep. 349.

⁴¹ That there is no presumption of negligence from the mere fact of an explosion, see: *Obertoni v. Boston &c. R. Co.*, 186 Mass. 481; s. c. 71 N. E. Rep. 980; 67 L. R. A. 422 (signal torpedo picked up on railroad track by boy and exploded); *Illinois Cent. R. Co. v. Prickett*, 109 Ill. App. 468; s. c. aff'd, 210 Ill. 140; 71 N. E. Rep. 435 (locomotive boiler).

⁴² That plaintiff has the burden of proving the defendant's negligence and that such negligence was the proximate cause of his injuries, see, generally: *Patterson v. San Francisco &c. R. Co.*, 147 Cal. 178; s. c. 81 Pac. Rep. 531; *Goldstein v. People's R. Co.*, — Del. —; s. c. 60 Atl. Rep. 975; *Tucker v. Central of Georgia R. Co.*, 122 Ga. 387; s. c. 50 S. E. Rep. 128; *North Chicago St. R. Co. v. O'Donnell*, 115 Ill. App. 110; *Indianapolis St. R. Co. v. Bordechecker*, 33 Ind. App. 138; s. c. 70 N. E. Rep. 995; *Baltimore &c. R. Co. v. State*, 101 Md. 359; s. c. 61 Atl. Rep. 189; *Purcell v. Tennant Shoe Co.*, 187 Mo. 276; s. c. 86 S. W. Rep. 121; *Boston &c. R. R. v.*

Sargent, 72 N. H. 455; s. c. 57 Atl. Rep. 688; *McGinness v. Third Ave. R. Co.*, 104 App. Div. (N. Y.) 342; s. c. 93 N. Y. Supp. 787; *Necker v. Frank*, 43 Misc. (N. Y.) 159; s. c. 88 N. Y. Supp. 250; *Ramsbottom v. Atlantic Coast Line R. Co.*, 138 N. C. 38; s. c. 50 S. E. Rep. 448; *Robertson v. Trammell*, 98 Tex. 364; s. c. 83 S. W. Rep. 1098; *Texas &c. R. Co. v. Shoemaker*, 98 Tex. 451; s. c. 84 S. W. Rep. 1049; rev'g s. c. 81 S. W. Rep. 1019; *Chesapeake &c. R. Co. v. Heath*, 103 Va. 64; s. c. 48 S. E. Rep. 508. That plaintiff is only required to prove his cause of action by a preponderance of the evidence and not beyond a reasonable doubt, see: *Serra v. Brooklyn Heights R. Co.*, 95 App. Div. (N. Y.) 159; s. c. 88 N. Y. Supp. 500. That defendant is not required to produce any evidence where plaintiff has failed to make a *prima facie* case, see: *Texas &c. R. Co. v. Shoemaker*, 98 Tex. 451; s. c. 84 S. W. Rep. 1049; rev'g s. c. 81 S. W. Rep. 1019. That defendant is entitled to a verdict if he produces sufficient evidence to balance evidence introduced by plaintiff, see: *Patterson v. San Francisco &c. Electric R. Co.*, 147 Cal. 178; s. c. 81 Pac. Rep. 531.

⁴³ That plaintiff must show his freedom from contributory negligence, see: *Orr v. Oldtown*, 99 Me. 190; s. c. 58 Atl. Rep. 914; *Lejonne v. Dry Dock &c. R. Co.*, 86 N. Y. Supp. 749. That contributory negligence is an affirmative defense, see: *Womble v. Merchants' Grocery Co.*, 135 N. C. 474; s. c. 47 S. E. Rep. 493; *Consumers' Cotton Oil Co. v. Jonte*, 36 Tex. Civ. App. 18; s. c. 80 S. W. Rep. 847.

proved by a preponderance of the evidence and it is not proper to charge that it must be proved by "evidence clear and convincing."⁴⁴

§ 7698. **Where Evidence Establishes Fact that Injury was Possible from More than One Cause.**—It may be said generally, that where it is just as possible that the injury was the result of one of two causes as of the other, for one of which the defendant is liable but not for the other, there can be no recovery against the defendant. Plaintiff must show with reasonable certainty that the cause for which the defendant is liable caused the injury.⁴⁵

§ 7700. **Malpractice of Physician.**⁴⁶

§ 7703. **Unsafe Condition of Street or Highway.**⁴⁷

§ 7709. **Care in the Transportation of Goods.**⁴⁸

§ 7714. **Care in the Transportation of Live Stock.**—Generally, the proof of delivery of live stock to a carrier in good condition, and their injury or death while in the sole custody of the carrier, makes a *prima facie* case against the carrier.⁴⁹ In action for injury to stock by delay in transit, the plaintiff has the burden of proof,⁵⁰ and mere proof of

⁴⁴ Sanders v. Aiken Mfg. Co., 71 S. C. 58; s. c. 50 S. E. Rep. 679.

⁴⁵ Chesapeake &c. R. Co. v. Heath, 103 Va. 64; s. c. 48 S. E. Rep. 508; Shore v. American Bridge Co., 111 Mo. App. 278; s. c. 86 S. W. Rep. 905.

⁴⁶ That plaintiff has the burden of proving negligence of physician, see: Wood v. Wyeth, 106 App. Div. (N. Y.) 21; s. c. 94 N. Y. Supp. 360.

⁴⁷ That plaintiff has burden of proof of negligence in cases of injury from unsafe condition of highway, see: Romano v. Seidel Furniture Mfg. Co., 114 La. 432; s. c. 38 South. Rep. 409.

⁴⁸ That burden is on the carrier to account for loss or injury of subject of shipment, see: Bank of Irwin v. American Exp. Co., 127 Iowa 1; s. c. 102 N. W. Rep. 107; Powers Mercantile Co. v. Wells, 93 Minn. 143; s. c. 100 N. W. Rep. 735; Alexander v. McNally, 112 Mo. App. 563; s. c. 87 S. W. Rep. 1; Grier v. St. Louis &c. R. Co., 108 Mo. App. 565; s. c. 84 S. W. Rep. 158; Hubbard v. Mobile &c. R. Co., 112 Mo. App. 459; s. c. 87 S. W. Rep. 52; Rieser v. Metropolitan Express Co., 45 Misc. (N. Y.) 632; s. c. 91 N. Y. Supp. 170; Hoffberg v. Bumford, 88

N. Y. Supp. 940; Everett v. Norfolk &c. R. Co., 138 N. C. 68; s. c. 50 S. E. Rep. 557. That the carrier must show affirmatively that the loss resulted from the act of God or the public enemy, see: Nashville &c. R. v. Stone & Haslett, 112 Tenn. 348; s. c. 79 S. W. Rep. 1031. The mere fact that freight was destroyed while in a railroad freight house does not of itself justify an inference of negligence on the part of the railroad company: Van Akin v. Erie R. Co., 92 App. Div. (N. Y.) 23; s. c. 87 N. Y. Supp. 871.

⁴⁹ Baltimore &c. R. Co. v. Fox, 113 Ill. App. 180; Chicago &c. R. Co. v. Woodward, 164 Ind. 360; s. c. 72 N. E. Rep. 558; 73 N. E. Rep. 810; Adams Exp. Co. v. Walker, — Ky. —; s. c. 83 S. W. Rep. 106; 26 Ky. L. Rep. 1025; 67 L. R. A. 412 (dogs); Keyes-Marshall Bros. Liv- ery Co. v. St. Louis &c. R. Co., 105 Mo. App. 556; s. c. 80 S. W. Rep. 53; Trace v. Pennsylvania R. Co., 26 Pa. Super. Ct. 466. But see Peterson v. Chicago &c. R. Co., — S. D. —; s. c. 102 N. W. Rep. 595.

⁵⁰ Sterling v. St. Louis &c. R. Co., —Tex. Civ. App. —; s. c. 86 S. W. Rep. 655.

delay without more does not make a *prima facie* case of negligence.⁵¹ Where from the evidence the injuries to the stock are as likely to have been caused by the nature of the animals as by the negligence of the carrier, the plaintiff is not entitled to a recovery.⁵²

§ 7716. **Care in Running Street Cars.**—A driver of a vehicle injured in a collision with a car, must show that the motorman by due care could have avoided striking him.⁵³ Where an act of a passenger was the proximate cause of an injury received by him, the burden is on him to prove actionable negligence on the part of the carrier. The presumption of negligence in cases of injuries to passengers does not obtain in such a case.⁵⁴

§ 7719. **Care in the Relation of Master and Servant Generally.**⁵⁵

§ 7721. **Fellow-Servant Relation.**⁵⁶—It is the general rule that the competency of the injured servant's fellow servants is presumed, and the burden rests on him to prove their incompetency, and the master's knowledge of that fact.⁵⁷

§ 7722. **Competency of Child Assigned to Dangerous Machinery.**⁵⁸

§ 7723. **Duty to Promulgate Rules.**⁵⁹

⁵¹ McCrary v. Chicago &c. R. Co., 109 Mo. App. 567; s. c. 83 S. W. Rep. 82.

⁵² Lewis v. Pennsylvania R. Co., 71 N. J. L. 339; s. c. 59 Atl. Rep. 1117; aff'g s. c. 70 N. J. L. 132; 56 Atl. Rep. 128.

⁵³ Solatinow v. Jersey City &c. St. R. Co., 70 N. J. L. 154; s. c. 56 Atl. Rep. 235.

⁵⁴ Taillon v. Mears, 29 Mont. 161; s. c. 74 Pac. Rep. 421.

⁵⁵ That servant has the burden of proving the master's negligence and that such negligence caused the injury, see: McMillan v. Grand Trunk R. Co. of Canada, 130 Fed. Rep. 827; O'Donnell v. American Mfg. Co., 112 La. 720; s. c. 36 South. Rep. 661; Glasscock v. Swofford Bros. Dry Goods Co., 106 Mo. App. 657; s. c. 80 S. W. Rep. 364; rev'g s. c. 74 S. W. Rep. 1039; Trigg v. Ozark Land &c. Co., 187 Mo. 227; s. c. 86 S. W. Rep. 222; Hendrix v. Cooleemee Cotton Mills, 138 N. C. 169; s. c. 50 S. E. Rep. 561; Cully v. Northern Pac. R. Co., 35 Wash. 241; s. c. 77 Pac. Rep. 202; Stratton v. C. H. Nichols Lumber Co., 39 Wash. 323; s. c. 81 Pac. Rep. 831.

⁵⁶ That master has the burden of

proof to establish the fellow-servant relation, see: Spring Valley Coal Co. v. Buzis, 115 Ill. App. 196; aff'g s. c. 213 Ill. 341; 72 N. E. Rep. 1060; Chicago City R. Co. v. Leach, 208 Ill. 198; s. c. 70 N. E. Rep. 222; rev'g s. c. 104 Ill. App. 30; Consolidated Kansas City Smelting &c. Co. v. Osborne, 66 Kan. 393; s. c. 71 Pac. Rep. 838.

⁵⁷ Wilkinson Co-Op. Glass Co. v. Dickinson, 35 Ind. App. 230; s. c. 73 N. E. Rep. 957.

⁵⁸ Under the New York child labor law, the child, in an action for his injury, must show that he did not file the certificate of a health officer, as required by the law, before he can invoke the rule that he was incapable of assuming the risk because of the illegality of his employment: Sitts v. Waiontha Knitting Co., 94 App. Div. (N. Y.) 38; s. c. 87 N. Y. Supp. 911.

⁵⁹ That plaintiff has the burden to prove affirmatively the necessity for the particular rule, since there is a presumption that all necessary rules were prescribed, see: Hill v. Boston &c. R. Co., 72 N. H. 518; s. c. 57 Atl. Rep. 924.

§ 7725. Assumption of Risk.⁶⁰§ 7726. Statutory Provisions for Protection of Employés.⁶¹

§ 7732. *Res Gestae*.—The declaration or act sought to be introduced in evidence as part of the *res gestae* must be connected with or grow out of the main or principal transaction, which is itself also admissible, and must tend to illustrate or explain it, and must be free from any suspicion of device or afterthought. If it is merely a narrative of a complete past event it is not admissible.⁶² The declara-

⁶⁰ That assumption of risk is an affirmative defense, see, generally: Chicago Terminal Transfer R. Co. v. O'Donnell, 114 Ill. App. 345; s. c. aff'd, 213 Ill. 545; 72 N. E. Rep. 1133; Commonwealth Electric Co. v. Rose, 214 Ill. 545; s. c. 73 N. E. Rep. 780; aff'g s. c. 114 Ill. App. 181; Mace v. H. A. Boedker & Co., 127 Iowa 721; s. c. 104 N. W. Rep. 475; Hailey v. Texas & P. R. Co., 113 La. 533; s. c. 37 South. Rep. 131; Missouri & c. R. Co. v. Jones, 35 Tex. Civ. App. 584; s. c. 80 S. W. Rep. 852; Tucker v. Nat. Loan & Co., 35 Tex. Civ. App. 474; s. c. 80 S. W. Rep. 879. That the servant is presumed to assume the ordinary and usual risks of his employment, and that he must prove that the injury did not arise from an obvious defect or from a hazard incident to the employment, see: Glasscock v. Swofford Bros. Dry Goods Co., 106 Mo. App. 657; s. c. 80 S. W. Rep. 364; rev'g s. c. 74 S. W. Rep. 1039.

⁶¹ Under the New York labor law the plaintiff still must show negligence on the part of the employer and his own freedom from contributory negligence: Hoehn v. Lautz, 94 App. Div. (N. Y.) 14; s. c. 87 N. Y. Supp. 921; McHugh v. Manhattan R. Co., 88 App. Div. (N. Y.) 554; s. c. 85 N. Y. Supp. 184; Wilson v. New York Mills, 107 App. Div. (N. Y.) 99; s. c. 94 N. Y. Supp. 1090. Under the Illinois statute making it the duty of mine owners to maintain attendants at the principal doorways of the mine, it is presumed that if the attendant had been at the door he would have performed his duty: Himrod Coal Co. v. Stevens, 203 Ill. 115; s. c. 67 N. E. Rep. 389; aff'g s. c. 104 Ill. App. 639. The South Carolina constitutional provision that every railroad employé shall have the same remedies for injuries

due to the negligence of the corporation or its employés as are allowed by law to other persons, whether the injury arises from the negligence of a superior officer or a fellow servant engaged in another department of labor, is held not to create a presumption of negligence from the fact of killing by a railroad: Land v. Southern R., 67 S. C. 290; s. c. 45 S. E. Rep. 203.

⁶² Di Prisco v. Wilmington City R. Co., — Del. —; s. c. 57 Atl. Rep. 906 (statement of child while being taken from under car as to her efforts to save her limbs from being cut off by street car admissible); Pool v. Warren County, 123 Ga. 205; s. c. 51 S. E. Rep. 328; Chicago City R. Co. v. White, 110 Ill. App. 23; Rothrock v. Cedar Rapids, 128 Iowa 252; s. c. 103 N. W. Rep. 475 (declaration made within half-hour after occurrence of accident, admissible); Horst v. Lewis, — Neb. —; s. c. 103 N. W. Rep. 460; aff'g s. c. 98 N. W. Rep. 460; Williams v. Southern R. Co., 68 S. C. 369; s. c. 47 S. E. Rep. 706; Gulf & c. R. Co. v. Willoughby (Tex. Civ. App.), 81 S. W. Rep. 829 (declaration within five minutes after occurrence of accident admissible); Missouri & c. R. Co. v. Jones, 35 Tex. Civ. App. 584; s. c. 80 S. W. Rep. 852 (declaration within five minutes after occurrence of accident admissible); Leach v. Oregon Short Line R. Co. 29 Utah 285; s. c. 81 Pac. Rep. 90. In the following cases the declaration was held inadmissible for the reason stated in the parenthesis: Guild v. Pringle, 130 Fed. Rep. 419 (declaration made in answer to direct question); Hot Springs St. R. Co. v. Hildreth, 72 Ark. 572; s. c. 82 S. W. Rep. 245 (statement made several minutes after injuries were received); White v. Southern R. Co., 123 Ga. 353; s.

tion or statement admissible as *res gestæ* may be testified to by one person who made it.⁶³ In an action for injuries to a train hand, resulting from misconstruction of orders, the orders were held admissible as *res gestæ* for the purpose of showing why the operatives moved their train as they did.⁶⁴ The testimony of a witness who saw a railroad accident as to remarks made by him to the operatives of the train when it stopped is not admissible.⁶⁵

§ 7734. **Exclamations and Declarations of Existing Pain.**⁶⁶—Testimony as to expressions of present pain in particular parts of the body, made by an injured person, is admissible, although the witnesses to whom these statements were made and who testified thereto are laymen and not physicians.⁶⁷

§ 7735. **Declarations of Injured Person to Physician.**⁶⁸—A physician questioning a patient for the purpose of getting a history of the

c. 51 S. E. Rep. 411 (narrative given an hour or more after accident and so with statement on day following accident); *Boyd v. West Chicago St. R. Co.*, 112 Ill. App. 50 (statement made a minute or more after accident); *White v. Marquette*, 140 Mich. 310; s. c. 103 N. W. Rep. 698; 12 Det. Leg. N. 141 (statement made over a mile from place of accident and an hour afterward); *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1; s. c. 84 S. W. Rep. 26 (answer of conductor to injured person's inquiry as to cause of accident after he had recovered consciousness); *Klingaman v. Fish & Hunter Co.*, — S. D. —; s. c. 102 N. W. Rep. 601 (statements concerning the nature of the injury and resulting pain and not exclamations indicative of existing pain).

⁶³*Gulf & C. R. Co. v. Hall*, 34 Tex. Civ. App. 535; s. c. 80 S. W. Rep. 133.

⁶⁴*Wallace v. Boston & C. R. Co.*, 72 N. H. 504; s. c. 57 Atl. Rep. 913.

⁶⁵*Indianapolis St. R. Co. v. Taylor*, 164 Ind. 155; s. c. 72 N. E. Rep. 1045.

⁶⁶That exclamations and declarations of existing pain are admissible, see: *Birmingham R. & C. Co. v. Ensen*, — Ala. —; s. c. 39 South. Rep. 74; *District of Columbia v. Dietrich*, 23 App. (D. C.) 577; *Nashville & C. R. Co. v. Miller*, 120 Ga. 453; s. c. 47 S. E. Rep. 959; *Western & C. R. Co. v. Burnham*, 123 Ga. 28; s. c. 50 S. E. Rep. 984; *Indianapolis*

St. R. Co. v. Schmidt, 163 Ind. 360; s. c. 71 N. E. Rep. 201; *Indianapolis St. R. Co. v. Haverstick*, 35 Ind. App. 281; s. c. 74 N. E. Rep. 34; *Battis v. Chicago & C. R. Co.*, 124 Iowa 623; s. c. 100 N. W. Rep. 543; *Fishburn v. Burlington & C. R. Co.*, 127 Iowa 483; s. c. 103 N. W. Rep. 481; *Louisville & C. R. Co. v. Smith*, 84 S. W. Rep. 755; s. c. 27 Ky. L. Rep. 257; *Cashin v. New York & C. R. Co.*, 185 Mass. 543; s. c. 70 N. E. Rep. 930; *Estes v. Missouri Pac. R. Co.*, 110 Mo. App. 725; s. c. 85 S. W. Rep. 627; *McHugh v. St. Louis Transit Co.*, 190 Mo. 85; s. c. 88 S. W. Rep. 853; *Chicago & C. R. Co. v. Williams*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 248; *St. Louis & C. R. Co. v. Burke*, 36 Tex. Civ. App. 222; s. c. 81 S. W. Rep. 774; *St. Louis & C. R. Co. v. Haynes*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 934; *Texas Cent. R. Co. v. Powell*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 21.

⁶⁷*Texas Cent. R. Co. v. Powell*, — Tex. Civ. App. —; s. c. 86 S. W. Rep. 21.

⁶⁸That the physician may not testify to statements made by the patient as to the circumstances of the injury, see: *Missouri & C. R. Co. v. Smith*, — Tex. Civ. App. —; s. c. 82 S. W. Rep. 787; *Shade v. Covington-Cincinnati & C. R. & C. Co.*, — Ky. —; s. c. 84 S. W. Rep. 733; 27 Ky. L. Rep. 224. That the physician may testify as to exclamations or outcries as indicating present pain,

case with a view to treatment may give answers made to him by the patient as to his pain and suffering.⁶⁹

§ 7747. **Opinions and Conclusions of Witnesses Not Generally Admissible.**—The opinions of expert witnesses are not receivable where all the facts in an inquiry can be ascertained and made intelligible to the jury.⁷⁰ Thus, opinions of expert witnesses as to which of two or more causes produced a given effect should not be received where the conditions necessary to the operation of the different causes can be described with such clearness that a jury can understand them and intelligently form an opinion.⁷¹ Because the matter was susceptible of proof, and within the comprehension of the jury, courts have held the expression of opinion by witnesses upon the following questions an invasion of the province of the jury:—Whether a heavy car thrown off the rails and dragged along the track would disturb the alignment of the rails;⁷² whether a particular piece of machinery should have been safeguarded;⁷³ whether, under the circumstances of the particular case, it was safe for a passenger to stand on the foot-board of a street car;⁷⁴ whether it was dangerous for a boy twelve years old to attempt to start a belt operating machinery by swinging over a sill above the belt by his hands, and tramping upon the belt with his feet;⁷⁵ whether the machinery causing the injury was reason-

see: *Atlanta &c. R. Co. v. Gardner*, 122 Ga. 82; s. c. 49 S. E. Rep. 818. That statements made by a patient during actual treatment, and in immediate connection therewith, though made after the commencement of the suit, are admissible, see: *Chicago City R. Co. v. Bundy*, 210 Ill. 39; s. c. 71 N. E. Rep. 28; aff'g s. c. 109 Ill. App. 637.

⁶⁹ *St. Louis &c. R. Co. v. Burke*, 36 Tex. Civ. App. 222; s. c. 81 S. W. Rep. 774.

⁷⁰ *National Biscuit Co. v. Nolan*, 138 Fed. Rep. 6. A witness cannot be asked as to the relative safety of different methods of performing a task: *Johnson v. Union Pac. Coal Co.*, 28 Utah 46; s. c. 76 Pac. Rep. 1089. Where a person is injured by the derailment of a car, and it is shown that the rails were spread, the wheel worn, and the flange chipped, an expert cannot be asked as to the cause of the derailment, as the facts are plain and within the understanding of the jury: *Schutz v. Union R. Co.*, 181 N. Y. 33; s. c. 73 N. E. Rep. 491; rev'g s. c. 88 App. Div. (N. Y.) 615; 84 N. Y. Supp.

1145. Where it is possible to state the data from which the jury can calculate what would be a reasonable time for the performance of an act an expert cannot testify as to what in his opinion would be a reasonable time: *Allison v. Wall*, 121 Ga. 822; s. c. 49 S. E. Rep. 831. A witness cannot be asked what he would have done under like circumstances: *Denver &c. R. Co. v. Vellido*, — Colo. —; s. c. 81 Pac. Rep. 766.

⁷¹ *Meehan v. Great Northern R. Co.*, — N. D. —; s. c. 101 N. W. Rep. 183.

⁷² *Cronk v. Wabash R. Co.*, 123 Iowa 349; s. c. 98 N. W. Rep. 884.

⁷³ *National Biscuit Co. v. Nolan*, 138 Fed. Rep. 6. See also: *Dolan v. Herring-Hall-Marvin Safe Co.*, 105 App. Div. (N. Y.) 366; s. c. 94 N. Y. Supp. 241.

⁷⁴ *Allen v. St. Louis Transit Co.*, 183 Mo. 411; s. c. 81 S. W. Rep. 1142.

⁷⁵ *Virginia Iron &c. Co. v. Tomlinson*, 104 Va. 249; s. c. 51 S. E. Rep. 362.

ably safe and suitable, especially when the evidence as to the state of repair of the machinery was conflicting.⁷⁶

§ 7750. Opinions Admissible when Facts Incapable of Presentation by One Other than Observer.⁷⁷

§ 7751. Matters Deemed the Subject of Expert Opinion Evidence.—The following matters have been held proper subjects of testimony by competent expert witnesses:—The sufficiency of the force employed to perform a piece of work;⁷⁸ how long before an injury by contact with a live wire the defect in the insulation of the wire had occurred;⁷⁹ the distance within which a street car in motion may be stopped;⁸⁰ the competency of employes;⁸¹ the safety of roadways in mines;⁸² the time required to make up trains and get under way;⁸³ the duties of particular servants;⁸⁴ the safety of unblocked switch frogs;⁸⁵ the necessity of placing tell-tales on each side of overhead bridges;⁸⁶ the safety of the supporting apparatus furnished employes at work on high structures;⁸⁷ the danger of attempting to force frozen dynamite into a drill hole with a stick;⁸⁸ that certain machinery should not be placed in charge of inexperienced operatives;⁸⁹ the proper method of placing switch points.⁹⁰

§ 7753. Competency of Experts.⁹¹

⁷⁶ *Coe v. Van Why*, 33 Colo. 315; s. c. 80 Pac. Rep. 894.

⁷⁷ See generally: *Horst v. Lewis*, — Neb. —; s. c. 103 N. W. Rep. 460; *aff'g* s. c. 98 N. W. Rep. 1046. An expert may state his opinion as to whether or not there is danger attending the operation of a particular machine where it is difficult of description and the danger arising from its operation cannot be easily explained or understood: *Gammel-Statesman Pub. Co. v. Monfort* (Tex. Civ. App.), 81 S. W. Rep. 1029.

⁷⁸ *Dell v. McGrath*, 92 Minn. 187; s. c. 99 N. W. Rep. 629.

⁷⁹ *Bernier v. St. Paul Gaslight Co.*, 92 Minn. 214; s. c. 99 N. W. Rep. 778.

⁸⁰ *Indianapolis St. R. Co. v. Seerley*, 35 Ind. App. 467; s. c. 72 N. E. Rep. 169, 1034; *Meng v. St. Louis & C. R. Co.*, 108 Mo. App. 553; s. c. 84 S. W. Rep. 213.

⁸¹ *Lake St. Elevated R. Co. v. Fitzgerald*, 112 Ill. App. 312.

⁸² *Henrietta Coal Co. v. Campbell*, 211 Ill. 216; s. c. 71 N. E. Rep. 863; *aff'g* s. c. 112 Ill. App. 452.

⁸³ *Chicago & C. R. Co. v. Kapp*, —

Tex. Civ. App. —; s. c. 83 S. W. Rep. 233.

⁸⁴ *Pittsburgh & C. R. Co. v. Nicholas*, — Ind. App. —; s. c. 73 N. E. Rep. 195; 74 N. E. Rep. 626.

⁸⁵ *Schroeder v. Chicago & C. R. Co.*, 128 Iowa 365; s. c. 103 N. W. Rep. 985.

⁸⁶ *Pittsburgh & C. R. Co. v. Lamphere*, 137 Fed. Rep. 20; s. c. 69 C. C. A. 542.

⁸⁷ *Anderson v. Fielding*, 92 Minn. 42; s. c. 99 N. W. Rep. 357.

⁸⁸ *Currelli v. Jackson*, 77 Conn. 115; s. c. 58 Atl. Rep. 762.

⁸⁹ *Gammel-Statesman Pub. Co. v. Monfort* (Tex. Civ. App.), 81 S. W. Rep. 1029.

⁹⁰ *Buckalew v. Quincy & C. R. Co.*, 107 Mo. App. 575; s. c. 81 S. W. Rep. 1176.

⁹¹ An employé, having had fourteen months' experience as an engineer, may give his opinion as to the distance an object could be seen on the track while driving the engine at a certain rate of speed: *Missouri & C. R. Co. v. Jones*, 35 Tex. Civ. App. 584; s. c. 80 S. W. Rep. 852.

§ 7754. Non-Expert may Testify as to Speed of Trains.⁹²

§ 7755. **Medical Experts.**—A physician may testify as to the seriousness of the plaintiff's injuries⁹³ and their probable future effects.⁹⁴ He may also state his opinion as to how the injury was caused,⁹⁵ and whether the plaintiff's condition could have resulted from the accident.⁹⁶ He should confine himself to the facts, and not draw any conclusions or offer his opinion on a matter not requiring medical skill or knowledge.⁹⁷ One court has held that the question as to whether an injury would be "likely to produce the condition" related to the witness, was open to the criticism that it called for speculative evidence on the issue of damages.⁹⁸ But it has been held proper elsewhere to permit a physician to be asked as to whether the injuries were "likely" to result in recurrent troubles, or were "apt" to affect other organs injuriously.⁹⁹

§ 7758. **Questions as to Intoxication, Distance, etc., Relate to Facts and Not Opinions.**—It has been held not improper to ask an experienced locomotive engineer as to how far a headlight could be seen.¹⁰⁰ So, it has been held proper to permit witnesses familiar with the situation at the time of a crossing accident, to state how far the track could be seen by one standing where the plaintiff stood, under the conditions that existed at the time of the accident.¹⁰¹

§ 7759. **Appearance or Health of Injured Person is a Question of Fact.**¹⁰²

⁹² See generally: *Metropolitan R. Co. v. Blick*, 22 App. (D. C.) 194; *Chicago City R. Co. v. Bundy*, 210 Ill. 39; s. c. 71 N. E. Rep. 28; aff'g s. c. 109 Ill. App. 637. A shipper acquainted with the speed of cattle trains was qualified to state the usual time required for cattle trains to run from a station in Texas to St. Louis: *International & C. R. Co. v. McGehee* (Tex. Civ. App.), 81 S. W. Rep. 804.

⁹³ *St. Louis & C. R. Co. v. Rea*, — Tex. —; s. c. 87 S. W. Rep. 324; rev'g s. c. 84 S. W. Rep. 428.

⁹⁴ *Kansas City & C. R. Co. v. Butler*, — Ala. —; s. c. 38 South. Rep. 1024; *Walden v. Jamestown*, 79 App. Div. (N. Y.) 433; 80 N. Y. Supp. 65; s. c. aff'd, 178 N. Y. 213; 70 N. E. Rep. 466; *Klingaman v. Fish & Hunter Co.*, — S. D. —; s. c. 102 N. W. 601; *Norfolk R. & C. Co. v. Spratley*, 103 Va. 379; s. c. 49 S. E. Rep. 502; *Edwards v. Burke*, 36 Wash. 107; s. c. 78 Pac. Rep. 610.

⁹⁵ *Birmingham R. & C. Co. v. Ens-*

len, — Ala. —; s. c. 39 South. Rep. 74; *Illinois Cent. R. Co. v. Smith*, 111 Ill. App. 177; *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1; s. c. 84 S. W. Rep. 26.

⁹⁶ *Hallum v. Omro*, 122 Wis. 337; s. c. 99 N. W. Rep. 1051; *Graham v. Joseph H. Bauland Co.*, 97 App. Div. (N. Y.) 141; s. c. 89 N. Y. Supp. 595; *Wood v. Metropolitan St. R. Co.*, 181 Mo. 433; s. c. 81 S. W. Rep. 152.

⁹⁷ *Knights Templars' & C. Indemnity Co. v. Crayton*, 110 Ill. App. 648; s. c. aff'd, 209 Ill. 550; 70 N. E. Rep. 1066.

⁹⁸ *Higgins v. United Traction Co.*, 96 App. Div. (N. Y.) 69; s. c. 89 N. Y. Supp. 76.

⁹⁹ *Faber v. C. Reiss Coal Co.*, 124 Wis. 554; s. c. 102 N. W. Rep. 1049.

¹⁰⁰ *Southern R. Co. v. Bonner*, 141 Ala. 517; s. c. 37 South. Rep. 702.

¹⁰¹ *Chicago & C. R. Co. v. Crose*, 214 Ill. 602; s. c. 73 N. E. Rep. 865.

¹⁰² See generally in support of principle: *Pioneer Reserve Ass'n*

§ 7767. **Existence of the Master and Servant Relation.**—On the question whether the person directing the injured employé in his work had the authority of a vice-principal, evidence is admissible that employés generally consulted him concerning their duties and the repair of appliances used by them in their work.¹⁰³

§ 7769. **Assumption of Risk.**—Extracts from an application for employment in one line of railroad service admitting a knowledge of the hazards and nature of the employment, and of the necessity for exercising care in the same, are not admissible on the issue of an assumption of risk in a different line of work in which the applicant was afterward employed.¹⁰⁴

§ 7770. **Knowledge of the Existence of Defects.**—The master is charged with a knowledge of dangerous conditions possessed by his superintendent or foreman,¹⁰⁵ and evidence is admissible that such representative was told of the particular defect or of the dangerous condition.¹⁰⁶ Constructive notice of a dangerous condition may be proved by evidence of a general defective condition around the defect causing the particular injury.¹⁰⁷

§ 7772. **Rules for the Government of Employés.**¹⁰⁸

v. Jones, 111 Ill. App. 156; Lake Erie & C. R. Co. v. Delong, 109 Ill. App. 241.

¹⁰³ Wysocki v. Wisconsin Lakes Ice & C. Co., 121 Wis. 96; s. c. 98 N. W. Rep. 950.

¹⁰⁴ Texas & C. R. Co. v. Swearingen, 196 U. S. 51; s. c. 25 Sup. Ct. Rep. 164; 49 L. Ed. 382.

¹⁰⁵ Lane Bros. & Co. v. Bauserman, 103 Va. 146; s. c. 48 S. E. Rep. 857.

¹⁰⁶ Bates Mach. Co. v. Crowley, 115 Ill. App. 540; Dutro v. Metropolitan St. R. Co., 111 Mo. App. 258; s. c. 86 S. W. Rep. 915.

¹⁰⁷ Southern R. Co. v. Sittasen, — Ind. App. —; s. c. 74 N. E. Rep. 898.

¹⁰⁸ A rule of a railroad company requiring section foremen to go over their sections during heavy rain storms to ascertain whether the track is safe, was held admissible in behalf of plaintiff on the question whether an engineer, whose death was caused by the giving way of a track which was undermined by a heavy rain storm, was guilty of contributory negligence in running over the track, and this though the failure of the track walker to perform his duty was not pleaded by the plaintiff as an act of negligence nor submitted as an issue in the

charge: Gulf & C. R. Co. v. Boyce, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 395. The meaning of an existing rule is not to be ascertained by reference to an amendment afterward made to the rule: Quinn v. Galveston & C. R. Co., — Tex. Civ. App. —; s. c. 84 S. W. Rep. 395. A railroad rule forbidding the backing of cars over public crossings unless a lookout is maintained on the forward car is admissible on the issue of contributory negligence in an action by an employé injured by cars being backed over a street crossing without a lookout where the injured employé testified that he was familiar with the rule, and looked and saw no man on the cars before attempting to cross the track: Galveston & C. R. Co. v. McAdams, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 1076. A book of rules compiled by a railroad company, purporting to give certain information as to the height of bridges is admissible where it appears that the information contained in the book is incorrect as to the height of the particular bridge which caused the injury complained of: Doyle v. Illinois Cent. R. Co., 113 Ill. App. 532.

§ 7773. **Abrogation of Rules by Habitual Violation.**—The abrogation of a rule may be established by evidence that for years it had been disregarded by the particular official whose duty it was to enforce it.¹⁰⁹ The master's knowledge of repeated violations of the rule must be shown where it is claimed that the rule has been abrogated by its habitual disregard.¹¹⁰

§ 7774. **Warning and Instructing Youthful and Inexperienced Employés.**—The fact of instruction or neglect to instruct a youthful or inexperienced servant is not proved by evidence of warning,¹¹¹ or failure to warn the fellow servants of the injured employé.¹¹² As showing a recognition of the necessity of instructing inexperienced employés, evidence is admissible to show a custom to send experienced employés along with inexperienced employés to learn the method of work.¹¹³

§ 7775. **Inability to Designate with Certainty the Defect Causing Injury.**¹¹⁴

§ 7776. **Comparison with Methods and Conditions of Employment Elsewhere.**¹¹⁵

§ 7777. **Evidence to Show that Safer Methods could have been Adopted.**—An employé, injured by a car escaping from a switch track onto a track where he was at work, may show the absence of a derailing switch where the tracks joined, and that such a device was in common use by the defendant elsewhere.¹¹⁶

§ 7779. **Evidence of Previous Accidents from Same Cause.**¹¹⁷

¹⁰⁹ *International &c. R. Co. v. Jacobs*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 288.

¹¹⁰ *Driver v. Southern R. Co.*, 103 Va. 650; s. c. 49 S. E. Rep. 1000; *Wallace v. Boston &c. R. Co.*, 72 N. H. 504; s. c. 57 Atl. Rep. 913.

¹¹¹ *Klauffke v. Bettendorf Axle Co.*, 125 Iowa 223; s. c. 100 N. W. Rep. 1116.

¹¹² *Virginia Iron &c. Co. v. Tomlinson*, 104 Va. 249; s. c. 51 S. E. Rep. 362.

¹¹³ *Pence v. California Min. Co.*, 27 Utah 378; s. c. 75 Pac. Rep. 934.

¹¹⁴ That failure to designate with certainty the defect causing the injury will not necessarily defeat a recovery, see: *Armour v. Golkowsky*, 202 Ill. 144; s. c. 66 N. E. Rep. 1037; aff'g s. c. 95 Ill. App. 492.

¹¹⁵ That methods and conditions of employment elsewhere may be

shown, see *Schroeder v. Chicago &c. R. Co.*, 128 Iowa 365; s. c. 103 N. W. Rep. 985; *Alabama &c. R. Co. v. Overstreet*, 85 Miss. 78; s. c. 37 South. Rep. 819; *Devoe v. New York &c. R. Co.*, 174 N. Y. 1; s. c. 66 N. E. Rep. 568; rev'g s. c. 70 App. Div. (N. Y.) 495; 75 N. Y. Supp. 136; *Bodie v. Charleston &c. R. Co.*, 66 S. C. 302; s. c. 44 S. E. Rep. 943. But evidence of this character must be given by witnesses shown to be acquainted with methods and conditions in other like establishments: *Dolan v. Boott Cotton Mills*, 185 Mass. 576; s. c. 70 N. E. Rep. 1025.

¹¹⁶ *Smith v. Fordyce*, 190 Mo. 1; s. c. 88 S. W. Rep. 679.

¹¹⁷ That such evidence is not admissible, see: *Roche v. Llewellyn Ironworks Co.*, 140 Cal. 563; s. c. 74 Pac. Rep. 147; *Cohen v. Hamblin-Russell Mfg. Co.*, 186 Mass. 544; s.

§ 7781. **Employment and Retention of Incompetent Fellow Servants.**—On the question of negligence in the retention of incompetent fellow servants, the plaintiff may show prior acts of negligence by such servants and knowledge thereof by the master or his representative.¹¹⁸ The master will be charged with knowledge of the incompetency of the servant where his acts of negligence were so notorious that the master could have known of them by the exercise of ordinary diligence,¹¹⁹ but this constructive knowledge is fixed by proof of isolated acts of negligence, drunkenness, or lack of skill.¹²⁰ In one case it was held proper to show the incompetency of a motorman by proof of his general reputation as to running motor cars, and by evidence that he had run past signals, had jerked the car he was pulling, and had been laid off and reprimanded by the master for his carelessness in the performance of his duties.¹²¹ Incompetency is not shown by evidence of the servant's discharge after the occurrence of the accident complained of.¹²²

§ 7784. **Inspection of Cars and Appliances.**—The general custom of well-regulated and prudently managed railroad companies as to the time of inspecting their engines and boilers may be proved.¹²³ But evidence as to the custom of railroads generally in this respect is not sufficient; the evidence must be limited to the custom of well-regulated and prudently managed companies.¹²⁴

c. 71 N. E. Rep. 948; *Mueller v. Northwestern Iron Co.*, 125 Wis. 326; s. c. 104 N. W. Rep. 67. The fact that an employé had been injured by the same defect in the same machine a short time before plaintiff's injury, and defendant had been notified of this fact may be shown: *Framke v. Hanly*, 215 Ill. 216; s. c. 74 N. E. Rep. 130. Evidence of the occurrence of other heavy rain storms in the same section of the country as great as the one undermining the railroad track which caused the injury sued upon is admissible to show that the storm in question should have been reasonably anticipated, and its disastrous effects provided against: *Gulf & C. R. Co. v. Boyce*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 395. In a case where the action for injuries to a servant was based on negligence in the employment of fellow servants unacquainted with the English language, and not the reckless conduct of these fellow servants on prior occasions, it was held that evidence of a prior occasion on

which one of these servants carelessly injured another servant was without relevance: *Date v. New York Glucose Co.*, 104 App. Div. (N. Y.) 207; s. c. 93 N. Y. Supp. 249.

¹¹⁸ *Conover v. Neher-Ross Co.*, 38 Wash. 172; s. c. 80 Pac. Rep. 281; *Date v. New York Glucose Co.*, 104 App. Div. (N. Y.) 207; s. c. 93 N. Y. Supp. 249; *Havens v. Rhode Island & C. R. Co.*, 26 R. I. 48; s. c. 58 Atl. Rep. 247.

¹¹⁹ *Southern Pac. Co. v. Hetzer*, 135 Fed. Rep. 272; s. c. 68 C. C. A. 26.

¹²⁰ *Southern Pac. Co. v. Hetzer*, 135 Fed. Rep. 272; s. c. 68 C. C. A. 26.

¹²¹ *Metropolitan & C. R. Co. v. Fortin*, 203 Ill. 454; s. c. 67 N. E. Rep. 977.

¹²² *Winters v. Naughton*, 91 App. Div. (N. Y.) 80; s. c. 86 N. Y. Supp. 439.

¹²³ *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140; s. c. 71 N. E. Rep. 435; aff'g s. c. 109 Ill. App. 468.

¹²⁴ *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140; s. c. 71 N. E. Rep. 435; aff'g s. c. 109 Ill. App. 468.

§ 7786. Scaffolds and Derricks.¹²⁵§ 7789. Overhead Bridges and Other Overhanging Objects.¹²⁶§ 7790. Various Matters of Evidence Relating to Railroad Signals.¹²⁷§ 7792. Habits of Injured Person.¹²⁸

§ 7798. **Railway Crossing Accidents.**—In an action for the death of a traveller on a crossing, evidence to show general knowledge on the part of the public as to the danger in crossing the track at this place is inadmissible; the issue on such an inquiry is whether the traveller knew, or ought to have known, of the danger in attempting to cross at that place and whether or not he acted as an ordinarily prudent man in attempting to cross under the circumstances.¹²⁹

§ 7800. Omissions of Signals at Crossings.¹³⁰

§ 7801. **Whether the Plaintiff Injured at a Railroad Crossing Exercised Due Care for His Own Safety.**—There is authority that where there is no direct evidence as to the conduct of a person killed on a railroad crossing, then evidence of his habit and custom to look and listen for trains when approaching this crossing may be admitted.¹³¹

§ 7816. Reputation of Motorman for Care.¹³²

¹²⁵ The fact that the material supplied by a master for the construction of a platform was reasonably suitable was held established by evidence that similar material had been safely used for several months upon the work and for a long time on other similar work: *Fukare v. Kerbaugh*, — N. J. L. —; s. c. 61 Atl. Rep. 376.

¹²⁶ On the question of the contributory negligence of a brakeman killed by striking an overhead bridge, evidence is admissible that he had passed under it on trains repeatedly: *Quinlan v. New York & C. R. Co.*, 89 App. Div. (N. Y.) 266; s. c. 85 N. Y. Supp. 814; s. c. aff'd, 181 N. Y. 523; 73 N. E. Rep. 1130.

¹²⁷ On the question whether the place at which an accident occurred was a place where the rules of the railroad company required signals to be sounded evidence of a custom of engineers to blow the whistle on approaching this place is admissible: *Gulf & C. R. Co. v. Minter*, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 477.

¹²⁸ Evidence of the reputation of an engineer killed in a railroad accident, as a sober, careful and competent engineer is admissible where there was no one in the cab with him at the time of the accident except his fireman, who was also killed, since direct proof of ordinary care on his part could not then have been made: *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140; s. c. 71 N. E. Rep. 435; aff'g s. c. 109 Ill. App. 468.

¹²⁹ *Savannah & C. R. Co. v. Evans*, 121 Ga. 391; 49 S. E. Rep. 308.

¹³⁰ *Chicago & C. R. Co. v. Mayer*, 112 Ill. App. 149 (absence of lookout on backing train may be shown).

¹³¹ *Tucker v. Boston & C. R.*, 73 N. H. 132; s. c. 59 Atl. Rep. 943.

¹³² On cross-examination of a motorman, whose negligence it is claimed was the cause of an injury, he may not be asked whether or not on another line he had some trouble in managing his car: *Munroe v. Hartford St. R. Co.*, 76 Conn. 201; s. c. 56 Atl. Rep. 498.

§ 7821. Condition of Track at Other Places.¹³³

§ 7823. Injuries Received in Boarding or Alighting from Cars.—A street railroad company, sued for injuries to a passenger received while boarding or alighting from a car that had stopped, may not, in its own behalf, show rules fixing other places for cars to stop to receive or discharge passengers,¹³⁴ but the injured passenger may show the custom of the street railroad company to stop at the place where he received his injuries.¹³⁵ On the question of defects in the place chosen by the street car company for the discharge of its passengers, evidence is admissible of previous injuries to alighting passengers from the same defect.¹³⁶

§ 7829. Admissibility of Rules for Government of Employés.—The violation of the carrier's own rules by its employés may be shown where it is claimed that the injury sued upon was occasioned by a failure to observe the rule.¹³⁷

§ 7831. Condition of Roadbed after Derailment may be Shown.¹³⁸

§ 7840. Evidence Necessary to Charge Municipal Corporation.¹³⁹

§ 7841. Evidence of Official Resolutions, Reports, Ordinances, etc.¹⁴⁰

§ 7844. Evidence of the Condition of the Highway near the Time of the Accident.¹⁴¹

§ 7845. Condition of the Highway at Other Places.¹⁴²—But the condition of the highway or sidewalk at places remote from the place

¹³³ That evidence of this character is not admissible, see: *Briggs v. East Broad Top R. &c. Co.*, 206 Pa. 564; s. c. 56 Atl. Rep. 36.

¹³⁴ *West Chicago St. R. Co. v. Brown*, 112 Ill. App. 351.

¹³⁵ *Nassau Elec. R. Co. v. Corliss*, 126 Fed. Rep. 355; s. c. 61 C. C. A. 257; *Gleason v. Metropolitan St. R. Co.*, 90 N. Y. Supp. 1025.

¹³⁶ *Holzhauser v. Brooklyn Heights R. Co.*, 43 Misc. (N. Y.) 145; s. c. 88 N. Y. Supp. 269.

¹³⁷ *Stevens v. Boston Elevated R. Co.*, 184 Mass. 476; s. c. 69 N. E. Rep. 338. See also *Frizzell v. Omaha St. R. Co.*, 124 Fed. Rep. 176; s. c. 59 C. C. A. 382.

¹³⁸ *Cronk v. Wabash R. Co.*, 123 Iowa 349; s. c. 98 N. W. Rep. 884 (condition thirteen months after accident incompetent).

¹³⁹ That it is necessary for plain-

tiff in an action against a city to recover for injuries by reason of defects in a street or sidewalk, to prove that the street at the time and place was a public street, see: *Parrish v. Huntington*, 57 W. Va. 286; s. c. 50 S. E. Rep. 416.

¹⁴⁰ An ordinance governing the manner of constructing sidewalks is without effect on sidewalks constructed before its passage and in conformity with an existing ordinance: *McCartney v. Washington*, 124 Iowa 382; s. c. 100 N. W. Rep. 80.

¹⁴¹ That such evidence is admissible see: *Hofacre v. Monticello*, 128 Iowa 239; s. c. 103 N. W. Rep. 488.

¹⁴² That the condition of the highway in the immediate vicinity of the place of the accident may be shown on the question of constructive notice of its condition to the

of the accident cannot be proved,¹⁴³ unless, perhaps, on the issue of contributory negligence, for the purpose of showing that there was no other safe and convenient way open to the traveller.¹⁴⁴

§ 7849. **Doctrine that Evidence of Other Accidents is Admissible.**¹⁴⁵

§ 7853. **Evidence to Show that Other Horses were Frightened by Object in Highway.**¹⁴⁶

§ 7855. **Relevancy and Irrelevancy of Evidence in Particular Highway Cases.**—Where the action is against the city for injuries caused by the failure of a paving contractor properly to guard an obstruction created by him, the contract between the city and the contractor is admissible to show the relations which existed between them.¹⁴⁷ Where an obstruction to travel is unlawfully erected by a third person, it is proper, in an action for injuries resulting from the obstruction, to admit evidence of a want of permission to create the particular obstruction.¹⁴⁸

§ 7856. **Evidence for the Defendant.**—In an action for personal injuries caused by the fall of a pedestrian on a sidewalk, it has been held proper to admit evidence of specific acts of intoxication on his part for the purpose of showing that the effects of the liquor on his system had produced the permanent injury which he claimed was brought about by the fall.¹⁴⁹

§ 7863. **Negligence may be Proved by Circumstantial Evidence.**¹⁵⁰

municipality, see: *Harrison v. Ayrshire*, 123 Iowa 528; s. c. 99 N. W. Rep. 132; *McCartney v. Washington*, 124 Iowa 382; s. c. 100 N. W. Rep. 80; *Nestle v. Flint*, 141 Mich. 153; s. c. 104 N. W. Rep. 406; 12 Det. Leg. N. 376; *Miller v. Canton*, 112 Mo. App. 322; s. c. 87 S. W. Rep. 96; *Duncan v. Grand Rapids*, 121 Wis. 626; s. c. 99 N. W. Rep. 317; *Lyon v. Grand Rapids*, 121 Wis. 609; s. c. 99 N. W. Rep. 311.

¹⁴³ *Radichel v. Kendall*, 121 Wis. 560; s. c. 99 N. W. Rep. 348.

¹⁴⁴ *Hollingsworth v. Ft. Dodge*, 125 Iowa 627; s. c. 101 N. W. Rep. 455.

¹⁴⁵ See: *Yates v. Covington*, — Ky. —; s. c. 83 S. W. Rep. 592; 26 Ky. L. Rep. 1154.

¹⁴⁶ *Gould v. Hutchins*, 73 N. H. 69; s. c. 58 Atl. Rep. 1046 (cakes of ice left in a highway); *Cunningham v.*

Clay Tp., 69 Kan. 373; s. c. 76 Pac. Rep. 907 (stone on the roadside).

¹⁴⁷ *Godfrey v. New York*, 104 App. Div. (N. Y.) 357; s. c. 93 N. Y. Supp. 899.

¹⁴⁸ *Shippers' Compress & Co. v. Davidson*, 35 Tex. Civ. App. 558; s. c. 80 S. W. Rep. 1032.

¹⁴⁹ *Ford v. Kansas City*, 181 Mo. 137; s. c. 79 S. W. Rep. 923.

¹⁵⁰ That negligence may be proved by circumstantial evidence, see generally: *Cecil v. American Sheet Steel Co.*, 129 Fed. Rep. 542; s. c. 64 C. C. A. 72; *Wabash Screen Door Co. v. Black*, 126 Fed. Rep. 721; s. c. 61 C. C. A. 139; *Alabama & C. R. Co. v. Williams*, 140 Ala. 230; s. c. 37 South. Rep. 255; *St. Louis & C. R. Co. v. Rawley*, 106 Ill. App. 550; *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531; s. c. 71 N. E.

§ 7865. **Negative Evidence—Witnesses Did Not Hear Bell, Whistle, etc.**¹⁵¹

§ 7868. **Ordinances.**—"Proof of the violation of an ordinance regulating or relating to conduct alleged to have been negligent is not in itself conclusive proof of the negligence charged. The ordinance and its violation are matters of evidence, to be considered with all other evidence in the case. * * * Ordinances and their violation are admissible, not as substantive and sufficient proof of the negligence of the defendant, but as evidence of municipal expression of opinion, on a matter as to which the municipal authorities had acted, that the defendant was negligent, and are to be taken in consideration with all the other facts in the case."¹⁵² Where the speed of a car colliding with a vehicle is material to the controversy, an ordinance regulating the speed is competent as bearing on the question of negligence.¹⁵³ An ordinance making it the duty of the engineer to ring the bell continuously while the engine is in motion in the city has been held admissible in an action for the wrongful death of a person on the track, on the issue of negligence in failing to ring the bell, regardless of whether the traveller was killed at or near a street crossing.¹⁵⁴ In an action for injuries to a pedestrian by stumbling over a cellar door in a sidewalk, it having been alleged that the door was so constructed as to form a dangerous obstruction to travel, and further that it was not constructed as required by ordinance, it was held not reversible error to admit the ordinance in evidence, although its violation was not necessary to the statement of the cause of action.¹⁵⁵ An ordinance limiting the speed of trains was held not admissible in an action by a fireman for injuries received in a collision on the theory of contributory negligence, since the fireman did not have control of the operation of the engine or its speed.¹⁵⁶

Rep. 1081; aff'g s. c. 113 Ill. App. 435; Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138; s. c. 70 N. E. Rep. 995; Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687; s. c. 68 N. E. Rep. 609; Kirstead v. Bryant, 98 Me. 523; s. c. 57 Atl. Rep. 788; Hobbs v. St. Louis & C. R. Co., 113 Mo. App. 126; s. c. 87 S. W. Rep. 525; Consumers' Brewing Co. v. Doyle, 102 Va. 399; s. c. 46 S. E. Rep. 390; Towle v. Stimson Mill Co., 33 Wash. 305; s. c. 74 Pac. Rep. 471.

¹⁵¹ That such evidence is admissible, see: Cleveland & C. R. Co. v. Beard, 106 Ill. App. 486; Chicago & C. R. Co. v. Pulliam, 111 Ill. App. 305; McDonald v. New York & C. R.

Co., 186 Mass. 474; s. c. 72 N. E. Rep. 55; Browne v. New York & C. R. Co. 87 App. Div. (N. Y.) 206; s. c. 83 N. Y. Supp. 1028; s. c. aff'd, 179 N. Y. 582; 72 N. Y. Supp. 1140.

¹⁵² Brown, J., in Ubelmann v. American Ice Co., 209 Pa. 398; s. c. 58 Atl. Rep. 849.

¹⁵³ Mathiesen v. Omaha St. R. Co., —Neb. —; s. c. 97 N. W. Rep. 243; rev'g s. c. 92 N. W. Rep. 639.

¹⁵⁴ Galveston & C. R. Co. v. Levy, 35 Tex. Civ. App. 107; s. c. 79 S. W. Rep. 879.

¹⁵⁵ Perrigo v. St. Louis, 185 Mo. 274; s. c. 84 S. W. Rep. 30.

¹⁵⁶ Chicago & C. R. Co. v. Vipond, 112 Ill. App. 558; s. c. aff'd, 212 Ill. 199; 72 N. E. Rep. 22.

§ 7870. Evidence of Conditions Before and After Accident.¹⁵⁷—

In one case—an action for injury to a workman due to the insufficient lighting of the place of work—it was held that the admission of evidence of the condition or position of lights after the accident, brought out in rebuttal, and by contradictions between witnesses, merely to fix the time of the accident and the conditions then existing, was not improper.¹⁵⁸

§ 7871. Evidence of Repairs and Precautions after the Accident—When Such Evidence Admissible.¹⁵⁹—The supreme court of the United States has held that the admission of testimony in an action for the death of a trainman, alleged to have been caused by contact with an overhanging water spout, that such spout was so recon-

¹⁵⁷ That such evidence is admissible where there has been no change in the conditions meanwhile, see: *E. E. Jackson Lumber Co. v. Cunningham*, 141 Ala. 206; s. c. 37 South. Rep. 445; *Shea v. Pacific Power Co.*, 145 Cal. 680; s. c. 79 Pac. Rep. 373 (condition of packing rings of boiler); *Chicago & C. R. Co. v. Vipond*, 212 Ill. 199; s. c. 72 N. E. Rep. 22; aff'g s. c. 112 Ill. App. 558; *Merchants' Loan & Co. v. Boucher*, 115 Ill. App. 101; *Harrison v. Ayrshire*, 123 Iowa 528; s. c. 99 N. W. Rep. 132; *Dunekake v. Beyer*, 79 S. W. Rep. 209; s. c. 25 Ky. L. Rep. 2001 (condition of saw four to six months prior to accident); *Droney v. Doherty*, 186 Mass. 205; s. c. 71 N. E. Rep. 547 (freight elevator); *Bernard v. Pittsburg Coal Co.*, 137 Mich. 279; s. c. 100 N. W. Rep. 396; 11 Det. Leg. N. 246; *Logan v. Metropolitan St. R. Co.*, 183 Mo. 582; s. c. 82 S. W. Rep. 126 (condition of defective switch eight days after accident); *Norton v. Kramer*, 180 Mo. 536; s. c. 79 S. W. Rep. 699; *Smith v. Missouri & C. Tel. Co.*, 113 Mo. App. 429; s. c. 87 S. W. Rep. 71; *Starer v. Stern*, 100 App. Div. (N. Y.) 393; s. c. 91 N. Y. Supp. 821; *Nelson v. Young*, 91 App. Div. (N. Y.) 457; s. c. 87 N. Y. Supp. 69; s. c. aff'd, 180 N. Y. 523; 72 N. E. Rep. 1146 (condition of building six weeks before collapse); *Galveston & C. R. Co. v. McAdams*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 1076; *St. Louis & C. R. Co. v. Arnold*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 173; *Burt v. Utah Light & C. Co.*, 26 Utah 157; s. c. 72 Pac. Rep. 497; *Meyers v. Highland Boy Gold*

Min. Co., 28 Utah 96; s. c. 77 Pac. Rep. 347; *Lane Bros. & Co. v. Bauserman*, 103 Va. 146; s. c. 48 S. E. Rep. 857; *Virginia & C. Wheel Co. v. Harris*, 103 Va. 708; s. c. 49 S. E. Rep. 991; *Towle v. Stimson Mill Co.*, 33 Wash. 305; s. c. 74 Pac. Rep. 471.

¹⁵⁸ *Devaney v. Degnon-McLean Const. Co.*, 79 App. Div. (N. Y.) 62; s. c. 79 N. Y. Supp. 1050; s. c. aff'd, 178 N. Y. 620; 70 N. E. Rep. 1098.

¹⁵⁹ That evidence of repairs and precautions after the accident is not admissible to prove antecedent negligence see: *Southern R. Co. v. Simpson*, 131 Fed. Rep. 705; 65 C. A. 563; *Davis v. Kornman*, 141 Ala. 479; s. c. 37 South. Rep. 789; *E. E. Jackson Lumber Co. v. Cunningham*, 141 Ala. 206; s. c. 37 South. Rep. 445; *Going v. Alabama Steel & C. Co.*, 141 Ala. 537; s. c. 37 South. Rep. 784; *Helling v. Schindler*, 145 Cal. 303; s. c. 78 Pac. Rep. 710; *Merchants' Loan & C. Co. v. Boucher*, 115 Ill. App. 101; *Stevens v. Boston Elevated R. Co.*, 184 Mass. 476; s. c. 69 N. E. Rep. 338; *Kearines v. Cullen*, 183 Mass. 298; s. c. 67 N. E. Rep. 243; *Wager v. Lamont*, 135 Mich. 521; s. c. 98 N. W. Rep. 1; 10 Det. Leg. N. 859; *Bailey v. Kansas City*, 189 Mo. 503; s. c. 87 S. W. Rep. 1182; *Schermer v. McMahon*, 108 Mo. App. 36; s. c. 82 S. W. Rep. 535; *Luria v. Cusick*, 47 Misc. (N. Y.) 126; s. c. 93 N. Y. Supp. 507; *Russell v. New York & C. R. Co.*, 96 App. Div. (N. Y.) 151; s. c. 89 N. Y. Supp. 429; *St. Louis & C. R. Co. v. Arnold*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 173.

structed after the accident as to be further removed from passing trains, was not error where the jury were expressly told that the change had no other bearing upon the issues involved than to test the correctness of the measurements offered in evidence by the railroad company to show that the water spout did not constitute an element of danger to trainmen on passing trains.¹⁶⁰ In an Iowa case, recognizing the rule that negligence may not be shown by changes or repairs after an accident, it is held that an injured person in an action for injuries from striking her foot against the abrupt street end of an approach to the sidewalk at a crossing may,—for the purpose of proving by a witness that she was familiar with the original construction of the approach, that it was dangerous, and that the danger continued down to and after the accident,—show that the approach was taken down after the accident.¹⁶¹

§ 7872. Evidence of Similar Accidents or Long Use Without Accident.¹⁶²

§ 7874a. Exhibition of Person to Jury.—A seemly exhibition of one's person to the jury to show the extent of his injuries is proper,¹⁶³ but not a dramatic exhibition, and such an exhibition may amount to error working a reversal of the case.¹⁶⁴ It follows that there is no

¹⁶⁰ *Choctaw &c. R. Co. v. McDade*, 191 U. S. 64; s. c. 24 Sup. Ct. Rep. 24; 48 L. Ed. 96.

¹⁶¹ *Achey v. Marion*, 126 Iowa 47; s. c. 101 N. W. Rep. 435.

¹⁶² That evidence of previous accidents is inadmissible in the absence of proof that the physical conditions were materially the same, see: *Gustafson v. Young*, 91 App. Div. (N. Y.) 433; s. c. 86 N. Y. Supp. 851. That such evidence is sometimes admitted to charge the defendant with constructive knowledge of the defect, see: *Whittlesey v. Burlington &c. R. Co.*, 121 Iowa 597; s. c. 90 N. W. Rep. 516; 97 N. W. Rep. 66; *Crigler & Crigler v. Ford*, 82 S. W. Rep. 599; s. c. 26 Ky. L. Rep. 784; *Withers v. Brooklyn Real Estate Exch.*, 106 App. Div. (N. Y.) 255; s. c. 94 N. Y. Supp. 328; *Nelson v. Union R. Co.*, 25 R. I. 251; s. c. 58 Atl. Rep. 780. Thus plaintiff, in an action for injury from a defective sidewalk, may not show that others had previously fallen off the sidewalk at the place in question, where it appeared that a barrier had been erected after these persons fell and was there when the plaintiff was

hurt: *Vander Velde v. Leroy*, 140 Mich. 359; s. c. 103 N. W. Rep. 812; 12 Det. Leg. N. 183. That evidence of long use without accident is not admissible, see: *Mobile &c. R. Co. v. Vallowe*, 214 Ill. 124; s. c. 73 N. E. Rep. 416; *Rapson v. Leighton*, 187 Mass. 432; s. c. 73 N. E. Rep. 540; *Newcomb v. New York &c. R. Co.*, 182 Mo. 687; s. c. 81 S. W. Rep. 1069; *Kelley v. Parker-Washington Co.*, 107 Mo. App. 490; s. c. 81 S. W. Rep. 631; *Garske v. Ridgeville*, 123 Wis. 503; s. c. 102 N. W. Rep. 22. But see *Powell v. Nevada &c. R.*, — Nev. —; s. c. 78 Pac. Rep. 978, where it was held, in an action for personal injuries caused by a runaway horse whose fright was caused by a steam whistle in defendant's railroad shops, that evidence that a team had been frightened thereby on another occasion was admissible to show the dangerous character of the whistle at the place it was used.

¹⁶³ *Missouri &c. R. Co. v. Moody*, 35 Tex. Civ. App. 46; s. c. 79 S. W. Rep. 856.

¹⁶⁴ *Felsch v. Babb*, — Neb. —; s. c. 101 N. W. Rep. 1011.

impropriety in permitting the plaintiff, though a cripple, to walk to the witness stand in the presence of the jury.¹⁶⁵

§ 7875. **Verification of Model Used for Purpose of Illustration.**¹⁶⁶

§ 7877. **Photographs and Maps.**—Photographs are not generally admissible where the situation they are intended to illustrate is capable of verbal description.¹⁶⁷ The correctness and accuracy of the photographs offered must always be shown before their admission.¹⁶⁸ In general the testimony of the injured party that the photograph offered in evidence was a correct picture of the scene of the accident is sufficient to render it admissible.¹⁶⁹ It must also be shown that there has been no material change in the appearance of the place between the happening of the accident and the taking of the photograph.¹⁷⁰ Where the photograph has been admitted the opposite party may, on rebuttal, show any changes in the scene between the time of the accident and the taking of the photograph.¹⁷¹ The taking of photographs of men in assumed postures and things in assumed situations to illustrate the claims of the parties is condemned by one court.¹⁷² It is not required that the photographs should be taken only after notice to the opposite party.¹⁷³ The foundation for admission of an X-ray photograph was held sufficiently laid by the testimony of an X-ray expert, that he was regularly engaged in taking X-ray photographs for physicians, that he took the negative from which the photograph was developed, that he developed the photograph, and that it was a correct representation.¹⁷⁴ There is authority that in an action for

¹⁶⁵ *Minden v. Vedene*, — Neb. —; s. c. 101 N. W. Rep. 330.

¹⁶⁶ A contention that a model representing the place of the injury was erroneously admitted was held without merit, where the model was shown to be a reproduction of the place in all essential particulars, and witnesses on cross-examination had pointed out particular details in which it failed to correspond exactly with the original: *Lush v. Parkersburg*, 127 Iowa 701; s. c. 104 N. W. Rep. 336.

¹⁶⁷ *Cirello v. Metropolitan Exp. Co.*, 88 N. Y. Supp. 932.

¹⁶⁸ *Houston &c. R. Co. v. Cluck*, — Tex. Civ. App. —; s. c. 84 S. W. Rep. 852; *Stone v. Lewiston &c. R. Co.*, 99 M. E. 243; s. c. 59 Atl. Rep. 56; *Chicago &c. R. Co. v. Crose*, 113 Ill. App. 547.

¹⁶⁹ *Accousi v. G. A. Stowers Furniture Co.* — Tex. Civ. App. —; s. c. 87 S. W. Rep. 861.

¹⁷⁰ *Chicago &c. R. Co. v. Crose*, 214 Ill. 602; s. c. 73 N. E. Rep. 865; *Huntington v. Lusch*, 33 Ind. App. 476; s. c. 70 N. E. Rep. 402; *Considine v. Dubuque*, 126 Iowa 283; s. c. 102 N. W. Rep. 102 (not an objection that the photograph was taken after snow and ice covering place at time of accident had disappeared); *Miller v. New York*, 104 App. Div. (N. Y.) 33; s. c. 93 N. Y. Supp. 227; *Maynard v. Oregon R. &c. Co.*, — Ore. —; s. c. 78 Pac. Rep. 983.

¹⁷¹ *Achey v. Marion*, 126 Iowa 47; s. c. 101 N. W. Rep. 435.

¹⁷² *Babb v. Oxford Paper Co.*, 99 Me. 298; s. c. 59 Atl. Rep. 290.

¹⁷³ *Hawkins v. Missouri &c. R. Co.*, — Tex. Civ. App. —; s. c. 83 S. W. Rep. 52.

¹⁷⁴ *Chicago &c. R. Co. v. Spence*, 213 Ill. 220; s. c. 72 N. E. Rep. 796. See also: *Miller v. Minturn*, 73 Ark. 183; s. c. 83 S. W. Rep. 918.

wrongful death, photographs of the deceased taken just before, and also after the injury causing the death, are admissible.¹⁷⁵

§ 7878a. **Jury's Examination of Injured Person.**—It has been held prejudicial error for a court to send the jury out to make a physical examination of the plaintiff, out of the presence of the court, where the defendant excepted on the jury's return, and it was held that this error was not cured by the court's offer, then made, to retire with the jury and the parties and have the examination made in his presence.¹⁷⁶

§ 7880. **Exhibition of Parts of Body Amputated or Removed.**¹⁷⁷

§ 7881a. **Clothing Worn by Deceased at time of Wrongful Death.**¹⁷⁸

§ 7882. **Customs and Usages.**¹⁷⁹

§ 7883. **Habits and Reputation.**¹⁸⁰

§ 7886. **Reason for Bringing Suit in Particular Jurisdiction may be Shown.**—Where the action is properly brought in a jurisdiction, evidence that the plaintiff had left his home in another State to sue where he did is inadmissible for the purpose of affecting the good faith of the plaintiff or to discredit his testimony as a witness.¹⁸¹

¹⁷⁵ *Davis v. Seaboard Air Line R. Co.*, 136 N. C. 115; s. c. 48 S. E. Rep. 591.

¹⁷⁶ *Fordyce v. Key*, 74 Ark. 19; s. c. 84 S. W. Rep. 797.

¹⁷⁷ That parts of the body amputated may be exhibited to the jury to illustrate some issue, see: *Anderson v. Seropian*, 147 Cal. 201; s. c. 81 Pac. Rep. 521.

¹⁷⁸ That such clothing may be exhibited as evidence, see: *Northern Alabama R. Co. v. Mansell*, 138 Ala. 548; s. c. 36 South. Rep. 459.

¹⁷⁹ Evidence of the usual and customary manner of construction of machinery or appliances is not admissible unless negligent construction is alleged as the basis of the action: *Hansel-Elcock Foundry Co. v. Clark*, 214 Ill. 399; s. c. 73 N. E. Rep. 787; aff'g s. c. 115 Ill. App. 209.

¹⁸⁰ In an action for injuries, not resulting in death, it is inadmissible to show the injured person's habits of industry: *Davis v. Kornman*, 141

Ala. 479; s. c. 37 South. Rep. 789. In an action against a railroad company for the burning of a flour-mill, claimed to have been caused by negligence in the operation of a railroad train, and the defendant claimed that the fire might have been due to spontaneous combustion from the machinery not having been properly oiled and cleaned, it was held that evidence that while plaintiff's head miller had held that position in other mills they had caught fire from machinery or unknown causes, was not competent in the absence of evidence that the conditions in the other mills were the same as in plaintiff's mill, or of the method of operation of these other mills, or of the temperature at the time the other mills caught fire: *Conner v. Missouri Pac. R. Co.*, 181 Mo. 397; s. c. 81 S. W. Rep. 145.

¹⁸¹ *Atchison & C. R. Co. v. Keller*, 33 Tex. Civ. App. 358; s. c. 76 S. W. Rep. 801.

§ 7887. **Evidence Incidentally Tending to Show Other Negligence.**¹⁸²

§ 7888. **Malpractice of Physicians, Surgeons, Dentists and Attorneys.**¹⁸³

§ 7889. **Dangerous Premises.**¹⁸⁴

§ 7892. **Injuries by Animals.**—After the introduction of evidence showing the vicious traits of the animal injuring the plaintiff, further evidence of the reputation of the animal is admissible to prove the owner's knowledge of his qualities.¹⁸⁵ In such an action it is competent to show that because of the vicious propensities of the animal—a horse—he was driven with another horse when used by the owner's servants, as it was not thought safe to drive him alone.¹⁸⁶

¹⁸² That it is no objection to evidence that it may incidentally tend to show other negligence, see: *Schwarzchild & Sulzberger v. Drysdale*, 69 Kan. 119; s. c. 76 Pac. Rep. 441; *Palmer Brick Co. v. Chenall*, 119 Ga. 837; s. c. 47 S. E. Rep. 329.

¹⁸³ In an action for malpractice it is proper to show the treatment received by the patient after the defendant gave up the case: *Bower v. Self*, 68 Kan. 825; s. c. 75 Pac. Rep. 1021. In an action against a physician for negligence in failing to diagnose a case of diphtheria, plaintiff claimed that the diphtheria developed at least two days before the patient died, during which time she was being treated by defendant. Defendant contended that the disease did not develop until within twelve hours before the patient's death. It was held error to exclude a question asked of an expert, as to whether it was possible for a child to show no symptoms of diphtheria on one day and develop a fatal case thereof on the next: *Purcell v. Jessup*, 99 App. Div. (N. Y.) 556; s. c. 91 N. Y. Supp. 165. The bare statement of a Christian Science healer that he could and would cure a patient of a disease does not tend to show that he did something in his

unsuccessful treatment which did not conform to the methods ordinarily adopted by such practitioners: *Spead v. Tomlinson*, 73 N. H. 46; s. c. 59 Atl. Rep. 376. In a case where the plaintiff in an action against a dentist for malpractice claimed that after the acts complained of there was a "clicking" or disagreeable sound made by the movement of the jaws, a refusal to allow defendant to show by numerous witnesses that they were similarly afflicted was upheld, since the plaintiff did not claim that the condition could be produced only by a dental operation: *Mernin v. Cory*, 145 Cal. 573; s. c. 79 Pac. Rep. 174.

¹⁸⁴ On the issue whether an unprotected turntable near a street was especially and unusually calculated to attract children, so that an invitation to them to use the same could be implied, evidence is irrelevant and incompetent that the turntable was no more attractive than ordinary pools of water near by: *Denison & Co. R. Co. v. Harlan*, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 732.

¹⁸⁵ *Palmer v. Coyle*, 187 Mass. 136; s. c. 72 N. E. Rep. 844.

¹⁸⁶ *Palmer v. Coyle*, 187 Mass. 136; s. c. 72 N. E. Rep. 844.

PART FIVE.

INSTRUCTIONS TO JURIES.

[§§ 7898-7923.]

§ 7898. **Definition of Terms.**—The trial court should define negligence and contributory negligence in its instructions,¹ and state the legal consequences flowing therefrom.² But the failure to define these terms will not generally suffice to work a reversal unless there was a request for a defining instruction.³ Where the jury have not been instructed as to the care required of the defendant, it is erroneous for the court to charge the jury to determine whether the defendant was guilty of a want of the “care required by the law.”⁴ There is need for the definition of the terms willfulness, wantonness and recklessness in cases where, without definition, the jury are likely to understand the terms as referring to the doctrine of comparative negligence.⁵

§ 7900. **Instructions as to “Gross” Negligence.**—An instruction on gross negligence should explain that willful negligence differs in kind as well as degree from ordinary negligence.⁶

§ 7901. **Instructions should be Clear and Easily Understood.**—The use of the abbreviation “etc.” in a charge enumerating the items of damages recoverable for personal injuries is likely to mislead the jury and should not be used.⁷ An instruction on exemplary damages is misleading where it is open to the construction that proof of a right to exemplary damages as against one defendant alone would authorize the allowance of such damages against another.⁸ An instruction in an action by an administrator of one killed in a crossing accident was

¹ Covington Saw Mill &c. Co. v. Drexilius, — Ky. —; s. c. 87 S. W. Rep. 266; 27 Ky. L. Rep. 903; Houghton v. Louisville R. Co., 81 S. W. Rep. 695; s. c. 26 Ky. L. Rep. 393.

² Kimble v. St. Louis &c. R. Co., 108 Mo. App. 78; s. c. 82 S. W. Rep. 1096.

³ Crown Cotton Mills v. McNally, 123 Ga. 35; s. c. 51 S. E. Rep. 13; Denison &c. R. Co. v. Barry, 98 Tex. 248; s. c. 83 S. W. Rep. 5.

⁴ Pittsburg &c. R. Co. v. Wise, 36 Ind. App. 59; s. c. 74 N. E. Rep. 1107.

⁵ Buxton v. Ainsworth, 138 Mich. 532; s. c. 101 N. W. Rep. 817; 11 Det. Leg. N. 682.

⁶ Banks v. Braman, 188 Mass. 367; s. c. 74 N. E. Rep. 594.

⁷ Lodwick Lumber Co. v. Taylor, — Tex. Civ. App. —; s. c. 87 S. W. Rep. 358.

⁸ Corkings v. Meier, 112 Ill. App. 655.

held misleading which told the jury that no duty existed by the defendant to the "plaintiff" either as to speed or efforts to stop the train, since the plaintiff in the case was the administrator, who was not present at the time of the accident.⁹ An instruction that if the railroad company did kill one or both of the plaintiff's horses in the manner alleged, then they should return a verdict for the plaintiff for the value of each of such horses, was held misleading, in that it impliedly authorized a verdict for the value of each of the horses, though only one may have been killed.¹⁰ But an instruction that it was the duty of the master to exercise reasonable care and diligence to provide and maintain a safe place and safe appliances for employes was held not misleading, although the breach of duty claimed to have caused the injury related solely to the appliances and not the place of work.¹¹

§ 7902. **Particular Words and Phrases Used in Instructions.**—One court has held that an instruction that negligence means the failure to exercise such care as ordinarily prudent persons exercise under similar circumstances was not erroneous for failing to limit the care to such care as ordinarily prudent persons "usually" exercise under like circumstances.¹² The use of the word "ample" instead of the word "sufficient" in an instruction as to the time a train should stop at a station to permit passengers to alight, though open to criticism, does not constitute reversible error.¹³ One court has held that an instruction that the jury "may," instead of "must," consider the contributory negligence of the injured person in mitigation of damages, was affirmatively erroneous.¹⁴ An instruction that it was the duty of an employer to use all "reasonable precautions" in maintaining the place of work in a safe condition, has been held to require no more than reasonable care and caution in this behalf.¹⁵

§ 7903. **Methods of Stating General Rules and Exceptions.**¹⁶

§ 7904. **As to Repetition of Instructions.**—One court rightly condemns the practice of a trial judge announcing in the presence of the

⁹ Louisville & C. R. Co. v. Robinson, 141 Ala. 325; s. c. 37 South. Rep. 431. — Tex. Civ. App. —; s. c. 86 S. W. Rep. 934.

¹⁰ Gulf & C. R. Co. v. Anson (Tex. Civ. App.), 82 S. W. Rep. 785. ¹⁴ Louisville & C. R. Co. v. Martin, 113 Tenn. 266; s. c. 87 S. W. Rep. 418.

¹¹ Terre Haute Electric Co. v. Kieley, 35 Ind. App. 180; s. c. 72 N. E. Rep. 658. ¹⁵ Allen B. Wrisley Co. v. Burke, 203 Ill. 250; s. c. 67 N. E. Rep. 818.

¹² Kentucky & C. Bridge & C. Co. v. Shrader, 80 S. W. Rep. 1094; 26 Ky. L. Rep. 206. ¹⁶ Texas Southern R. Co. v. Long, 35 Tex. Civ. App. 339; s. c. 80 S. W. Rep. 114 (instruction erroneous for failure to include question of contributory negligence).

¹³ St. Louis & C. R. Co. v. Haynes,

jury what he considers the sole question involved in the case, on the ground that this is equivalent to an oral instruction, and takes from the jury the consideration of other questions.¹⁷

§ 7905. Instructions must be Confined to the Issue Made by the Pleadings.¹⁸—It may be said generally that where the right of recovery rests upon each of two separate and concurring acts of negligence it is the right of each party to have the jury correctly instructed with respect to each act of negligence the same as if the right of recovery rested upon that right only; if there is any material error in the instructions given or refused respecting either charge of negligence, a general verdict cannot stand.¹⁹

§ 7906. Instructions must be Based upon the Evidence.—In a case where the plaintiff testified on the trial that he did not see the car that struck him and inflicted the injuries, an instruction was plainly not germane that told the jury that “a pedestrian seeing a car approaching at what to him seems a safe distance to allow him to cross, has a right to assume that the car will be controlled and the speed slackened.”²⁰ Where the expenses for medicine is not made an issue by either the pleadings or the evidence, an instruction is clearly erroneous which authorizes a recovery “for medicines, if any.”²¹ Where the evidence in an action for injuries does not disclose any definite act of negligence on the part of the defendant, or any specific defect in the instrumentalities claimed to have caused the accident, it is proper for the court to instruct the jury that their verdict should not be founded on mere conjecture, but the proof must tend to show that negligence in fact existed and caused the injury.²²

¹⁷ Chicago Junction R. Co. v. Pietrzak, 110 Ill. App. 549.

¹⁸ See generally: Chicago &c. R. Co. v. Thrasher, 35 Ind. App. 58; s. c. 73 N. E. Rep. 829; Gibson v. Freygang, 112 Mo. App. 594; s. c. 87 S. W. Rep. 3; Baltimore &c. R. Co. v. Lockwood, 72 Ohio St. 586; s. c. 74 N. E. Rep. 1071; Maynard v. Oregon R. & Nav. Co., — Or. —; s. c. 78 Pac. Rep. 983; Freeman v. Carter (Tex. Civ. App.), 81 S. W. Rep. 81; Galveston &c. R. Co. v. Perry, 36 Tex. Civ. App. 414; s. c. 82 S. W. Rep. 343; Culver v. South Haven &c. R. Co., 138 Mich. 443; s. c. 101 N. W. Rep. 663; 11 Det. Leg. N. 642 (alleged negligence that of defects in track and instruction authorized recovery for defect in car coupling); Portsmouth St. R. Co. v. Peed, 102 Va. 662; s. c. 47 S. E. Rep. 850 (al-

leged negligence was excessive speed, and instruction on failure to give warnings). Where plaintiff claims damages according to one standard in his complaint and by his evidence, an instruction authorizing assessment of the damages under another standard is plainly erroneous: Thornton-Thomas Mercantile Co. v. Bretherton, 32 Mont. 80; s. c. 80 Pac. Rep. 10.

¹⁹ Chicago &c. R. Co. v. Voelker, 129 Fed. Rep. 522; rev'g s. c. Voelker v. Chicago &c. R. Co., 116 Fed. Rep. 867.

²⁰ Toohey v. Interurban St. R. Co., 102 App. Div. (N. Y.) 296; s. c. 92 N. Y. Supp. 427.

²¹ Northern Texas Traction Co. v. Jamison, — Tex. Civ. App. —; s. c. 85 S. W. Rep. 305.

²² Stewart v. Van Deventer Carpet

§ 7907. **Instructions Limiting the Scope of Inquiry.**—Where there is no evidence of a greater amount for a certain item of damages than that claimed in the complaint or declaration, there is no error in the refusal of the court to caution the jury not to go beyond the amount claimed.²³

§ 7909. **Burden of Proof and Presumptions.**—An instruction that the jury must find, with a “reasonable degree of certainty,” that the injuries were the proximate result of the accident, requires a higher degree of evidence than a mere preponderance and should not be given.²⁴ An instruction telling the jury substantially, that if they believe certain facts, then the law raises a presumption of negligence, is misleading, unless it also tells the jury that such a presumption is rebuttable.²⁵ It has been held that an instruction that the plaintiff must establish the facts on which he relies by a preponderance of the evidence, and, where the defendant relies on contributory negligence, he must establish the same by a like preponderance “of the evidence in the case,” was not open to the objection that it was calculated to lead the jury to believe that the issue of contributory negligence was to be determined on the evidence adduced by the defendant alone.²⁶ Another instruction, telling the jury that before the plaintiff could recover he must establish by a fair preponderance of the evidence that he received the injuries charged in the complaint, and that the negligence charged was the proximate cause of such injury, was held not open to the criticism that it led the jury to believe that the requirement of the preponderance of the evidence related only to the injuries and not to the negligence.²⁷

§ 7910. **Instructions on the Weight of the Evidence.**—An instruction which, instead of defining the duty of a motorman or engineer, stated that he had no right to run on the person whose death was caused by the accident sued on, was held erroneous, in that it tended to give the jury the impression that in the opinion of the court such operative intentionally ran over the deceased.²⁸

Co., 138 N. C. 60; s. c. 50 S. E. Rep. 562.

²³ *San Antonio Traction Co. v. Menk*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 290; *South Covington & c. R. Co. v. Smith*, 86 S. W. Rep. 970; s. c. 27 Ky. L. Rep. 811.

²⁴ *St. Louis & c. R. Co. v. Burke*, 36 Tex. Civ. App. 222; s. c. 81 S. W. Rep. 774.

²⁵ *Chicago & c. R. Co. v. Crose*, 113

Ill. App. 547; *Chicago & c. R. Co. v. Jamieson*, 112 Ill. App. 69.

²⁶ *Gulf & c. R. Co. v. Elmore*, 35 Tex. Civ. App. 56; s. c. 79 S. W. Rep. 891.

²⁷ *Indianapolis v. Cauley*, 164 Ind. 304; s. c. 73 N. E. Rep. 691.

²⁸ *Feitl v. Chicago City R. Co.*, 211 Ill. 279; s. c. 71 N. E. Rep. 991; *aff'g* s. c. 113 Ill. App. 381.

§ 7911. Instructions as to Facts Necessary to Constitute Negligence.²⁹—But an instruction that it was the duty of a railroad company to use ordinary care to see that its tracks and siding were not in such close proximity to other structures as to unnecessarily endanger trainmen engaged in the discharge of their duties upon trains or cars passing along such tracks or siding, was held not inferentially to instruct the jury that such proximity of structure to the track would be negligence. What was meant was that failure to use ordinary care in that respect would be negligence.³⁰

§ 7915. Assumption of Facts in Instructions.—An instruction that the jury, in case they find for the plaintiff, may consider the physical or mental suffering he had suffered or might thereafter suffer, was held not open to the objection that it assumed that the plaintiff would inevitably endure physical suffering from the injury.³¹ Another instruction,—in a case of injuries to a passenger by the derailment of a car,—that the company owed the plaintiff the duty of exercising the utmost care and skill to prevent the car from running at a rate of speed which was dangerous, and that failure to exercise such care was negligence, was held not open to the objection that it assumed that the speed at which the car was running was dangerous.³²

§ 7916. Proximate Cause of the Injury.³³

§ 7917. Instructions as to Mere Accident.—Where liability is denied by the defendant, and evidence is received that the injury was the result of an accident, it is the duty to charge on this theory without special request.³⁴

²⁹ That it is an invasion of the province of the jury for the court to instruct that certain facts constituted negligence except where the act amounted to negligence *per se*, see: *Atlanta & C. R. Co. v. Hudson*, 123 Ga. 108; s. c. 51 S. E. Rep. 29; *Augusta R. & C. Co. v. Smith*, 121 Ga. 29; s. c. 48 S. E. Rep. 681; *Central of Georgia R. Co. v. McKinney*, 118 Ga. 535; s. c. 45 S. E. Rep. 430; *West Chicago St. R. Co. v. Winters*, 107 Ill. App. 221; *Pittsburg & C. R. Co. v. Banfill*, 206 Ill. 553; s. c. 69 N. E. Rep. 499; aff'g s. c. 107 Ill. App. 254; *Pittsburgh & C. R. Co. v. Moore*, 110 Ill. App. 304; *Swift & Co. v. Griffin*, 109 Ill. App. 414; *Bodie v. Charleston & C. R. Co.*, 66 S. C. 302; s. c. 44 S. E. Rep. 943.

³⁰ *Galveston & C. R. Co. v. Mortson*,

31 Tex. Civ. App. 142; s. c. 71 S. W. Rep. 770.

³¹ *Missouri & C. R. Co. v. Nesbit*, — Tex. Civ. App. —; s. c. 88 S. W. Rep. 891.

³² *South Covington & C. R. Co. v. Constans*, 74 S. W. Rep. 705; s. c. 25 Ky. L. Rep. 158.

³³ An instruction that if plaintiff was guilty of negligence which "caused or contributed" to his injury, he could not recover, was held not open to the criticism that it failed to require that the negligence must have proximately contributed to such injury: *Ratteree v. Galveston & C. R. Co.*, 36 Tex. Civ. App. 197; s. c. 81 S. W. Rep. 566.

³⁴ *Hilton & Dodge Lumber Co. v. Ingram*, 119 Ga. 652; s. c. 46 S. E. Rep. 895.

§ 7918. **Instructions as to Liability of the Defendant Notwithstanding the Plaintiff's Negligence.**—The "last clear chance" doctrine was held properly covered by an instruction in a street railway injury case, which in effect told the jury that the motorman must use diligence to avoid injury to a person on the track, and that the car must be stopped, if there is time to stop it, when a person is seen in a dangerous position, and if there was time, in the exercise of ordinary care, for a motorman to have stopped the car after seeing, or after he was bound to see, with ordinary care, the dangerous position of the person on the track, and failed to check the speed of the car, then the defendant was guilty of negligence.³⁵

§ 7920. **As to Conflicting Instructions.**³⁶

§ 7921. **Instructions should be Considered as a Whole.**—General instructions omitting certain elements may be supplemented and cured by other instructions which supply the omission.³⁷ Thus a failure to refer in an instruction to the questions of contributory negligence and assumed risk will not render the particular instruction misleading, if other paragraphs condition the plaintiff's recovery on his freedom from contributory negligence or assumption of risk.³⁸

§ 7922. **Error harmless where Jury Not Misled.**—Thus, a binding instruction given for the plaintiff in an action against a city for in-

³⁵ *Indianapolis St. R. Co. v. Seerley*, 35 Ind. App. 467; s. c. 72 N. E. Rep. 169, 1034.

³⁶ There was no inconsistency between an instruction that defendant was held to the exercise of extraordinary care and caution to prevent injury to a passenger, and that plaintiff, on his part, was bound to exercise only ordinary care and caution for his own safety, and an instruction that if plaintiff was not guilty of contributory negligence, and was injured by reason of defendant's negligence, she was entitled to recover. The first instruction defines what will constitute negligence of a carrier of passengers, and the second states that if by reason of such negligence the plaintiff is injured, he is entitled to recover: *Hutcheis v. Cedar Rapids & C. R. Co.*, 128 Iowa 279; s. c. 103 N. W. Rep. 779. There was no inconsistency between an instruction that if the jury found that plaintiff knew of the approach of the car and failed to exercise ordinary care to avoid a

collision he could not recover, and an instruction authorizing a verdict for plaintiff if he was unaware of the peril he was in until too late to avoid the collision, and the motorman was aware thereof in time to prevent the accident and negligently failed to do so, thereby causing the accident: *Hyman v. St. Louis Transit Co.*, 108 Mo. App. 453; s. c. 83 S. W. Rep. 1030.

³⁷ *Economy Light & C. Co. v. Hiller*, 211 Ill. 568; s. c. 71 N. E. Rep. 1096; aff'g s. c. 113 Ill. App. 103; *Chicago & C. R. Co. v. Wicker*, 34 Ind. App. 215; s. c. 72 N. E. Rep. 614; rev'g s. c. 71 N. E. Rep. 223; *Cobb Chocolate Co. v. Knudson*, 207 Ill. 452; s. c. 69 N. E. Rep. 816; aff'g s. c. 107 Ill. App. 668; *Ringue v. Oregon Coal & Navigation Co.*, 44 Or. 407; s. c. 75 Pac. Rep. 703; *Gulf & C. R. Co. v. Davis*, 35 Tex. Civ. App. 285; s. c. 80 S. W. Rep. 253.

³⁸ *International & C. R. Co. v. Mills*, 34 Tex. Civ. App. 127; s. c. 78 S. W. Rep. 11.

juries caused by a projection in a sidewalk, which omitted to state that the plaintiff must prove that the street was controlled and treated by the city authorities as a public thoroughfare, was held not prejudicial where the evidence upon that point was without conflict and the fact was not disputed by the evidence of the defendant.³⁹

§ 7923. Instructions in Actions for Negligent Injuries to Children.—The court should submit to the jury the question of the age and capacity of the child for their consideration, when passing upon the question whether he was in the exercise of proper care at the time he received his injuries.⁴⁰ In one case it was held not error for the court, after charging that, regardless of whether the defendant was negligent or not, if the plaintiff, a child, could have avoided his injuries by the use of such care as his mental and physical capacity fitted him for exercising, he could not recover, to add: "If you believe that the child, * * * in the exercise of all his mental capacity, such as he was possessed of at the time, did not know that the same was dangerous, and the accident happened by reason of this defect in the pulley, then he would be entitled to recover."⁴¹

³⁹ Parrish v. Huntington, 57 W. Co., 112 Mo. App. 656; s. c. 87 S. W. Va. 286; s. c. 50 S. E. Rep. 416.

⁴⁰ Edwards v. Metropolitan St. R. ⁴¹ Eagle & Phenix Mills v. Herron, 119 Ga. 389; s. c. 46 S. E. Rep. 405.

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